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IMPORTANT ANNOUNCEMENT

We have introduced a new section "Notes on recent Supreme Court Cases" in A. I. R. from last month. Every effort will be made to cover the latest decisions of the Supreme Court in this section.

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—S. 20 — Suit for obtaining relief on ground of fraud — Article 95 attracted — Fraud committed on 7-1-1924 and discovered on 16-4-1924 — Defendant outside India for several months in 1924 and 1926 — Suit instituted on 14-9-1927 in Court at D in India — Defendant residing at place within jurisdiction of Court on that date — Court at D, held had jurisdiction to entertain and try suit, though cause of action for suit arose outside India — See Limitation Act (1908), S. 13

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—S 34, O 34, R 2, 4, 11 — Scope and applicability — Suit by puisne mortgagee — Grant of interest — Principles — Appeal No 82 of 1959, D/-17-1-1962 (Cal), Reversed — (Civil P. C. (1908), Pre — Interpretation of Statutes — Special and general provisions) SC 600 B (C N 118)

—S 35 — Costs in Supreme Court appeals — Suit for declaration and for accounts — Claim partly reduced — Parties directed to bear their own costs in Supreme Court SC 552 SC (C N 105)

—S 35 — Costs in Supreme Court Appeals — Representation of the People Act (1951), Sections 116-A, 100 — Dismissal of Election petition as well as appeal therefrom — Prevarications of returned candidate not attempted to be explained by his counsel — Petitioner not allowed any costs either in Supreme Court or in High Court SC 586 C (C N 115)

—S 35, O 34, R 10 — Puisne mortgagee also a party in suit by prior mortgagee — Separate suit by puisne mortgagee — Part of claim in respect of interest not decreed — Plaintiff awarded costs proportionate to his success as between attorney and client — Puisne mortgagee held not entitled to costs incurred by him in previous suit in which he was made a party SC 600 C (C N 118)

—Ss 39 (1) (c), 41, 42 — Power of transferee Court after despatch of non-satisfaction certificate Orissa 147 D (C N 51)

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—S 41 — Issue of non-satisfaction certificate though found not in accordance with law is yet a step-in-aid of execution — See, Limitation Act (1908), Art 182 Orissa 147 B (C N 51)

—S 41 — Order of executing Court holding that "non-satisfaction certificate" was sent though in fact it was not sent—Failure to take objection — Party precluded from raising objection at later stage — See Civil P. C. (1908), S 11 Orissa 147 C (C N 51)

—S 41 — Non dispatch of non-satisfaction certificate by transferee Court — Jurisdiction of transferor Court to execute decree — See Civil P. C. (1908), S 39 (1) (c) Orissa 147 D (C N 51)

—S 42 — Powers of transferee Court — See Civil P. C. (1908), S 39 (1) (c) Orissa 147 D (C N 51)

—S 44-A — Application for execution under S 44-A — Notice under O 21, R 22 necessary — When notice can be dispensed with — See Civil P. C. (1908), O 21, R 22 Pat 228 C (C N 58)

—S. 46 — Precept — Enables decree-holder to apply for execution within two months in Court to which precept in sent— See Civil P. C. (1908), S 48 Andh Pra 250 B (C N 77) (FB)

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—S 47 — Determination of any question within S 47 is a decree — Appellant can file appeal under S 96 — Appeal is incompetent unless memorandum thereof is accompanied by certified copy of judgment — AIR 1940 Pat 176, Overruled — See Civil P. C. (1908), O 41, R 1 SC 575 A (C N 112)

—Ss 47, 146 and O 21, R 16 — Death of decree-holder — A claiming to be a legatee of the subject-matter of the suit under a will executed prior to decree by the decree-holder filing execution application — Genuineness of will held should be decided in the execution proceedings itself — Sections 213 and 57 of the Succession Act did not apply to oust the jurisdiction of the executing Court as the will was executed outside the city of Madras and the property also was situated outside that city — Section 146 applied to the case and not O 21, R 16, as there was no assignment of the decree under the will — ILR (1964) 2 Mad 363, Diss Mad 271 (C N 61)

—S 47 — Objection to execution which could be taken under O 21, R 22 if not taken cannot be agitated under S 47 Civil P. C. — See Civil P. C. (1908), S 11 Pat 251 (C N 63)

—S 48 — Previous execution petition dismissed for default for non payment of batta — Subsequent execution petition cannot be treated as revival of the previous one — (Limitation Act (1908), Art-182) Andh Pra 250 A (C N 77) (FB)

—Ss 48, 46 and O 21, R 53 — Limitation Act (1908), S 15 — Limitation for execution of decree — Order of attachment of the decree by another Court under O 21, R 53 in execution — Period during which attachment subsisted cannot be excluded for purpose of limitation under Section 15, Limitation Act — Attachment under O 21, R 53, does not amount to an injunction or order of stay within meaning of S 15, Limitation Act — Attachment does not amount to absolute stay — It is within power of holder of decree sought to be executed and holder of decree attached, to execute the decree by getting the notice withdrawn — Effect of attachment by precept under S 46 indicated Andh Pra 250 B (C N 77) (FB)

—S 48 — Section is not controlled by S 19 of Limitation Act (1908) — Limitation Act (1908), Ss 19, 29 (2) Arts 181 and 182 Andh Pra 250 C (C N 77) (FB)

—S 48, O 7, R 7 — Limitation Act (1908), S 15 — Present execution petition asking for treating same as continuation of previous E. P. 3/46 — No prayer for revival of E. P. 26/40 which was closed by reason of A. P. (Andhra Area) Agriculturists Relief Act (4 of 1938)—In E. Ps filed subsequently but before present E. P. no prayer made for revival of E. P. 26/40 — Oral application in present E. P. for revival of E. P. 26/40 cannot be entertained — What is not asked

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—S. 48 — Non-satisfaction certificate issued under S. 41 — Certificate not in accordance with law — It is yet step-in aid of execution and saves limitation — See Limitation Act (1908), Art. 182

—S. 51 (b) and O. 21, R. 46 — Attachment of shares — Jurisdiction of executing Court — Judgment-debtor residing within limits of jurisdiction — Executing Court can attach shares — Fact that place of business of Company is outside the jurisdiction, is immaterial — Mad 268 (C N 60)

—S. 73 and O. 21, R. 11 (2) (i) — Money decree — Execution application seeking assistance of Court by rateable distribution is in accordance with law. AIR 1929 Nag 148, Dissented from — Guj 200 (C N 37)

—S. 80 — Scope — Notice under — Identity of person issuing notice and person bringing suit — Held there was compliance with S. 80 — Railways Act (1890), S. 77 (Old) — Assam 84 A (C N 18)

—S. 80 — Question as to validity of notice, allowed to be raised in appeal — See Civil P. C. (1908), S. 96

—S. 96 — Determination of any question within S. 47 is a decree — Appellant can file appeal under S. 96 — Appeal is incompetent unless memorandum thereof is accompanied by certified copy of judgment — AIR 1940 Pat 176, Overruled — See Civil P. C. (1908), O. 41, R. 1

—Ss. 96 and 80 — Question of validity and propriety of notice under Section 80 specifically raised in trial Court — Issue not pressed at time of hearing by lawyer of defendant — Defendant held not barred from raising question of validity of notice in first appeal — Assam 84 B (C N 18)

—Ss. 96 and 100-101 and O. 20, R. 4 — First appellate Court — Duty of — Judgment must clearly suggest that Court has applied judicial mind to appreciation of evidence particularly when reversing conclusions of fact — Delhi 197 (C N 33)

—Ss. 100-101 — Judgment must suggest that Court has applied judicial mind to appreciation of evidence particularly when reversing conclusions of fact — See Civil P. C. (5 of 1908), S. 96 — Delhi 197 (C N 33)

—Ss. 100-101 — Question of adverse possession — It is a mixed question of fact and law — High Court can interfere if the decision of the lower Courts on this question is erroneous — Ker 222 B (C N 53)

—Ss. 100-101, O. 43, R. 1 (u) — Lower Appellate Court substituting its own judgment and decree to that of trial Court and remanding case — Remedy — Remedy is to file a second appeal and not an appeal under O. 43, R. 1 (u) — Mad 248 B (C N 56)

—Ss. 100 and 101 — Question of fact — Question of Benami is a question of fact —

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When the decision of the lower Court is given on merits, on consideration of well-recognized principles for determination findings will not be interfered with in second appeal — Mad 252 B (C N 57)

—S. 100 — Finding of fact — Finding as to non-reconstitution of firm after its dissolution is one of fact — Partnership Act (1932), Ss. 6, 39 — Mad 257 A (C N 58)

—S. 100 — Finding as to service of notice under S. 6 Mysore Motor Vehicles (Taxations on Passengers and Goods) Act (1961) is a finding of fact — See Constitution of India, Art. 226 — Mys 222 A (C N 46)

—S. 100 and O. 1, R. 8 — Frame of suit was held not in accordance with the provision — Easement acquired by villages, held, could not be deprived — (Easements Act (1882), S. 15) — Pat 233 (C N 59)

—S. 100 — Concurrent findings of fact — Misconstruction of documents — Finding of Courts below, perverse — High Court is not debarred from reviewing it in second appeal — Punj 244 B (C N 42)

—S. 105 (2) — Points on which appeal may be heard — Points decided by interlocutory order of single Judge can be canvassed — Section 105 (2), Civil P. C. does not apply — See Letters Patent (Bom) Cl. 15 — SC 560 B (C N 107)

—S. 115 — High Court cannot in revision, determine amount of compensation for land acquisition — See Municipalities — M. B. Municipal Corporation Act (23 of 1956), S. 392 — SC 579 C (C N 113)

—S. 115, O. 21, R. 60, O. 41, R. 5 — Execution of decree for costs — Proper remedy against — High Court, can convert stay application into application for injunction — Andh Pra 236 B (C N 74)

—S. 115, O. 11, Rr. 18, 20 — "Any case which has been decided" — Words "case decided" include order relating to some error of procedure — Controversy between parties in regard to right or obligation in relation to inspection of documents — Decision of Court thereon held would amount to "case decided" — Guj 213 A (C N 39)

—S. 115, O. 11, Rr. 18, 20 — Exercise of jurisdiction illegally or with material irregularity — Court's power to order for inspection of documents under O. 11, Rr. 18, 20 — Extent of — Court ignoring those provisions acts illegally or with material irregularity — Guj 213 B (C N 39)

—S. 115 — Arbitration Act (1940), Sections 8 (2) and 20 — Appointment of arbitrator by Court in pending suit — Court bound to appoint two arbitrators if agreement so requires it — Order appointing one arbitrator under misconception — Application for appointment of two arbitrators by defendant in accordance with agreement rejected by trial Court — Revision — High Court set aside order of appointment as not being in accordance with law — Pat 248 (C N 62)

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- S 115 and O 43, R 1 (s) — Court recalling its own order appointing receiver — Recalling order appealable — Revision against recalling order hence not maintainable Pat 256 B (C N 65)
- S 115 — Point about proof of document not raised in lower Courts or even in grounds for revision — Cannot be raised at stage of revision — See Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949) S 15 (5)
- S 141 — Proceedings under S 146, Cr P C — See Criminal P C (1898) S 146 Assam 81 B (C N 17)
- S 146 — Execution taken out by legatee of deceased decree-holder — Genuineness of will held should be decided in execution proceedings itself — Ss 213 and 57 Succession Act, did not oust jurisdiction of Executing Court — Sec 146 applied and not O 21, R 16 — ILR (1964) 2 Mad 363, Dissented from — See Civil P C (1908), S 47 Mad 271 (C N 61)
- S 151 — Order of remand not mentioning provision of law — AIR 1956 Raj 43, AIR 1937 Sind 279 Dissented from — See Civil P C (1908), O 41, R 23 Andh Pra 216 A (C N 67)
- S 151 — Power under cannot override express provisions of law — Power should be sparingly exercised Andh Pra 216 C (C N 67)
- Ss 151 6 15, O 21, R 60, O 41 R 5 — Claim suit against execution of decree for costs — Court competent to entertain suit under S 15 read with S 6, can stay, execution of decree — Decree whether passed by Superior Court is immaterial Andh Pra 236 A (C N 74)
- S 151 — Prayer for recovery of possession deleted to bring in suit within jurisdiction — Plaintiff held entitled to return of court-fee in interest of justice—See Court-fees and Suits Valuations — Court-fees Act (1870), S 13 Ker 203 (C N 47)
- O 1, R 8 — Community as a whole interested in lands in suit — Suit not framed under O 1, R 8 — Community should not be deprived of its rights — See Civil P C (5 of 1908) S 100 Pat 233 (C N 59)
- O 1, R 10 — Suit for dissolution of partnership — All partners are necessary parties Guj 205 (C N 38)
- O 1, R 10 — See Civil P C (1908) S 11 Pat 228 A (C N 53)
- O 1, R 13 and O 8 R 2 — Plea of non-joinder of necessary parties — Plea taken vaguely at earlier stage — Plea allowed to be raised in Article 227 proceeding — See, however, failed on merits — (Constitution of India, Art 227 — Court not an ap. Court — No interference called for) (Hindu Law — Succession — Thika tenancy held by late karta in absolute severalty Tenancy devolves by succession and not survivorship) — Tenancy Laws —

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- Calcutta Thika Tenancy Act (2 of 1949), Section 3 — Thika tenancy held by late Karta of joint family in absolute severalty — Tenancy devolves by succession — Only heirs to be impleaded Cal 360 (C N 60)
- O 2 (2) — Determination of any question within S 47 is a decree — AIR 1940 Pat 176, Overruled — See Civil P C (1908) O 41, R 1 SC 575 A (C N 112)
- O 3, R 4 — General power of attorney in Urdu — Power to compromise — Construction of power of attorney — See Contract Act (1872), S 186 Andh Pra 211 (C N 64)
- O 5, R 10 — Provision under Proviso to O 5, R 10 permissive—Court must not wait for service by registered post — See Civil P C (1908), O 29, R 2 (b) Pat 246 (C N 61)
- O 5, R 20 (A) — When summons is returned unserved then O 5, R 20 (A) applies — See Civil P C (1908), O 29, R 2 (b) Pat 246 (C N 61)
- O 6, R 4 — Corrupt practice by undue influence must be pleaded — Pleadings must set out full facts — See Representation of the People Act (1951), S 123 (2) SC 583 A (C N 114)
- O 6, R 17 — Notice of amended plaint, to be served on defendant — Duty of Court to see that defendant is aware of amendment — See Civil P C (1908), O 22, R 10 Pat 228 B (C N 58)
- O 7, R 7 — Relief not asked for nor prayed cannot be granted — See Civil P C (5 of 1908), S 48 Andh Pra 250 D (C N 77) (FB)
- O 7, R 10 — Under-valuation of plaint — Plaint returned — Appeal — Plaintiff directed to delete prayer for possession to bring suit within jurisdiction — Representation of plaint after deletion of prayer — Plaintiff entitled to refund of court-fee already paid — See Court-fees and Suits Valuations — Court-fees Act (1870), S 13 Ker 203 (C N 47)
- O 8, R 2 — Plea of non-joinder of necessary parties raised vaguely at earlier stage — Plea allowed to be raised in Article 227 proceedings — See Civil P C (1908), O 1, R 13 Cal 360 (C N 60)
- O 8 R. 6 — Applicability — Plea of adjustment — Rule applies if adjustment has not been effected prior to institution of suit Orissa 171 (C N 58)
- O 9, R 13 — Summonses found duly served — Dismissal in default — O 9, R 13 has no application — See Civil P C (1903), S 29, R 2 (b) Pat 246 (C N 61)
- O 11, R 18 — Controversy between parties in regard to right and obligation in relation to inspection of documents — Order on, is "case decided" within meaning of Section 115 — See Civil P C (1903), S 115 Guj 213 A (C N 39)
- O 11, R 18 — Court ignoring provisions of acts illegally or with material irregularity

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rity within meaning of S. 115 — See Civil P. C. (1908), S. 115 Guj 213 B (C N 39)
 —O. 11, R. 20 — Inspection of document — Controversy between parties as regards right to — Decision thereon 'case decided' within meaning of S. 115 — See Civil P. C. (1908), S. 115 Guj 213 A (C N 39)
 —O. 11, R. 20 — Court ignoring provisions of, acts illegally and with material irregularity within meaning of S. 115 — See Civil P. C. (1908), S. 115 Guj 213 B (C N 39)
 —O. 13, R. 4 — Endorsements on documents exhibited and admitted in evidence — Requirements — Non-compliance — Effect Punj 256 (C N 44)
 —O. 20, R. 4 — Judgment must clearly suggest that Court has applied its mind to appreciation of evidence — See Civil P. C. (5 of 1908), S. 96 Delhi 197 (C N 33)
 —O. 21, R. 10 — Execution application — Notice under R. 22 when necessary — See Civil P. C. (1908), O. 21, R. 22 Pat 228 C (C N 53)
 —O. 21, R. 11 (2) (i) — Money decree — Execution application seeking assistance of Court by rateable distribution is in accordance with law. AIR 1929 Nag 148, Dissented from. — See Civil P. C. (1908), S. 73 Guj 200 (C N 37)
 —O. 21, R. 16 — Legatee of deceased decree-holder taking out execution — Genuineness of will can be determined in execution proceedings itself — Sec. 146 applied and not O. 21, R. 16. ILR (1964) 2 Mad 363, Dissented from — See Civil P. C. (1908), S. 47 Mad 271 (C N 61)
 —O. 21, R. 22 — Notice when can be issued and when dispensed with — See Civil P. C. (1908), S. 11 Pat 228 A (C N 58)
 —O. 21, Rr. 22 and 10, S. 44-A — Application for execution — Service of notice under O. 21, R. 22 is imperative Pat 228 C (C N 53)
 —O. 21, R. 22 — Notice under O. 21, R. 22 served — Objection that could be taken, not taken — Subsequent application under Section 47, Civil P. C. objecting to execution cannot be taken — See Civil P. C. (1908), S. 11 Pat 251 (C N 63)
 —O. 21, R. 23 (1) — Objections to executability of decree — Must be raised before order of issue of attachment — See Civil P. C. (1908), S. 11 Pat 251 (C N 63)
 —O. 21, R. 46 — J. D. residing within limits of jurisdiction — Executing Court can attach shares — Fact that business of company is outside jurisdiction, is immaterial — See Civil P. C. (1908), S. 51 (b) Mad 268 (C N 60)
 —O. 21, R. 53 — Attachment under O. 21, R. 53 is not injunction — Neither it is a stay order within meaning of S. 15, Limitation Act — See Civil P. C. (1908), S. 48 Andh Pra 250 B (C N 77) (FB)
 —O. 21, R. 60 — Claim suit against execution of decree for costs—Court competent to entertain suit under S. 15 read with S. 6

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can stay execution of decree — Decree whether passed by Superior Court is immaterial — See Civil P. C. (1908), S. 151 Andh Pra 236 A (C N 74)
 —O. 21, R. 60 — Execution of decree for costs — Proper remedy against — High Court can convert stay application into application for injunction — See Civil P. C. (1908), S. 115 Andh Pra 236 B (C N 74)
 —O. 22, Rr. 3, 9 and 11 — Suit for dissolution of partnership — All partners are necessary parties — Failure to bring representatives of deceased parties on record in appeal — Appeal abates as a whole Guj 205 (C N 38)
 —O. 22, R. 9 — Suit for dissolution of partnership — Failure to bring on record legal representative of one deceased partner — Appeal abates as a whole — See Civil P. C. (1908), O. 22, R. 3 Guj 205 (C N 38)
 —O. 22, R. 10 — Duty of applicant — Nature of assignment or devolution and party from whom it is claimed must be disclosed — See Civil P. C. (1908), S. 11 Pat 228 A (C N 58)
 —O. 22, R. 10; O. 6, R. 17 — Application under — Contents of — Amendment of plaint — Duty of Court Pat 228 B (C N 58)
 —O. 22, R. 11 — Partnership, dissolution of — Suit for — Legal representative of deceased partner not brought on record — Appeal abates as a whole — See Civil P. C. (1908), O. 22, R. 3 Guj 105 (C N 38)
 —O. 23, R. 3—General power of attorney in Urdu—Power to compromise—Construction of power of attorney — See Contract Act (1872), S. 186 Andh Pra 211 (C N 64)
 —O. 29, R. 2 (b); O. 5, Rr. 10 and 20 (A) and O. 9, R. 13 — Service of summons on a company — Word 'Corporation' in O. 29, R. 2 (b) — Meaning of — Application under O. 9, R. 13 — Court not bound to find actual date of knowledge — (Companies Act (1956), S. 34 — Company registered under the Act, held, a Corporation within meaning of O. 29, R. 2 (b) of Civil P. C.) Pat 246 (C N 61)
 —O. 32, R. 4 (1) — Suit by next friend — Person who has no interest in the benefit of minors cannot maintain Ker 214 A (C N 52)
 —O. 33, R. 1 — Suit on pro-note by endorsee for collection — Endorsee cannot apply for permission to use in forma pauperis Andh Pra 215 (C N 66)
 —O. 34, R. 1 — Puisse mortgagee party in prior mortgagee's suit — Claim of prior mortgagee satisfied by payments made by mortgagor before sale — Puisse mortgagee is entitled to institute separate suit in respect of his mortgage — See Transfer of Property Act (1882), S. 67 SC 600 A (C N 118)
 —O. 34, R. 1 — Prior and puisse mortgagees — Right to rateable distribution — AIR 1938 Pat 179, Held, no longer good law — See T. P. Act (1882), Section 73 Guj 222 A (C N 40)

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—O 34, R 2 — Scope and applicability — Suit by puisne mortgagee — Grant of interest — See Civil P C (1908), S 34

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—O 34, R 4 — Puisne mortgagee party in prior mortgagees suit — Claim of prior mortgagee satisfied by payments made by mortgagor before sale — Puisne mortgagee is entitled to institute separate suit in respect of his mortgage — Effect of incorporation of relevant sections of T P Act in O 34 — See Transfer of Property Act (1882), S 67

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—O 34, R 4 — Scope and applicability — Suit by puisne mortgagee — Grant of interest — See Civil P C (1908), S 34

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—O 34, R 10 — Puisne mortgagee also a party in suit by prior mortgagor — Separate suit by puisne mortgagee — Part of claim in respect of interest not decreed — Plaintiff awarded costs proportionate to his success as between attorney and client — Puisne mortgagee held not entitled to costs incurred by him in previous suit in which he was made a party — See Civil P C (1908), S 35

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—O 34, R 11 — Scope and applicability — Suit by puisne mortgagee — Grant of interest — Principles — (Appeal No 82/1959 D/17-1-62 (Cal) Reversed) — See Civil P C (1908), S 34

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—O 34, R 12 — Prior and puisne mortgagees—Right to rateable distribution—AIR 1938 Pat 179 held no longer good law — See T P Act (1882), S 73

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—O 34, Rr. 12 and 13 — Rule 13 has got relation to R 12

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—O 34, R 13 — Prior and puisne mortgagees—Right to rateable distribution—AIR 1938 Patna 179 held no longer good law — See T. P Act (1882) S 73

Guj 222 A (C N 40)

—O 34, R 13 — Rule 13 has got relation to R 12 — See Civil P C (1908), O 34, R 12

Guj 222 B (C N 40)

—O 41, R 1 — Conflict of jurisdiction — Receiver for car appointed by High Court—Subsequently for same car without knowledge of such High Court another receiver appointed by Subordinate Judge — Subordinate Judge recalling his order is correct

Pat 256 A (C N 65)

—O 41, R 1, O 2 (2), Ss 47, 96 — Determination of any question within S 47 is a decree — Appellant can file appeal under S 96 — Appeal is incompetent unless memorandum thereof is accompanied by certified copy of judgment — AIR 1940 Pat 176

SC 575 A (C N 112)

—O 41, R 1 — Delay in filing appeal — Sufficient cause — Delay condoned under S 5, Lim. Act 1963—(1963) 70 Pun LR (D) 332 Reversed — See Limitation Act (1963), S 5

SC 575 B (C N 112)

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—O 41, R 5 — Claim suit against execution of decree for costs — Court competent to entertain suit under S 15 read with Section 6 can stay execution of decree—Decree whether passed by Superior Court is immaterial — See Civil P C (1908), S 151

Andh Pra 236 A (C N 74)

—O 41, R 5 — Execution of decree for costs — Proper remedy against — High Court can convert stay application into application for injunction — See Civil P C (1908), S 115

Andh Pra 236 B (C N 74)

—O 41, R 22 — Right to raise cross-objection is creation of statute — No rights under Coal Bearing Areas (Acquisition and Development) Act (1957), S 20 — See Coal Bearing Areas (Acquisition and Development Act (1957), S 20

Pat 235 A (C N 60)

—O 41, R 23 (as amended by Madras Amendment of 1930) and S 151 — Order of remand by lower appellate Court — Non-mention of provision under which it was passed — Presumption is that it is passed under O 41, R 23, and not under S 151 — Objection as to maintainability of appeal against such order — Respondent must rebut presumption — Omission regarding refund of court-fee in order of remand — Not conclusive AIR 1956 Raj 43 and AIR 1937 Sind 279, Dissented from

Andh Pra 216 A (C N 67)

—O 41, Rr 23 and 27 (as amended by Madras Amendment of 1930) — Provision of R 23 is mandatory — Power of remand — Not to be exercised to give undue advantage to aggrieved party to fill in lacuna in evidence on record

Andh Pra 216 B (C N 67)

—O 41, R 23 — See Civil P C (1908), O 43, R 1 (u)

Mad 248 A (C N 36)

—O 41, R 27 (as amended by Madras Amendment of 1930) — Power of remand — Exercise of — See Civil P C (1908) (as amended by Madras Amendment of 1930), O 41, R 23

Andh Pra 216 B (C N 67)

—O 43, R 1 (s) — High Court appointing receiver for one property — Subordinate Court doing same without knowledge of High Court orders — Subordinate Court recalling its order — Order appealable — See Civil P C (1908) S 115

Pat 256 B (C N 65)

—O 43 R 1 (u) and O 41 R 23 — Scope — Remand of case on some issues — Appeal against remand — Appellant cannot canvass all findings of fact

Mad 248 A (C N 56)

—O 43, R 1 (u) — Lower appellate Court substituting its own judgment and remanding case — Remedy is to file second appeal and not under O 43, R 1 (u) — See Civil P C (1908) Ss 100-101

Mad 248 B (C N 56)

—First Schedule App 'D' Form 5-A — Puisne mortgagee party in prior mortgagees suit — Claim of prior mortgagee satisfied

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by payments made by mortgagor before sale — Punise mortgagee is entitled to institute separate suit in respect of his mortgage — He can ask for decree in form 5-A of App. D in Sch. One of Civil P. C. — See Transfer of Property Act (1882), S. 67
SC 600 A (C N 118)

CIVIL SERVICE REGULATIONS

See under Civil Services.

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See Constitution of India, Art. 311.

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—CIVILIANS IN DEFENCE SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1952)

—R. 31 — Order downgrading appellant — No appeal pending against order as contemplated by R. 31 when Rules came into force — Memorial by appellant against order in appeal however pending — Memorial held could not constitute an appeal within the meaning of Rule 31 and his case could not be disposed of under the Rules
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—R. 6 — See Civil Services — Madhya Pradesh Unification of Pay Scales and Fixation of Pay on Absorption Rules (1959), R. 4
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—R. 17 — Enquiry against one K, a Sub-Inspector of Police on probation — Charge relating to unsatisfactory work while in charge of a police station during certain period — Charge being subject matter of previous enquiry resulting in extension of probation by six months — K having been punished once, his charge ought not to have been again made subject-matter of fresh enquiry
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—R. 17 — Enquiry against a member of service — Question of termination of probation — Framing of specific charge relating to punishments accumulated — Permissible. See Civil Services — Madras State and Subordinate Services Rules, R. 27 (c), Expln. III
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—R. 27 (c), Expln. III — Scope — Madras Civil Services (Classification Control and Appeal) Rules (1953), R. 17 — Enquiry against a member of service — Question of termination of probation — Framing of specific charge relating to punishments accumulated — Permissible
Mad 275 B (C N 63)

—REGULATIONS FOR THE MEDICAL SERVICES OF THE ARMY IN INDIA

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—S. 34 — Word "Corporation" used in Civil P. C. with reference to Section 34 Companies Act — Service of summons in accordance with Order 29, Rule 2 (b) could be effected on company — See Civil Procedure Code (5 of 1908), Order 29, Rule 2 (b)
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—S. 433 — Winding up on just and equitable grounds — Held, on facts, that respondent's application for winding up was not motivated by desire to do justice to company or to see that justice was done to share-holders but by private reasons, that is, to injure directors for acts of omission and

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commission in which respondent himself participated or acquiesced — That, in the circumstances respondent should not be permitted to proceed with the hearing of the application and stay of winding up must be granted Order of Datta, J. D/- 23-4-1968 (Cal), Reversed

Cal 363 B (C N 61)

—S 433 — Order for winding up must be confined to grounds set out in petition — Allegations and circumstances on date of petition should alone be looked into — On summons taken out by company for stay of winding up proceedings commenced at instance of respondent, the Judge being satisfied that petition was not made bona fide, was inclined to grant stay but ultimately refused stay on ground that company had suppressed fact of sale of certain property after winding up petition was presented — Held, stay should have been granted — Fact of suppression of alleged sale should not have weighed with the Judge, because it was beyond scope of petition and sale was a disputed transaction (Per Ray, J.)

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—S 433 — Remedy of investigation chosen — Winding up proceedings should not be pursued — See Companies Act (1956), Section 235 Cal 363 D (C N 61)

—S 483 — Order made in matter of winding up in order to be appealable under Section 483 does not have to satisfy test of judgment within meaning of Clause 15 of Letters Patent — Any order made in winding up is appealable under Section 483 unless it is merely procedural order not affecting rights of parties — Held, order refusing stay of winding up is order in matter of winding up and is appealable (1966) 70 Cal WN 516, Held, not good law in view of AIR 1965 SC 507 — (Letters Patent (Cal), Clause 15)

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—R 64 — Election petition — Pleas — Contention about wrong refusal of demand of general recount — Absence of plea in this regard — Mention of general recount only in relief clause of petition — Held, under the circumstances, that there was no room for further count — Representation of the People (Conduct of Election and

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—Art. 215 — See Contempt of Courts Act (1952), S. 3

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—S. 4 — Contempt of Court by one person — Another person taking entire responsibility for offence and expressing unqualified regrets — Is no ground for absolving former — Applicability of rule to Editor and correspondent of newspaper — See Contempt of Courts Act (1952), S. 3

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—S. 25(3) — Applicability — Provisions apply only if there is express promise to pay

Raj 192 C (C N 38) (FB)

—Ss. 28, 2(d) and (e) — Decree for eviction — Execution — Decree-holder accepting representation of tenant not to pursue remedy by way of appeal if time granted to vacate — Agreement reduced to writing — Agreement held not hit by S. 28 — It was a good consideration — Tenant, held, not entitled to prosecute appeal filed in contravention of agreement — Evidence Act (1872), S. 115

Bom 221 (C N 38)

—S. 56 — Contract becoming impossible — Force majeure — Meaning — Force majeure clause — Rule of ejusdem generis applies — (Words and Phrases — Force majeure)

Orissa 152 F (C N 53)

—S. 65 — Plaintiff agreeing to adjust amounts due from defendant — Defendant agreeing to convey his lands to plaintiff — Agreement not void ab initio — Plaintiff entitled to his dues both under S. 65 and S. 70 — See Contract Act (1872), S. 70

Orissa 171 C (C N 58)

—Ss. 70, 65 — Plaintiff agreeing to adjustment of amount due to him from defendant — Defendant to convey title in lands to him after conversion into rayati — Contract is not void ab initio — Plaintiff is entitled for refund under S. 65 as well as under S. 70

Orissa 171 C (C N 58)

—S. 72 — Non-delivery of consignment — Claim for special damages — See Railways Act (1890), S. 72 (Old)

Assam 84 E (C N 18)

CONTRACT ACT (contd)

—S 171—Fiduciary relationship between legal representative of deceased partner and surviving partners — See Partnership Act (1932), S 46

Mad 257 D (C N 58)

—Ss 186, 188 — General power of attorney in Urdu — Use of word 'sulah' does not include reference to arbitration — Expression means only 'compromise' — Difference between compromise and reference to arbitration explained AIR 1947 Nag 17, Not foll — (Power of Attorney Act (1882), S 2) — (Civil P. C. (1908), O 3, R 4, O 23 R 3) — (Words and Phrases — 'Sulah' and "Supurd Salisi", meaning of)

Andh Pra 211 (C N 64)

—S 188 — General power of attorney in Urdu — Power to compromise — Construction of power of attorney — See Contract Act (1872), S 186

Andh Pra 211 (C N 64)

—S 188 — Possession of care-taker — It is possession of principal

Ker 214 C (C N 52)

COURT-FEES ACT (7 of 1870)

See under Court Fees and Suits Valuations

COURT FEES AND SUITS VALUATIONS**—COURT-FEES ACT (7 of 1870)**

—S 13 — Return of plaint on ground of under-valuation of claim — Appeal — Plaintiff directed to delete prayer for recovery of building for purpose of bringing suit within jurisdiction of Munsiff Court — Presentation of plaint after deletion of prayer — Plaintiff entitled in the interest of justice to Court-fee already paid — Civil P. C. (1908), O 7, R 10, S 151

Ker 203 (C N 47)

—Sch II, Art 17A (Orissa) — Interpretation of Cols 1 and 3 — Suit for partition — Appeal — Jurisdictional value should be same as that of plaint and same court-fee is payable

Orissa 167 (C N 56)

CRIMINAL PROCEDURE CODE (5 of 1898)

—S 4(h) — Final report by Police — Protest petition with request to call upon police to submit charge sheet and to take action against opposite party — Protest petition was to be treated as petition of complaint — See Criminal P. C. (1898), S 200

Orissa 149 (C N 52)

—S 4(1)(t) — Public Prosecutor—"Engaging" lawyer for State — Lawyer, if public prosecutor — See Criminal P. C. (1898), S 492(2)

Cal 321 A (C N 57)

—S 4(1)(t) — Assistant Public Prosecutor is unknown to law — See Criminal Procedure Code (5 of 1898), S 270

Cal 321 N (C N 57)

—Ss 4(1)(t), 492(2), 270 — Duty of Public Prosecutor of District pointed out

Cal 321 O (C N 57)

—S 10(2) — Appointment of Public Prosecutor "Engaging lawyer" for State, if

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appointment — See Criminal P. C. (1898), S 492(2)

Cal 321 A (C N 57)

—S 35 — Word 'may' — It not only confers a power but also imposes a duty of putting it in use — Passing of cumulative sentence — Duty of Court

Orissa 146 (C N 50)

—S 54 — Power under the P. D. Act is in addition to those contained in the Cr P. Code — See Public Safety — Preventive Detention Act (1950), S 1

Tripura 44 C (C N 10)

—Ss 83, 84, 101 — Court receiving search warrant for execution — Not required to decide its legality

Cal 340 A (C N 58)

—S 83 — Removal of seized article to Court issuing search warrant — See Criminal P. C. (1898), S 99

Cal 340 B (C N 58)

—Ss 83, 537 — Issuing Court putting the name of executing Court in the form of search warrant — Mere technical irregularity — Warrant valid

Cal 340 C (C N 58)

—S 84 — Court receiving search warrant for execution — Not required to decide its legality — See Criminal P. C. (1898), S 83

Cal 340 A (C N 58)

—Ss 90, 492, 270, 236 — Issue of summons to material witnesses — Investigating officer reporting that witness could not be found — Held, that it was duty of prosecution to pray for a warrant and proclamation for compelling production of witness and that the Public Prosecutor failed in discharging his legal function

Cal 321 J (C N 57)

—Ss 99, 83, 101 — Removal of seized articles to Court issuing search warrant — Within discretionary power of the Court executing search warrant — Refusal to send certain articles not sufficiently identified — Valid

Cal 340 B (C N 58)

—S 101 — Court receiving search warrant for execution — Not required to decide its legality — See Criminal P. C. (1898), S 83

Cal 340 A (C N 58)

—S 101 — Removal of articles seized to Court issuing search warrant — See Criminal P. C. (1898), S 99

Cal 340 B (C N 58)

—S 146 — Civil Court of competent jurisdiction — Competency as to territorial and not pecuniary jurisdiction is required — AIR 1968 Punj 301, Dissented from.

Assam 81 B (C N 17)

—Ss 146 (1B) and (1D), 435, 439 — Final order under S 146 (1B) — Revision against not barred by S 146 (1D) — AIR 1960 All 599 and AIR 1959 Cal 366, Dissented from

Assam 81 A (C N 17)

—S 146 (1) — Reference to Civil Court — Magistrate should always draw up a statement of the case — Mere omission to do so cannot, however, be fatal to the validity of the proceedings

Assam 81 C (C N 17)

CRIMINAL P. C. (contd.)

—S. 154 — Cooking up story — Nothing is more reprehensible than to cook up a story for recording an F. I. R. and attempt to improve the cooking of the story at the trial stage in any case — It is more so when it is done, to foist a charge of murder — [Their Lordships recorded emphatic condemnation of the performance of the prosecution in the case and expressed their deep disappointment at callousness of the trial Judge revealed in the record at not noting this] — Evidence Act (1872), S. 3

Cal 321 L (C N 57)

—S. 156 — Final report by police — The magistrate had no power to call for a charge sheet — See Criminal P. C. (1898), S. 200

Orissa 149 (C N 52)

—S. 169 — Final report by police — The Magistrate had no power to call for a charge sheet — See Criminal P. C. (1898), S. 200

Orissa 149 (C N 52)

—S. 173 — Final report by police — The magistrate had no power to call for a charge sheet — See Criminal P. C. (1898), S. 200

Orissa 149 (C N 52)

—Ss. 190 and 247 — Report of excise officer under S. 77 Bihar and Orissa Excise Act — Is a police report and not a complaint for purposes of Ss. 190 and 247 — Absence of Excise Officer on date of hearing — Acquittal of accused under S. 247 is illegal — Bihar & Orissa Excise Act (2 of 1915), S. 77 — Powers of Excise Officer

Pat 253 (C N 64)

—Ss. 195 (1)(c), 476, 479A — Penal Code (1860), Ss. 471, 467 — Suit based on forged cheque — Criminal Court taking cognisance of offence under S. 471 — Sanction of the Civil Court not necessary under S. 195 (1)(c)

Guj 195 A (C N 36)

—S. 196A — Conspiracy can have plurality of objects — Charge-sheet showing various objects of conspiracy including commission of offences of forging passports and fraudulently and dishonestly using them as genuine for enabling passengers to go abroad — No distinction can be made between primary and subsidiary objects — To such a case subsection (2) and not sub-s. (1) would apply — Trial under S. 196A is not invalid because the primary object was to send people abroad which by itself is not an offence — Penal Code (1860), Ss. 120B, 471

Punj 225 A (C N 41)

—S. 196-A — Sanction of Government — 'Government', meaning of — Order should be in name of Governor and duly authenticated — Proof — Order can, however, be challenged on the ground that it was made by person not authorised — Consideration of Rules of business of Government framed under Art. 166(3) — Order made by Home Secretary without reference to Minister-in-charge of department — Order is invalid — Constitution of India, Arts. 166 (3), 154

Punj 225 B (C N 41)

CRIMINAL P. C. (contd.)

—S. 198-B — Provisions of, are not pari materia under those of S. 20, Prevention of Food Adulteration Act, 1954. AIR 1963 Orissa 158, Dissented from — See Prevention of Food Adulteration Act (1954), S. 20 (as it stood prior to amendment by Act 49 of 1964) Delhi 198 B (C N 34)

—Ss. 200, 202, 203, 156, 169, 173, 190(1)(b), 4, 537 — Final report by police — Protest petition with request to call upon police to submit charge sheet and to take action against opposite party — Dismissal of petition without examining petitioner on oath and without proceeding in accordance with provisions of Chapter 16, held contrary to law — Though the Magistrate had no power to call for a charge-sheet it does not mean that petitioner should be disentitled to get relief provided by law — Protest petition was to be treated as petition of complaint

Orissa 149 (C N 52)

—S. 202 — Police investigation not ordered — Magistrate cannot look into statements of witnesses recorded by police or to result of enquiry embodied in final report — See Criminal P. C. (1898), S. 200

Orissa 149 (C N 52)

—S. 203 — Material on which Magistrate can act, explained — See Criminal P. C. (1898), S. 200

Orissa 149 (C N 52)

—S. 237 — Charge of conspiracy of forging passport and other travel documents — Accused acquitted of charge of forging passport — Conviction for forging other related document not illegal, when accused knew of the charge and was not prejudiced — See Criminal P. C. (1898), S. 537

Punj 225 C (C N 41)

—S. 247 — Word "day" does not mean whole working day — Absence of complainant at time when case is called on — Court is justified in acquitting accused without waiting for whole day to see whether complainant appears

Andh Pra 222 A (C N 69)

—Ss. 247, 417 (3), 423 — Acquittal of accused under S. 247 — Appeal under Sec. 417 — High Court can decide sufficiency of cause of non-appearance of complainant — On satisfaction it can set aside the acquittal

Andh Pra 222 B (C N 69)

—Ss. 247 and 259 — Non-cognizable offence — Death of complainant — Magistrate has discretion to substitute fit and willing complainant

Mys 221 (C N 45)

—S. 247 — Report of excise officer under S. 77 Bihar and Orissa Excise Act — Is a police report and not a complaint for purposes of Ss. 190 and 247 — Absence of Excise Officer on date of hearing — Acquittal of accused under S. 247 is illegal — Powers of Excise Officer — See Criminal P. C. (1898) S. 190

Pat 253 (C N 64)

—S. 256 — Statements of prosecution witnesses previously recorded — Must be made available to accused for his defence — State-

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ments not with prosecution but with third party — Accused can summon such third party — See Evidence Act (1872), S 145
Orissa 176 B (C N 59)

—S 259 — Non-cognizable offence — Death of complainant — Magistrate has discretion to substitute fit and willing complainant — See Criminal P C (1898), S 247
Mys 221 (C N 45)

—S 270 — See Criminal P C (1898), S 492(2)
Cal 321 A (C N 57)

—S 270 — Public Prosecutor must be fair to Court, independent and unbiased — See Criminal P C (1898), S 492
Cal 321 G (C N 57)

—S 270 — Material witnesses summoned but not attending — Investigating officer reporting that witness could not be found — Duty of prosecution to ask for warrant and proclamation, pointed out — See Criminal P C (1898), S 90
Cal 321 J (C N 57)

—Ss 270, 492(2), 4 (1)(t) — Assistant Public Prosecutor is unknown to law — (Per Amaresh Roy J)
Cal 321 N (C N 57)

—S 270 — Duty of Public Prosecutor of District, pointed out — See Criminal P C (1898), S 4(1)(t)
Cal 321 O (C N 57)

—S 286 — Public Prosecutor must be fair to court, independent and unbiased — See Criminal P. C (1898), S 492
Cal 321 G (C N 57)

—S 286 — Material witnesses summoned but not attending — Investigating Officer reporting that witness could not be found — Duty of prosecution to ask for warrant and proclamation, pointed out — See Criminal P C (1898), S 90
Cal 321 J (C N 57)

—Ss 290, 367 — Appreciation of evidence — Judgment should not show complete negation of presumption of innocence of accused — There is no presumption in law of absolute truthfulness of prosecution witnesses — Duty of Court to weigh the probability of prosecution evidence, pointed out — Evidence Act (1872), Ss 3 and 114
Cal 321 E (C N 57)

—S 340 — Adjournment — Defence counsel absent — Trial continued — Propriety — See Criminal P C. (1898) S 344
Cal 321 B (C N 57)

—S 340 — Appointment of defence counsel by Government — Counsel appointed absent due to illness — Appointment of another counsel on same day without being furnished with brief and continuing with trial — It is negation of fair trial — Court's duty pointed out — Constitution of India, Arts 22(1) and 225
Cal 321 C (C N 57)

—S 342 — Purpose of examination under — All possible questions not asked — Accused fully made aware of case against him — Proceedings are not vitiated
PunJ 225 D (C N 41)

CRIMINAL P. C. (contd)

—Ss 344 and 340 — Adjournment — Counsel for defence absent due to illness — Trial continuing in absence of defence lawyer — Propriety — Constitution of India, Art 22(1)
Cal 321 B (C N 57)

—S 367 — Appreciation of evidence — See Evidence Act (1872), S 3

—S 367 — Appreciation of evidence — Truthfulness of witness — Presumption — Judgment should not show complete negation of presumption of innocence of accused — See Criminal P C (1898), S 290
Cal 321 E (C N 57)

—S 367 — Conflict between oral evidence of eye-witnesses and medical evidence — Duty of Court — See Evidence Act (1872), S 3
Cal 321 I (C N 57)

—S 417 — Acquittal under S 247 setting aside of in appeal — See Criminal P C (1898), S 247
Andh Pra 222 B (C N 69)

—S 423 — Acquittal under S 247, setting aside of, in appeal — See Criminal P C (1898), S 247
Andh Pra 222 B (C N 69)

—S 423 — Appeal — Retrial — Prosecution unable to prove offence against accused — Materials in evidence pointing strongly to accused's innocence — Retrial not ordered as it would enable prosecution to brush up defects appearing in the evidence given in the trial — Accused acquitted
Cal 321 D (C N 57)

—S 423 (1) — Held eye-witnesses' evidence stood discredited and conviction based on it wrong — See Evidence Act (1872), S 3
Cal 321 I (C N 57)

—S 435 — Final order under S 146 (1B) — Revision not barred by S 146 (1D) — AIR 1963 All 599 and AIR 1959 Cal 366 Dissented from — See Criminal P C (1898), S 146 (1B) and (1D)
Assam 81 A (C N 17)

—S 439 — Final order under S 146 (1B) — Revision not barred by S 146 (1D) — AIR 1963 All 599 and AIR 1959 Cal 366 Dissented from — See Criminal P C (1898), S 146 (1B) and (1D)
Assam 81 A (C N 17)

—S 476 — Suit based on forged cheque — Criminal Court taking cognizance under S 471, Penal Code — Sanction of Civil Court is not necessary — See Criminal P. C (1898), S 195(1)(c)
Guj 195 A (C N 36)

—S 479A — Suit on forged cheque — Civil Court taking cognizance under Section 471, Penal Code — Sanction of Civil Court is not necessary — See Criminal P C (1898), S 195(1)(c)
Guj 195 A (C N 36)

—Ss 492, 270, 286 — Public Prosecutor must be fair to Court, independent and unbiased
Cal 321 G (C N 57)

—S 492 — Material witnesses summoned but not attending — Investigating Officer reporting that witnesses could not be

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found — Duty of prosecution to ask for warrant and proclamation, pointed out — See Criminal P. C. (1898), S. 90

Cal 321 J (C N 57)

—S. 492 (1) — Court took judicial notice of the fact that in 1966-67 there had been for the district of 24 parganas, a Public Prosecutor appointed generally by the State Government under Section 492 (1) — Evidence Act (1872), Ss. 56 and 57

Cal 321 M (C N 57)

—Ss. 492 (2), 270, 10 (2) and 4 (1) (t) — Appointment of Public Prosecutor — Additional District Magistrate 'engaging' lawyer on behalf of State — Does not amount to appointing a lawyer as Public Prosecutor — Conduct of case by such lawyer is illegal — 'Trial is vitiated' — Duty of Court indicated — Legal Remembrancers' Administrative Manual (West Bengal), Chap. II, Part VI, Para 9 (i) and (ii) (as amended) and Appendix 'E'

Cal 321 A (C N 57)

—S. 492 (2) — Defence lawyer not able to carry out his duties properly — Duty of Court pointed out — See Criminal P. C. (1898), S. 537

Cal 321 H (C N 57)

—S. 492 (2) — Assistant Public Prosecutor is unknown to law — See Criminal Procedure Code (5 of 1898), S. 270

Cal 321 N (C N 57)

—S. 492 (2)—Duty of Public Prosecutor of District, pointed out — See Criminal P. C. (1898), S. 4(1)(t)

Cal 321 O (C N 57)

—Ss. 497, 498 — Principles governing grant of bail — Dacoity — Accused persons not concealing their identity before committing offence — No ground to hold prima facie evidence against them as unbelievable — (Penal Code (1860), Ss. 395, 397)

Tripura 42 A (C N 9)

—Ss. 497, 498 — Probability of absconding — Grant of bail, not proper — Penal Code (1860), Ss. 395, 397

Tripura 42 B (C N 9)

—Ss. 497, 498 — Grant of bail — Matters to be considered

Tripura 42 C (C N 9)

—Ss. 497 498 — Dacoity case involving five accused — Two of them released on bail — Case against remaining three accused prima facie stronger than against those released on bail — Refusal to grant bail to these three does not amount to discrimination

Tripura 42 D (C N 9)

—S. 498 — Principles governing grant of bail in dacoity cases — See Criminal P. C. (1898), S. 497

Tripura 42 A (C N 9)

—S. 498 — Probability of accused absconding — Grant of bail not proper — See Criminal P. C. (1898), S. 497

Tripura 42 B (C N 9)

—S. 498 — Matters to be taken into consideration when granting bail — See Criminal P. C. (1898), S. 497

Tripura 42 C (C N 9)

—S. 498 — Release on bail — Dacoity

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case—Refusal of bail to those against whom prima facie stronger case — No discrimination — See Criminal P. C. (1898), S. 497

Tripura 42 D (C N 9)

—S. 499 — Consideration of bail bond after Court hours — Duty of Magistrate

Delhi 214 B (C N 36)(SB)

—Ss. 537, 492 (2) — Failure of justice — Illegal appointment of Public Prosecutor — Defence lawyer not able to carry out his duties properly — Failure of Judge to weigh prosecution evidence properly — Held, there was prejudice to accused and failure of justice — Had there been only an illegal appointment of Public Prosecutor, the irregularity would have been curable under S. 537

Cal 321 H (C N 57)

—S. 537 — Issuing Court putting name of executing Court in form of search warrant — It is mere irregularity—See Criminal Procedure Code (5 of 1898), S. 83

Cal 340 C (C N 58)

—S. 537 — Final report by police — Protest petition with request to call upon police to submit charge sheet and to take action against opposite party — Dismissal petition without examining petitioner on oath and without proceeding in accordance with provisions of Ch. 16, held contrary to law — Failure to examine petitions on oath is irregularity — See Criminal P. C. (1898), S. 209

Orissa 149 (C N 52)

—Ss. 537, 237 — Charge of conspiracy of forging passport and other travel documents — Accused acquitted of charge of forging passport — Conviction for forging other related document not illegal, when accused knew of the charge and was not prejudiced — Penal Code (1860), S. 466

Punjab 225 C (C N 41)

DEED — CONSTRUCTION

See (1) Evidence Act (1872), S. 91.

(2) Government Grants Act (1895), S. 3.

(3) T. P. Act (1882), S. 8.

DOCTRINE OF ECLIPSE

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—S. 15 — Orchard in enjoyment of village community for over twenty years — Community deemed to have acquired easement — See Civil Procedure Code (5 of 1908), S. 100

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EDUCATION

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Raj 182 B (C N 37)

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—S. 39 — Complaint by Chief Engineer—He is "person aggrieved"—Complaint, proper

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— Ss 50, 39 — Expressions "Person aggrieved" and "at the instance of" in S 50
— Meaning — Complaint under S 39 by Chief Engineer of Electric Supply Corporation held proper
Mad 280 (C N 64)

EVIDENCE ACT (1 of 1872)

— S 3 — Appreciation of evidence — See Criminal P C (1898), S 367

— S 3 — Bigamy — Proof of second marriage — Evidence held not enough — See Penal Code (1860), S 494
Assam 90 (C N 19)

— Ss 3, 45 and 59 — Criminal P C (1898), Ss 367, 423 (1) — Medical evidence conflicting with oral evidence of eye-witnesses — Oral evidence of eye-witnesses not corroborated in material particulars by any circumstantial evidence — Held, eye-witnesses' evidence stood discredited and Court was wrong in convicting accused on such evidence
Cal 321 I (C N 57)

— S 3 — Attempt to improve upon prosecution story — Effect — See Criminal Procedure Code (5 of 1898), S 154
Cal 321 L (C N 57)

— S 3 — "Proved" — Best judgment assessment — Quantum of escaped turnover — Proof of — See Sales Tax — M P General Sales Tax Act 1958 (2 of 1959), S 19 (1)
Madh Pra 134 A (C N 37)

— S 3 — Circumstantial evidence — Conviction based on — Nature of circumstantial evidence required
Punj 225 F (C N 41)

— S 3 — Circumstantial evidence — Existence of agreement — Partnership Act (1932) Sections 42, 47 — Contract to continue partnership after death of a partner may be implied from conduct of parties — Limitation Act (1908) Art 106 — Two brothers A and B entering into partnership — B died on 3-11-1957 — Hears of B continuing business till its dissolution on 5-2-1958 by mutual consent — A filing suit for rendition of accounts on 4-2-1961 — A's suit held to be within time — AIR 1952 All 506 and AIR 1921 Mad 708 Diss from
Punj 244 A (C N 42)

— S 5 — Interested and partisan witnesses — Appreciation of evidence — Communal riot — Witness belonging to one community — Duty of Court — (Penal Code (1860), Section 147 — Evidence)
Orissa 176 A (C N 59)

— Ss 17 and 18 — Entries in partnership books are prima facie evidence against each of partners
Mad 257 B (C N 58)

— S 18 — Bigamy — Second marriage must be proved — Admission is not enough — See Penal Code (1860), S 494
Assam 90 (C N 19)

EVIDENCE ACT (contd)

— S 18 — Entries in partnership books are prima facie evidence against each of partners — See Evidence Act (1872), S 17
Mad 257 B (C N 58)

— S 45 — Expert evidence — Admission of evidence of expert — Fact that he was competent to give expert evidence must be proved — Law does not permit assumption without evidence on material point of competence
Cal 231 F (C N 57)

— S 45 — Conflict between oral evidence of eye-witnesses and medical evidence — Duty of Court — See Evidence Act (1872), S 3
Cal 321 I (C N 57)

— S 45 — Medico legal jurisprudence — Medical expert performing post-mortem examination 13 hours after death, reporting rigor mortis — No information if there was any element of cadaveric rigidity or spasm present — Cadaveric spasm occurs in cases in which death was immediately preceded by state of great nervous tension or excitement caused by terror or struggle — Cadaveric spasm is to be distinguished from rigor mortis and is not rigor mortis — Medical evidence of the expert, held, could not be relied upon — Medico-legal jurisprudence
Cal 321 K (C N 57)

— Ss 45 and 47 — Accused charged with forgery — Conviction can be based solely on expert testimony, though as a measure of precaution the evidence should be corroborated by other evidence — Penal Code (1860), Ss 465 471
Punj 225 E (C N 41)

— S 47 — Accused charged with forgery — Conviction can be based solely on expert testimony, though as a measure of precaution the evidence should be corroborated by other evidence — See Evidence Act (1872), S. 45
Punj 225 E (C N 41)

— Ss. 56 and 57 — Judicial notice of the fact that in 1966-67, there had been for district of 24 paraganas, a Public Prosecutor, appointed generally — See Criminal P C (1898), S. 492 (1)
Cal 321 M (C N 57)

— S 59 — Conflict between oral evidence of eye-witnesses and the medical evidence — Duty of Court — See Evidence Act (1872) S 3
Cal 321 I (C N 57)

— Ss 91 to 98 — Terms of document — Construction — Extrinsic evidence — Admissibility
Bom 231 A (C N 41)

— S 92 proviso (6) — Scope — Proviso is of exceptional nature and is of a substantive nature itself — It is not an exception to the rule laid down in the main part of the section
Bom 231 D (C N 41)

— S 92 proviso (6) — Proviso (6) is an exception to main rule in the section — See Civil P C (1908), Preamble — Interpretation of statutes — Proviso
Bom 231 E (C N 41)

— Ss 101 to 104 — Benami Transaction — Determination — Motive, source of consideration possession of property and its enjoyment, custody of title deeds are the

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features whose effect either severally or cumulatively has to be considered — Onus lies on the person who pleads benami nature
Mad 252 A (C N 57)

—Section 108 — Presumption of death in respect of a person not heard of for seven years — There is no presumption of date of death — Onus to prove that death took place within seven years lies on person who claims a right to the establishment of which the fact is essential.
Ker 213 (C N 51)

—S. 114 — Order of remand not mentioning provision of law — Presumption is that it is passed under O. 41 R. 23 Civil P. C. — See Civil P. C. (1908), O. 41 R. 23
Andh Pra 216 A (C N 67)

—S. 114 — There is no presumption of absolute truthfulness of prosecution witnesses — See Criminal P. C. (1898), S. 290
Cal 321 E (C N 57)

—S. 114 — Limitation Act (1963) Arts. 64 and 65 — Co-owners — Adverse possession — Ouster — Inference of ouster or exclusion — See Limitation Act (1963) Art. 64
Ker 222 A (C N 53)

—S. 114 Illus (e)—Approval of transport scheme — Presumption — See Motor Vehicles Act (1939), S. 68-D
Mys 215 G (C N 44)

—S. 115 — S. 12(7), U. P. Consolidation of Holdings Act creates estoppel by record — See Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 12 (7)
All 342 F (C N 59) (FB)

—S. 115 — Agreement not to file appeal, against eviction decree, if tenant given time — Time given — Tenant is precluded from filing appeal — See Contract Act (1872), S. 28
Bom 221 (C N 38)

—S. 115 — C. P. and Berar Regulation of Accommodation Act (23 of 1946) S. 2— C. P. and Berar Letting of Houses and Rent Control Order 1949, Cl. 12-A — Prohibition under, to sublet accommodation except by written permission of landlord — Tenant subletting accommodation only with oral permission — Subletting is unlawful — Oral permission by landlord cannot operate as waiver of benefit of prohibition — He is not estopped from pleading that subletting is unlawful
Madh Pra 130 C (C N 36)

—Ss. 145 and 155 — Previous statements of prosecution witnesses reduced into writing — Right of accused to ask prosecution to make them available for his defence — Statement not in possession of prosecution but of third party — Accused should summon such person — (Criminal P. C. (1898), S. 256)
Orissa 176 B (C N 59)

—S. 155 — Statements of prosecution witnesses previously recorded — Use for impeachment, right of accused — See Evidence Act (1872), S. 145
Orissa 176 B (C N 59)

EXPERT EVIDENCE

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GENERAL CLAUSES ACT (10 of 1897)

—S. 3 (36) — Copyright is incorporeal moveable property
Mad 284 A (C N 65)

GOVERNMENT GRANTS ACT (15 of 1895)

—S. 2 — Ss. 111 and 114 Transfer of Property Act (1882) do not apply to government Grants — See Mines and Minerals (Regulation and Development) Act (1957), S. 5
Orissa 152 G (C N 53)

—S. 3 — Government grants should be construed according to tenor of the grant— See Mines and Minerals (Regulation and Development) Act (1957), S. 5
Orissa 152 G (C N 53)

GOVERNMENT OF INDIA ACT (1935) (26 GEO V & 1 EDW. VIII c 2)

—S. 100 — Central legislature was competent to enact Import and Export (Control) Act 1947 — See Imports and Exports (Control) Act (1947) S. 3
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—S. 107 (2) — C. P. & Berar Letting of Houses and Rent Control Order (1949) falls under Entry 21, List II, Sch. VII and is not ultra vires — See Houses and Rents — C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946), S. 6
Madh Pra 130 A (C N 36)

—List 1, Entry 19 — Import and Export (Control) Act 1947 and Import (Control) Order (1955) are covered by Entry 19 — See Imports and Exports (Control) Act (1947) S. 3
Bom 224 A (C N 39)

—Seventh Schedule List II Entry 21 — C. P. & Berar Letting of Houses and Rent Control Order (1949) falls within Entry 21 and is not ultra vires — See Houses and Rents — C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946), S. 6
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—S. 25 — Decree or agreement fixing amount of widow's maintenance — S. 25 is no bar to widow claiming increased maintenance due to change of circumstances irrespective of whether decree or agreement was prior to or subsequent to Act
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HINDU LAW

—Charitable endowment — Succession — Rule of — Charitable trust created by will — No direction as to line of succession — Ordinary rule of inheritance applies—Sister precedes distant agnate — (Hindu Law of Inheritance (Amendment) Act (1929), Section 2)
SC 569 A (C N 110)

—Charitable endowments — Tank can be an object of charity — Inam in favour of the "uracheruvu" (tank) — Tank must be considered a charitable institution within the meaning of Andhra Act 37 of 1956 — Andhra Inams (Abolition and Conversion into Ryotwari) Act, 1956, S. 2 (E)
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HINDU LAW (contd.)

— Partition — Unregistered partition deed can be looked into to establish severance of status AIR 1962 Andh Pra 443 Overruled LPA No 44 of 1963, D/- 1-10-1965 Partially Overruled — See Registration Act (1908), S 49(c) Andh Pra 242 (C N 76) (FB)
 — Succession — Thika tenancy held by late Karta in absolute severalty — Tenancy devolves by succession and not by survivorship — See Civil P. C. (1908), Or 1 R 13 Cal 360 (C N 60)

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (2 of 1929)

— S 1 (2) — Property — Whether hereditary trusteeship is 'property' — (Quaere) SC 569 B (C N 110)
 — S 2 — Succession — Rule of — Charitable trust created by will — No direction as to line of succession — Ordinary rule of inheritance applies — Sister precedes distant agnate — See Hindu Law — Charitable endowment SC 569 A (C N 110)

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— S 17 — Bigamy — Second marriage not proved — Admission is not enough — See Penal Code (1860), S 494 Assam 90 (C N 19)

HOUSES AND RENTS**— C. P. AND BERAR LETTING OF HOUSES AND RENT CONTROL ORDER, (1949)**

— Cl 12-A — Clause is not ultra vires — See Houses and Rents — C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946) S 6 Madh Pra 130 A (C N 36)
 — Cl 12-A — Permission to sublet must be in writing — See Evidence Act (1872), S 115 Madh Pra 130 (C N 36)

— C. P. AND BERAR REGULATION OF LETTING OF ACCOMMODATION ACT (11 of 1946)

— S 2 — Cl 12-A of C. P. and Berar Letting of Houses and Rent Control Order, 1949, is not ultra vires — See Houses and Rents — C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946) S 6 Madh Pra 130 A (C N 36)
 — S 2 — Permission of landlord to sublet must be in writing — See Evidence Act (1872), S 115 Madh Pra 130 C (C N 36)
 — Ss 6, 2 — Orders under S. 2 — C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cl 12A — Validity of — Not ultra vires or unconstitutional — (Government of India Act (1935) S 107 (2) Entry 21, List II, Seventh Schedule) — S A. No 357 of 1962 D/- 27-11-1962 (MP) and AIR 1959 Bom 98 Overruled Madh Pra 130 A (C N 36)

— EAST PUNJAB URBAN RENT RESTRICTION ACT (3 of 1949)

— S 15 (5) — New plea in revision — Point about proof of execution of document marked as exhibit not raised either before the Rent Controller or before the Appellate authority or even in grounds of revision

HOUSES AND RENTS — C. P. URBAN RENT RESTRICTION ACT (contd)

— Cannot be entertained at stage of arguments in revision — (Civil P. C (1908) S 115) Punj 256 B (C N 44)

— JAMMU AND KASHMIR PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT (13 of 1959)

— S 5 (prior to its amendment) and Section 15 — Validity — Provisions of S 5 violate Art 14 of the Constitution — Proceedings taken under the provisions are illegal — Subsequent amendment does not validate the proceedings — Section 15 is ultra vires the State Legislature — Being a post Constitution amendment doctrine of eclipse does not apply J & K 88 A (C N 18) (FB)

— S 15 — Section is ultra vires — See Jammu & Kashmir Public Premises (Eviction of Unauthorised Occupants) Act (13 of 1959) S 5 J & K 88 A (C N 18) (FB)

— M. P. ACCOMMODATION CONTROL ACT (23 of 1955)

— S 4 Cl (e) Proviso — Protection of subletting of accommodation under — Not available to unlawful subletting Madh Pra 130 B (C N 36)

— PUNJAB PUBLIC PREMISES AND LAND (EVICTION AND RENT RECOVERY) ACT (3 of 1959)

— S 5 — Section violates Art 14 of the Constitution — See Houses and Rents — Punjab Public Premises and Land (Eviction and Rent Recovery) Act (3 of 1959) S 7 (2) Delhi 194 (C N 32)
 — Ss 7 (2) and 5 — Constitution of India Art. 14 — S 7 (2) is violative of Art. 14 on the basis of reasoning adopted by AIR 1967 SC 1581 in striking down S 5 as violative of Art 14 — Even otherwise, in absence of S 5, S 7 (2) cannot operate Delhi 194 (C N 32)

— PUNJAB PUBLIC PREMISES AND LAND (EVICTION AND RENT RECOVERY) RULES (1957)

— R 7 — No procedure is prescribed for determination of what is essentially a 'fact' requiring judicial determination — See Houses & Rents — Punjab Public Premises and Land (Eviction and Rent Recovery) Act (1959), S 7(2) Delhi 194 (C N 32)

IMPORTS AND EXPORTS (CONTROL) ACT (18 OF 1947)

— S 3 — Imports (Control) Order (1955) Fre. and S 3 — Validity — Neither S 3 of the Act of 1947 nor Imports (Control) Order (1955) is beyond legislative competence of Central Legislature — Constitution of India, Art 246 — Government of India Act (1935), Section 100, List 1, Entry 19 Bom 224 A (C N 39)

IMPORTS (CONTROL) ORDER (1955)

—Pre. — Order is not beyond legislative competence of Central Legislature — See Imports and Exports (Control) Act (1947), S. 3 Bom 224 A (C N 39)

INCOME-TAX ACT (11 OF 1922)

—S. 10(2-A) — Scope — When speculative loss or liability is treated as income or profit from business, profession or vocation, such income or profit can only be one arising from speculative business

SC 572 (C N 111)

—S. 10(2) (xv) — Allowable deduction — Formation of assessee company by taking over State concerns — By agreement, State to be given 10 p.c. of net profits every year — Net profits to mean amounts for which assessee's audited profits in any year are assessed to income-tax — Amount paid to State held allowable deduction

Ker 196 (C N 46)

—Ss. 18A(3) and 23B — Expression "any person who has not hitherto been assessed" cannot be interpreted to include a person who has only been provisionally assessed under S. 23B — Word "assessed" has to be read in its ordinary sense including every kind of assessment.

SC 543 A (C N 103)

—S. 18A(3) — Interpretation of Statutes — Meaning of words — Subsequent Act, no guidance for meaning of earlier Act unless the both are laws on the same subject and earlier Act is ambiguous — See Civil P. C. (1908), Preamble

SC 543 (C N 103)

—S. 23B — Expression "any person who has not hitherto been assessed" in S. 18-A (3) does not include a person who has only been provisionally assessed under S. 23B — Word "assessed" has to be read in its ordinary sense including every kind of assessment — See Income-tax Act (1922), S. 18-A (3)

SC 543 A (C N 103)

—S. 46(2) — Revenue sale for recovery of arrears of income-tax subsequent to mortgage — Cannot prevail over the mortgage — Case law Ref.

Andh Pra 237 (C N 75)

INCOME-TAX ACT (43 OF 1961)

—S. 144 — Best judgment assessment — Mode of determination — See Mysore Motor Vehicles (Taxation on Passengers and Goods) Act (10 of 1961), S. 6

Mys 222 B (C N 46)

—S. 210 — Interpretation of Statutes — Meaning of words — Subsequent Act does not afford any guidance for meaning of earlier Act unless the both are laws on the same subject and earlier Act is ambiguous — See Civil P. C. (1908), Preamble

SC 543 (C N 103)

—S. 212(3) — Interpretation of Statutes — Meaning of words — Subsequent Act does not afford any guidance for meaning of earlier Act unless the both are laws on the same subject and earlier Act is ambiguous — See Civil P. C. (1908), Preamble

SC 543 (C N 103)

INDUSTRIAL DISPUTES ACT (14 OF 1947)

—Ss. 25FF and 25 FFF — Wages — Whether include compensation payable under S. 25FF, Industrial Disputes Act — Authority under Payment of Wages Act in application under S. 15(2) cannot entertain claim for compensation under S. 25 FF — 1967-1 Lab LJ 232 (Punj) Overruled — See Payment of Wages Act (1936) (as amended by Act 68 of 1957), S. 2(vi)(d)

SC 590 (C N 116)

INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT (20 OF 1946)

—Pre. — Object of Act — Is to require employers to define with certainty conditions of service in their establishments and to reduce them to writing and to get them compulsorily certified with a view to avoid unnecessary industrial disputes

SC 513 B (C N 101)

—Ss. 4, 6 and 10 — Effect of amendment by Act 36 of 1956 — Act gave individual workman right to contest draft standing orders or to apply for their modification in addition to existing right to raise industrial dispute

SC 513 C (C N 101)

—S. 4 (as amended by Act 36 of 1956) — Scope — Certified standing orders — Modification of — See Industrial Employment (Standing Orders) Act (20 of 1946 as amended by Act 36 of 1956), S. 10

SC 513 D (C N 101)

—S. 4—Modification of certified standing Orders under Industrial Employment (Standing Orders) Act — Question as to fairness and reasonableness of modifications has been left by Legislature to the authorities empowered under the Act — Supreme Court would not be justified in interfering with conclusions of authorities under the Act unless an important principle of industrial law requiring elucidations involved — See Constitution of India, Art. 136

SC 513 F (C N 101)

—Ss. 4, 6 and 10 — Modification of Standing Order requiring giving of reasons in cases of discharge of workman simpliciter — Modification is fair and reasonable and should not be interfered with under Article 136 — (Constitution of India, Art. 136)

SC 513 G (C N 101)

—Ss. 4 and 10 — Modification of Standing Order requiring the giving of second show cause notice at stage of imposing punishment of removal cannot be considered as fair or reasonable and should be set aside under Article 136 — To import such a requirement from Article 311 in industrial matters is neither necessary nor proper and would be equating industrial employees with civil servants — (Constitution of India, Arts. 136 and 311)

SC 513 H (C N 101)

—S. 6 — Effect of amendment by Act 36 of 1956 — Act gave individual workman right to contest draft standing orders or to apply for their modification in addition to existing right to raise industrial dispute

INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT (contd.)

— See Industrial Employment (Standing Orders) Act (20 of 1946) S 4

SC 513 C (C N 101)

—S 6 (as amended by Act 36 of 1956) — Scope — Certified standing orders — Modification of finality when achieved — See Industrial Employment (Standing Orders) Act (20 of 1946 as amended by Act 36 of 1956) S 10

SC 513 D (C N 101)

—S 6 — Principle of res judicata — Applicability to industrial matters — Proceedings for modification of standing orders under Industrial Employment (Standing Orders) Act — It is doubtful whether principles analogous to res judicata can properly be applied to such proceedings — See Civil P C (1908), S 11

SC 513 E (C N 101)

—S 6 — Modification of certified standing Orders under Industrial Employment (Standing Orders) Act — Question as to fairness and reasonableness of modifications has been left by Legislature to the authorities empowered under the Act — Supreme Court would not be justified in interfering with conclusions of authorities under the Act unless an important principle of industrial law requiring elucidations involved — See Constitution of India, Art 136

SC 513 F (C N 101)

—S 6 — Modification of standing order requiring giving of reasons in cases of discharge of workman simpliciter — Modification is fair and reasonable and should not be interfered with under Art 136 of Constitution — See Industrial Employment (Standing Orders) Act (20 of 1946) S 4

SC 513 G (C N 101)

—S 10 — Effect of amendment by Act 26 of 1956 — Act gave individual workman right to contest draft standing orders or to apply for their modification in addition to existing right to raise industrial dispute — See Industrial Employment (Standing Orders) Act (20 of 1946) S 4

SC 513 C (C N 101)

—Ss 10, 4, 6, 11 and 12 (as amended by Act 36 of 1956) — Scope — Certified standing orders — Modification of — Existence of new circumstances not a condition precedent to exercise of jurisdiction under S 10 (2)

SC 513 D (C N 101)

—S 10 — Principle of res judicata — Applicability to industrial matters — Proceedings for modification of standing orders under Industrial Employment (Standing Orders) Act — It is doubtful whether principles analogous to res judicata can properly be applied to such proceedings — See Civil P C (1908), S 11

SC 513 E (C N 101)

—S 10 — Modification of certified standing Orders under Industrial Employment (Standing Orders) Act — Question as to fairness and reasonableness of modifications

INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT (contd)

has been left by Legislature to the authorities empowered under the Act — Supreme Court would not be justified in interfering with conclusions of authorities under the Act unless an important principle of industrial law requiring elucidations involved — See Constitution of India, Art 136

SC 513 F (C N 101)

—S 10 — Modification of standing order requiring giving of reasons in cases of discharge of workman simpliciter — Modification is fair and reasonable and should not be interfered with under Art 136 of Constitution — See Industrial Employment (Standing Orders) Act (20 of 1946) S 4

SC 513 G (C N 101)

—S 10 — Modification of standing order requiring the giving of second show cause notice at stage of imposing punishment of removal cannot be considered as fair or reasonable and should be set aside under Art 136 — See Industrial Employment (Standing Orders) Act (20 of 1946) S 4

SC 513 H (C N 101)

—S 11 (as amended by Act 36 of 1956) — Scope — Certified standing orders — Finality to certification by appellate authority is subject to further modification — See Industrial Employment (Standing Orders) Act (20 of 1946 as amended by Act 36 of 1956) S 10

SC 513 D (C N 101)

—S 12 — As amended by Act (36 of 1956) — Scope — Certified standing orders — Modification of — S 6 read with S 12 — Finality against challenging in Civil Court — See Industrial Employment (Standing Orders) Act (20 of 1946 as amended by Act 36 of 1956), S 10

SC 513 D (C N 101)**INTERPRETATION OF STATUTES**

See (1) Civil P C (1908), Preamble
(2) Constitution of India, Preamble and Art 246

JAMMU AND KASHMIR LANDS GRANT ACT (38 of 1960)

—Ss 6 and 13 and R 21 — Possession from lessee can be taken only after paying compensation — So long as compensation is not paid possession of lessee continues to be lawful

J & K 88 B (C N 18) (FB)

—S 13 — So long as compensation is not paid possession of lessee continues to be lawful — See Jammu & Kashmir Lands Grant Act (38 of 1960), S 6

J & K 88 B (C N 18) (FB)

—Rules under, R. 21 — So long as compensation is not paid possession of lessee continues to be lawful — See Jammu & Kashmir Lands Grant Act (38 of 1960) S 6

J & K 88 B (C N 18) (1B)

JAMMU AND KASHMIR PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT (13 of 1959)

See Under Houses and Rents.

JUDICIAL PRECEDENTS

See (1) Civil P. C. (1908), Preamble — Precedents.

(2) Constitution of India Art. 141.

KERALA GENERAL SALES TAX RULES (1950)

See Under Sales Tax.

LAND ACQUISITION ACT (1 of 1894)

—S. 4 — Public purpose — Acquisition of land to provide amenities and conveniences to pilgrims visiting renowned Devasthanam — Acquisition is for public purpose
Andh Pra 231 A (C N 72)

—S. 16 — Requirements — Existence of local authority for the area in question not necessary
Andh Pra 231 B (C N 72)

—S. 23 (2) — Acquisition by Corporation — Compensation payable—Arbitrators have power to award 15 p. c. solatium over and above compensation under Land Acquisition Act S. 23 (2), which applies to acquisition proceedings under the Act — See Municipalities — M. B. Municipal Corporation Act (23 of 1956) S. 387
SC 579 A (C N 113)

LEGAL PRACTITIONERS ACT (18 of 1879)

—S. 13 — Professional misconduct involves moral turpitude — See Notaries Act (1952), S. 10 (d)

All 363 (C N 60)

LEGAL REMEMBRANCERS' ADMINISTRATIVE MANUAL (WEST BENGAL)

—Chap. II, Part VI, Para 9 (i) and (ii) (as amended) and App. 'E'—Engaging lawyer for State — Lawyer if public prosecutor — Duty of Court pointed out — See Criminal P. C. (1898), S. 492 (2)

Cal 321 A (C N 57)

LETTERS PATENT

—(Bom) Cl. 15 — Points on which appeal may be heard — Points decided by interlocutory order of Single Judge can be canvassed — S. 105(2) Civil P. C. does not apply — (Civil P. C. (1908), S. 105 (2))
SC 560 B (C N 107)

—(Cal) Cl. 15 — Order made in matter of winding up in order to be appealable under S. 483 Companies Act, need not satisfy test of "judgment" — See Companies Act (1956), S. 483
Cal 363 A (C N 61)

LIMITATION ACT (9 of 1908)

—S. 12 — Time requisite for obtaining copy of award should be excluded in computing period of limitation
Pat 235 D (C N 60)

—S. 13, Article 95 — Scope and applicability — Suit for obtaining relief on ground of fraud — Article 95 attracted — Fraud committed on 7-1-1924 and discovered on 16-4-1924 — Defendant outside India for several months in 1924 and 1926 — Suit instituted on 14-9-1927 in Court at D in

LIMITATION ACT (1908) (contd.)

India — Defendant residing at place within jurisdiction of Court on that date — Held Court at D had jurisdiction to entertain and try suit though cause of action for suit arose outside India — Suit was not barred by limitation — AIR 1928 Mad 1088 and AIR 1944 Mad 437 held rightly overruled by AIR 1955 Mad 96 (FB) — Civil P. C. (1908), S. 20
SC 552 B (C N 105)

—S. 15 — Period of attachment under O. 21, R. 53 — Cannot be excluded under S. 15 — See Civil P. C. (1908), S. 48

Andh Pra 250 B (C N 77) (FB)

—S. 15 — Execution proceedings — Revival — See Civil Procedure Code (5 of 1908), S. 48

Andh Pra 250 D (C N 77) (FB)

—S. 19 — S. 19 does not control S. 48 Civil P. C. (1908) — See Civil P. C. (1908), S. 48

Andh Pra 250 C (C N 77) (FB)

—S. 29(2) — Extent of application — See Civil P. C. (1908), S. 48

Andh Pra 250 C (C N 77) (FB)

—Art. 95 — Suit for obtaining relief on ground of fraud—Art. 95 attracted—Fraud committed on 7-1-1924 and discovered on 16-4-1924 — Defendant outside India for several months in 1924 and 1926 — Suit instituted on 14-9-1927 in Court at D in India — Suit was not barred by Limitation — See Limitation Act (1908), S. 13
SC 552 B (C N 105)

—Art. 106 — Suit by legal representative of deceased partner for share in assets of partnership — Art. 106 applies — See Partnership Act (1932), S. 46
Mad 257 D (C N 58)

—Art. 106 — Partnership continuing even after death of one partner under agreement — Later partnership dissolved — Suit for rendition of accounts brought within three years of dissolution held was within time — See Evidence Act (1872), S. 3

Punj 244 A (C N 42)

—Art. 120 — "When right to sue accrued" — Government servant claiming benefits of Art. 487-B of Civil Service Regulations after retirement — Benefits refused on account of certain reversions in the past — Suit by servant to declare order of reversion as illegal — Starting point — (Civil Service Regulations, Art. 487-B)

Andh Pra 221 (C N 68)

—Art. 181 — Art. 181 refers to S. 48 for period of limitation — Art. 181 does not specify any application under S. 48 — See Civil P. C. (1908), S. 48

Andh Pra 250 C (C N 77) (FB)

—Art. 182 — Revival — See Civil P. C. (1908), S. 48

—Art. 182 — Art. 182 envisages application for execution of decrees and orders not provided for by Art. 183 or S. 48 Civil P. C. — See Civil P. C. (1908), S. 48

Andh Pra 250 C (C N 77) (FB)

LIMITATION ACT (1908) (contd)

—Art 182, Cl (5) — 'Step in aid of execution' — Transferee Court wrongly dismissing execution petition as being not maintainable — Order amounts to step in aid of execution — (Civil P C (1908), Ss 41 and 48) Orissa 147 B (C N 51)

LIMITATION ACT (36 of 1963)

—S 5 — Scope — Words "Sufficient cause" — Meaning — On facts, application under S 5 was allowed and delay in filing appeal was condoned — (1968) 70 Pun LR (D) 332, Reversed — Civil P C (1908), O 41, R 1 SC 575 B (C N 112)

—S 5 — Application for condonation of delay in filing revision — Its dismissal does not amount to affirmation of order sought to be revised — See Civil P C (1908) S 115 Pat 248 (C N 62)

—S 19 — Acknowledgment—An acknowledgment which contains a promise to pay even by implication in an agreement creates a new right of action on which a suit can be founded—AIR 1951 Raj 74 & AIR 1956 Raj 12, Overruled, AIR 1952 Raj 7 (FB) Dissented, AIR 1935 All 129 held overruled by AIR 1953 SC 225

Raj 192 A (C N 38) (FB)
—S 19 — Acknowledgment — Essentials Raj 192 E (C N 38) (FB)

—Art 5 — See Limitation Act (1908), Art 106

—Arts 64 and 65 — Co-owners — Adverse possession — Ouster — Inference of ouster or exclusion

Ker 222 A (C N 53)
—Art 65 — Co-owners — Adverse possession — Ouster — Inference of ouster or exclusion — See Limitation Act (1908), Art 64 Ker 222 A (C N 53)

M. B MUNICIPAL CORPORATION ACT (23 of 1956)

See under Municipalities

MADHYA PRADESH ACCOMMODATION CONTROL ACT (23 of 1955)

See under Houses and Rents

MADHYA PRADESH GENERAL SALES TAX ACT, 1958 (2 of 1959)

See under Sales Tax

MADHYA PRADESH GENERAL SALES TAX RULES (1959)

See under Sales Tax

MADHYA PRADESH UNIFICATION OF PAY SCALES AND FIXATION OF PAY ON ABSORPTION RULES (1959)

See under Civil Services

MADRAS CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1953)

See under Civil Services

MADRAS GENERAL SALES TAX ACT (1 of 1959)

See under Sales Tax

MADRAS GENERAL SALES TAX (THIRD AMENDMENT) ACT (19 of 1967)

See under Sales Tax

MADRAS MOTOR VEHICLES RULES (1940)

—R 153-D — Rule is imperative — See Motor Vehicles Act (1939), S 47(1)(a) Andh Pra 225 (C N 70)

MADRAS STATE AND SUBORDINATE SERVICES RULES

See under Civil Services

MAHARASHTRA AGRICULTURAL LANDS (CEILING ON HOLDINGS) ACT (27 of 1961)

See under Tenancy Laws

MAHARASHTRA MUNICIPALITIES ACT (40 of 1965)

See under Municipalities

MAHARASHTRA MUNICIPALITIES RULES (1965)

See under Municipalities

MAINTENANCE

—Hindu widow — See Hindu Adoptions and Maintenance Act (1956), S 25

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MEDICO LEGAL JURISPRUDENCE

See Evidence Act (1872) S 45

MINERAL CONCESSION RULES (1960)

—R 24(3) — Application for mining lease to State Government not disposed of for over nine months — Deemed refusal order revisable by Central Government — See Constitution of India, Art 226

Orissa 163 A (C N 54)

—R 27(5) — Non-compliance with notices under, requiring lessee to make payment of rent and royalty — Subsequent notice demanding rent and royalty becoming payable thereafter — Right to forfeit or determine lessee on ground of non-compliance with previous notices waived — Cancellation of lease on that ground is unauthorised — T P Act (1882), S 112

Madh Pra 141 (C N 38)

—R 54 — Order in revision passed by Central Government under Rr 54 and 55 — State Government bound to carry it out — See Mines and Minerals (Regulation and Development) Act (1957) S 28

Orissa 165 (C N 55)

—R 55 — Central Government can revise orders of State Government of "deemed refusal" to grant lease — Order, quasi-judicial in nature — See Constitution of India Art 226

Orissa 163 A (C N 54)

—R 55 — Order in revision passed by Central Government under Rr 54 and 55 — State Government bound to carry it out — See Mines and Minerals (Regulation and Development) Act (1957), S 28

Orissa 165 (C N 55)

MINES AND MINERALS (REGULATION AND DEVELOPMENT) ACT (67 of 1957)

—S 5 — Courts should not import implied term in mining lease — See Constitution of India, Art 299(1)

Orissa 152 E (C N 53)

MINES & MINERALS (REGULATION AND DEVELOPMENTS) ACT (contd.)

—S. 5 — Government Grants Act (1895), Ss. 2, 3 — Transfer of Property Act (1882), Ss. 111(g), 114 — Government grants—Construction of — Mineral leases — Being Government grants Ss. 111(g) and 114 T. P. Act do not apply to it — (Deed — Construction)

Orissa 152 G (C N 53)

—S. 28—Mineral Concession Rules (1960) Rr. 54, 55 — Order passed by Central Government in revision — State Government is bound to carry out direction of Central Government — Mining lease to be executed will be in sufficient compliance with Art. 299 of Constitution — (Constitution of India, Arts. 256, 257, 299, 266, 227)

Orissa 165 (C N 55)

MINIMUM WAGES ACT (11 of 1948)

—S. 3(1)(a) — Proviso and S. 3(3)(iv) — Scope of proviso — In case of employment specified in Part I of Schedule minimum rates of wages must be for entire State — Such rates need not, however, be uniform — Different rates can be fixed for different zones or localities

Andh Pra 227 A (C N 71)

—S. 5 — Actual rate of wages finally fixed found to be more than what was given in draft proposals — Contention that there should have been another notification and another opportunity given to employers to make representation against variation — Held, contention was without substance — Draft proposals are only tentative and representations are received from both employers and employees — Any representations made by parties must contemplate and take into account possible enhancement or reduction

Andh Pra 227 B (C N 71)

—S. 5 — Revision of minimum rates of wages of workers employed in Bidi manufactory — Contention that Advisory Board ought to have made independent enquiries of its own by visiting centres of Bidi industry — Held, as full information was made available to Board by the Government, who had gathered statistics from its various District Officers it was wholly unnecessary for Board to go from place to place for making enquiries

Andh Pra 227 C (C N 71)

MOTOR VEHICLES ACT (4 of 1939)

—Ss. 44 (5), 68 and 68-G — U. P. State Road Transport Services (Development) Rules (1958), R. 10 — U. P. Motor Vehicles Rules (1940), R. 44A — Power of Regional Transport Authority under S. 44(5) — Delegation of, to Secretary Member — Validity — W. P. No. 296 of 1963, D/- 7-8-1964 (All), Overruled

All 365 A (C N 61) (FB)

—S. 47(1)(a) — Madras Motor Vehicles Rules (1940), R. 153-D — Sub-rules (A)(i) (b) and (A)(ii) introduced by G. O. Ms. No. 2455, Home (Transport-I) dated 25-11-1960 — Rule is imperative — Grant of stage carriage permits on medium route — Pre-ference has to be given to applicants holding

MOTOR VEHICLES ACT (contd.)

1 to 4 stage carriages

Andh Pra 225 (C N 70)

—Ss. 68 and 68-G — Power of Regional Transport Authority under S. 44(5) of the Act — Delegation of to Secretary Member — Validity — W. P. No. 296 of 1963, D/- 7-8-1964 (All), Overruled — See Motor Vehicles Act (1939), S. 44(5)

All 365 A (C N 61) (FB)

—S. 68-C — Exclusive operation by corporation on notified route — Fact that passenger travelling on other route has, on overlapping portion of notified route, to travel in State bus — Does not amount to lack of co-ordination

Mys 215 B (C N 44)

—S. 68-C — Approved scheme whether economical — Fare charged by operator is not a decisive factor

Mys 215 C (C N 44)

—S. 68-C — Exclusive operation on notified routes — Approved scheme, whether efficient — Performance of corporation in another area is not of relevance

Mys 215 D (C N 44)

—S. 68-C — Opportunity given to seek modification in scheme given to persons making representation — Modification not placed before Chief Minister — Approved Scheme cannot be denounced by High Court under Art. 226 — See Constitution of India, Art. 226

Mys 215 E (C N 44)

—Ss. 68-C, 68-D — Chief Minister according approval to scheme under S. 68-D — Fact that he was determined to implement policy of nationalisation of transport services does not amount to bias on his part

Mys 215 F (C N 44)

—S. 68-D — Approval of scheme under — Scope of enquiry — Order when open to challenge — Constitution of India, Art. 226

Mys 215 A (C N 44)

—S. 68-D — Opportunity given to seek modifications in scheme to persons making representations — Modifications not placed before Chief Minister — Approved scheme cannot be denounced under Art. 226 — See Constitution of India, Art. 226

Mys 215 E (C N 44)

—S. 68-D — Approval of scheme under S. 68-D—Fact that Chief Minister was determined to implement nationalisation of transport services does not amount to bias on his part — See Motor Vehicles Act (1939), S. 68-C

Mys 215 F (C N 44)

—S. 68-D — Approval of scheme under — Presumption — Evidence Act (1872), S. 114 Illus. (e)

Mys. 215 G (C N 44)

—S. 68-G — Interpretation of

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—M. B. MUNICIPAL CORPORATION ACT (23 of 1956)

—S. 305 — Corporation cannot withdraw from acquisition proceedings

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MUNICIPALITIES — M. B. MUNICIPAL CORPORATION ACT (contd.)

—S 387 — Acquisition by Corporation — Compensation payable — Arbitrators have power to award 15 p c solatium over and above compensation under Land Acquisition Act, S 23(2), which applies to acquisition proceedings under the Act — (Land Acquisition Act (1894), S 23(2))

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—S 392 — High Court cannot, in revision, determine amount of compensation — (Civil P C (1908), S 115)

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—MAHARASHTRA MUNICIPALITIES ACT (40 of 1965)

—S 11 — List prepared under S 11 of Maharashtra Municipalities Act (40 of 1965) is final if not got corrected and is conclusive evidence for purposes of S 12 — See Municipalities — Maharashtra Municipalities Act (40 of 1965), S 12

Bom 213 A (C N 36)

—Ss 12, 11 — Right to vote at Municipal election is statutory — Only list of voters prepared and authenticated under S 11, has to be seen to find out whether a person is qualified or not to vote at such election — Name of citizen included in electoral roll of Legislative Assembly but not in list of voters prepared for municipal election — No step taken to get name included under Section 11 — List held was conclusive evidence under S 12(2) of the rights of persons who were entitled to vote — Right to franchise must be deemed to have been denied to those whose names were not in the list

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—MAHARASHTRA MUNICIPALITIES RULES (1965)

—R 37 — Mark made by voter not on face but on back of ballot paper over that part where symbol could be seen against light — Requirement of R 37 held not complied with by voter — Vote held invalid

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—S 6 — Best judgment assessment — Mode of — Tax Officer must have some material before him — Determination of tax on basis of erroneous presumption that public carrier had carried its full complement of goods cannot be sustained — (Income Tax Act (1961), S 144)

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—S 10(d) — Scope — Section contemplates professional and other misconduct — Professional misconduct involves moral turpitude — Charges not indicating professional

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—S 6 — Non-reconstitution of firm, finding of is one of fact — See Civil P C (1908), S 100

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—S 39 — Finding of non-reconstitution of firm is one of fact — See Civil P C (1908), S 100

Mad 257 A (C N 58)

—S 42 — Contract to continue partnership after death of partner — May be implied from conduct of parties — See Evidence Act (1872), S 3

Pun 244 A (C N 42)

—Ss 46, 48 — Lien of partner's representative on assets of partnership after dissolution is on surplus of assets — Suit by legal representative of deceased partner for share in assets of partnership is governed by Article 106, Limitation Act — Trusts Act (1882), S 88 — Limitation Act (1908), Article 106 — Contract Act (1872), S 171 — Limitation Act (1963), Article 5

Mad 257 D (C N 58)

—S 47 — Surviving partners of dissolved firm can sell assets of firm in the course of winding up

Mad 257 C (C N 58)

—S 47 — Agreement to continue partnership after death of partner — Held on facts partnership continued after death of one partner till finally dissolved — See Evidence Act (1872), S 3

Pun 244 A (C N 42)

—S 48 — Lien of deceased partner's representative on assets of partnership after dissolution is on surplus of assets — See Partnership Act (1932), S 46

Mad 257 D (C N 58)

PAYMENT OF BONUS ACT (21 of 1965)

—Preamble — Interpretation — Reference to history of bonus and the background of the Act — Civil P C (1908), Preamble — Interpretation of Statutes — Reference to background of the Act

SC 530 A (C N 102)

—Ss 1(3), 2(16), 32(x), 22, 39 — Claim to bonus by workers in establishments to which the Act does not apply — Scope of Sections 22 and 39 — Industrial Disputes Act does not provide for right to bonus — Act is exhaustive — Workers in establishments to which Act does not apply cannot claim bonus de hors the Act

SC 530 B (C N 102)

—S 2(16) — Claim to bonus by workers in establishments to which the Act does not apply — Workers in establishments to which Act does not apply cannot claim bonus de hors the Act — Reasons for exempting public sector establishments — See Payment of Bonus Act (21 of 1965), S 1 (3)

SC 530 B (C N 102)

PAYMENT OF BONUS ACT (contd.)

—S. 10 — Interpretation of — See Payment of Bonus Act (1965), S. 36

Mad 273 (C N 62)

—S. 22 — Scope of Ss. 22 and 39 — Industrial Disputes Act does not provide for right to bonus — Act is exhaustive — Workers in establishments to which Act does not apply cannot claim bonus de hors the Act — See Payment of Bonus Act (21 of 1965), S. 1(3)

SC 530 B (C N 102)

—S. 32(x) — Claim to bonus by workers in establishments to which the Act does not apply — Workers in establishments to which Act does not apply cannot claim bonus de hors the Act — Limitation of exemption under S. 32 (x) — See Payment of Bonus Act (21 of 1965), S. 1(3)

SC 530 B (C N 102)

—S. 34(3) — Application under S. 36 — No absolute discretion in Govt. to refuse to grant exemption — See Payment of Bonus Act (1965), S. 36

Mad 273 (C N 62)

—Ss. 36, 10 and 34 (3) — Interpretation of Ss. 36 and 10 — Application under Section 36 — No absolute discretion in Government to refuse to grant exemption — It is bound to exercise its powers under Section 36 and pass such order as it thinks fit giving reasons for the same

Mad 273 (C N 62)

—S. 39 — Scope of Ss. 22 and 39, Industrial Disputes Act does not provide for right to bonus — Act is exhaustive — Workers in establishments to which Act does not apply cannot claim bonus de hors the Act — See Payment of Bonus Act (21 of 1965) S. 1(3)

S C 530 B (C N 102)

PAYMENT OF WAGES ACT (4 of 1936)

—Ss. 2(vi) (d), 15 (2) (as amended by Act 68 of 1957) — Wages — Whether include compensation payable under S. 25 FF, Industrial Disputes Act — Authority under payment of Wages Act in application under Section 15 (2) cannot entertain claim for compensation under Section 25-FF, when defence raised involves complicated question of law — Proper authority is Labour Court

—Scope of jurisdiction of Authority under Payment of Wages Act indicated — (Industrial Disputes Act (1947), Ss. 25-FF and 25-FFF) — 1967-1 Lab LJ 232 (Punj) Overruled.

S C 590 (C N 116)

—S. 15(2) (as amended by Act 68 of 1957) — Wages — Whether include compensation payable under S. 25-FF, Industrial Disputes Act — 1967-1 Lab LJ 232 (Punj) Overruled — See Payment of Wages Act (1936), (as amended by Act 68 of 1957), S. 2 (vi) (d)

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PENAL CODE (45 of 1860)

—Ss. 34, 141, 142 and 149 — Being a member of unlawful assembly — Proof of overt act — Not essential in every case — Proof of sharing common object of assembly

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is necessary — Common object and common intention — Distinction

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—S. 120-B — Conspiracy can have plurality of objects — Charge sheet showing various objects of conspiracy including commission of offences of forging passports and fraudulently and dishonestly using them as genuine for enabling passengers to go abroad — No distinction can be made between primary and subsidiary objects — See Criminal P. C. (1898), S. 196-A

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—S. 141 — Unlawful assembly — Member of — Overt act not essential in each case — Common object essential — Common object and common intention, difference between — See Penal Code (1860), S. 34

Orissa 176 C (C N 59)

—S. 142 — Unlawful assembly — Member of — Overt act not essential in each case — Common object essential — Common object and common intention, difference between — See Penal Code (1860), S. 34

Orissa 176 C (C N 59)

—S. 147 — Evidence — Communal riots — Witnesses belonging to one community — Evidence should not be mechanically thrown out — See Evidence Act (1872), S. 5

Orissa 176 A (C N 59)

—S. 149 — Unlawful assembly — Member of — Overt act not essential in each case — Common object essential — Common object and common intention, difference between — See Penal Code (1860), S. 34

Orissa 176 C (C N 59)

—S. 228 — Jurisdiction of High Court to punish contempt of subordinate Courts— See Contempt of Courts Act (1952), S. 3(2)

Delhi 214 D (C N 36) (SB)

—S. 395 — Dacoity — Bail — Principles governing grant of — See Criminal P. C. (1898), S. 497

Tripura 42 A (C N 9)

—S. 395 — Probability of accused absconding — Grant of bail not proper — See Criminal P. C. (1898), S. 497

Tripura 42 B (C N 9)

—S. 397 — Dacoity — Bail — Principles governing grant of — See Criminal P. C. (1898), S. 497

Tripura 42 A (C N 9)

—S. 397 — Prima facie evidence against accused — Probability of absconding — Grant of bail not proper — See Criminal P. C. (1898), Section 497

Tripura 42 B (C N 9)

—Ss. 464, 465, 466 — Making false document — Making document by copying false entries from forged document — It is "making false document"

Punj 225 G (C N 41)

—S. 465 — Accused charged with forgery — Conviction can be based solely on expert testimony, though as a measure of precaution the evidence should be corroborated

PENAL CODE (contd)

by other evidence — See Evidence Act (1872), Section 45 Punj 225 E (C N 41)
 —S 465 — Making false document — Making document by copying false entries from forged document — It is "making false document" — See Penal Code (1860), Section 464 Punj 225 G (C N 41)

—S 466 — Charge of conspiracy of forging passport and other travel documents — Accused acquitted of charge of forging passport — Conviction for forging other related document not illegal, when accused knew of the charge and was not prejudiced — See Criminal P C. (1898), Section 537 Punj 225 C (C N 41)

—S 466 — Making false document — Making document by copying false entries from forged document — It is "making false document" — See Penal Code (1860), Section 464 Punj 225 G (C N 41)

—S 467 — Suit on forged cheque — Civil Court taking cognizance under Section 471, Penal Code — Sanction of Civil Court is not necessary — See Criminal P C (1898), Section 195 (1) (c)

—S 471 — Suit on forged cheque — Civil Court taking cognizance under Section 471 — Sanction of Civil Court is not necessary — See Criminal P C (1898), Section 195 (1) (c)

—S 471 — Charge sheet showing various objects of conspiracy including commission of offences of forging passports and fraudulently and dishonestly using them as genuine for enabling passengers to go abroad — No distinction can be made between primary and subsidiary objects — Trial under is not invalid because the primary object was to send people abroad which is by itself is not an offence — See Criminal P C (1898), Section 196-A Guj 195 A (C N 36)

—S 471 — Accused charged with forgery — Conviction can be based solely on expert testimony, though as a measure of precaution the evidence should be corroborated by other evidence — See Evidence Act (1872), Section 45 Punj 225 E (C N 41)

—S 494 — Scope — Prosecution under Section 494 — Parties Ahoms following "Saklong" form of marriage — Material ceremonies of second marriage, not proved — Mere admission of second marriage by accused, not enough — Accused held not liable under Section 494 — (Hindu Marriage Act (1955), Section 17) — (Evidence Act (1872), Sections 18, 3) — (Criminal P C (1898), Section 367) Assam 90 (C N 19)

PITH AND SUBSTANCE RULE

See Constitution of India Art 246

POWER OF ATTORNEY ACT (7 of 1882)

—S 2 — General power of attorney in Urdu — Power to compromise — Construction of power of attorney — See Contract

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 (2) Constitution of India, Art 141

PREVENTION OF FOOD ADULTERATION ACT (37 of 1954)

—S 10 (7) (as it stood prior to amendment of 1964) — Taking of samples of Chillies powder by Food Inspector — Another Food Inspector and a peon present at relevant time — Two customers who were also present refusing to be become witnesses — Absence of any witnesses from public cannot be regarded as non-compliance with requirements of Section 10 (7) Delhi 193 A (C N 34)

—S 20 (as it stood prior to amendment by Act 49 of 1964) — N a Municipal Prosecutor authorised under Section 20 through a resolution of Municipal Corporation to institute and conduct all prosecutions under the Act — Complaint filed by him is valid — General authorisation to prosecute offences under the Act is valid — What the section means is that prosecution must be instituted either by some person duly authorised with delegated power or else by some person not so delegated but with the written consent of an authorised person — Provisions of Section 198-B, Criminal P C are not in pari materia with those of Section 20 — AIR 1963 Orissa 158, Dissented from — Criminal P C (1898) Section 198-B Delhi 198 B (C N 34)

PREVENTION OF FOOD ADULTERATION RULES (1955)

—Rr 7 and 18 — Specimen impression of seal used to seal the sample was affixed on Form No VII sent along with sample of Chillies powder — Report of Public Analyst mentioning that he found "the seal" intact and unbroken — Held, no objection could be taken that there was nothing in report to show that seal on bottle containing sample tallied with specimen seal impression — Report obviously meant that seal tallied with specimen signature

—R 18 — Sealing of specimen sample — Report of Public Analyst mentioning seal intact — Report held meant that seal tallied with signature — See Prevention of Food Adulteration Rules (1955), Rule 7 Delhi 198 D (C N 34)

—Appendix B, R A 0510 — Sample of Chillies powder — Report of Public Analyst — Presence of extraneous colouring matter in the form of coal tar dye — Classification of coal tar dye is not necessary — Mere presence of extraneous colouring matter is sufficient to make chillies (Capsicum) adulterated Delhi 198 C (C N 34)

PROVINCIAL INSOLVENCY ACT (5 of 1920)

—S 37 — "Act done by Court or Receiver" — Official Receiver fixing amount

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due from debtor to insolvent's estate —
Order passed is "act done by Receiver"

Ker 211 A (C N 50)

—S. 37 — Assignment of rights in bond
executed by debtor in favour of insolvent
— Amount of bond reduced by Official Re-
ceiver — Suit by assignee — Assignee is
entitled to recover only amount as found by
Official Receiver — Assignment being sub-
ject to equities which could have been
claimed against assignor, equitable set off is
permissible Ker 211 B (C N 50)

PUBLIC PURPOSE

See Land Acquisition Act (1894), S. 4.

PUBLIC SAFETY

—PREVENTIVE DETENTION ACT (4 of 1950)

—Ss. 1 and 3 (1) (a) — Power under the
Act is in addition to that contained in Cri-
minal P. C. — (Criminal P. C. (1898), S. 54).

Tripura 44 C (C N 10)

—S. 3 (1) (a) (ii) and (iii) — Grounds of
detention — Sufficiency — Action pre-
judicial to maintenance of supplies and
services which are essential to community is
sufficient ground Tripura 44 A (C N 10)

—S. 3 (1) (a) (ii) — Action prejudicial to
public order — "Jhuming" involving cul-
tivation by clearing forest in reserved forest
area affects maintenance of public order

Tripura 44 B (C N 10)

—S. 3 (1) (a) — Power under the Act is
in addition to those contained in Criminal
Procedure Code — See Preventive Deten-
tion Act (1950) S. 1

Tripura 44 C (C N 10)

—S. 3 (1) (a) — Past conduct of detenu
can be taken into account when making
a detention order

Tripura 44 D (C N 10)

—S. 3 (1) (a) — Detention Order — Validity
— There should be subjective satisfaction
of detaining authority about soundness of
grounds Tripura 44 E (C N 10)

**PUNJAB PUBLIC PREMISES AND LAND
(EVICTION AND RENT RECOVERY)
ACT (31 of 1959)**

See under Houses and Rents.

**PUNJAB PUBLIC PREMISES AND LAND
(EVICTION AND RENT RECOVERY)
RULES (1957)**

See under Houses and Rents.

RAILWAYS ACT (9 of 1890)

—S. 72 (Old) — Non-delivery of goods —
Claim for damages — Measure of — Onus
Assam 84 C (C N 18)

—Ss. 72 (Old) and 77 (old) — Claim for
non-delivery of goods — Quantum of
damages — Determination of

Assam 84 D (C N 18)

—S. 72 (Old) — Suit for non-delivery of
consignment of coal — Claim for special
damages due to closure of Mills for want of
supply of coal — No definite data before
Court to show how many days Mills were
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RAILWAYS ACT (Contd.)

stopped, what was exact loss suffered and
whether there was any stock of coal or not
— Nothing to show that railways at time of
accepting consignments knew that goods in
question would be used for running the
Mills — In absence of any claim in notices
issued by consignee for such special damages
due to stoppage of running Mills and lack
of reliable evidence on the point, plaintiffs
could not claim any special damages —
Contract Act (1872), Section 72

Assam 84 E (C N 18)

—S. 77 (Old) — Identity of person issuing
notice and filing suit — See Civil P. C.
(1908), Section 80 Assam 84 A (C N 18)

—S. 77 (Old) — Non-delivery of goods —
Quantum of damages — Determination —
See Railways Act (1890), Section 72 (Old)

Assam 84 D (C N 18)

RAJASTHAN UNIVERSITY ACT

See under Education.

REGISTRATION ACT (16 of 1908)

—S. 17 — Unregistered partition deed
can be looked into to prove severance of
status — AIR 1962 Andh Pra 443, Overruled;
L. P. A. No. 44 of 1963, D/- 1-10-1965
(Andh Pra) Partially overruled — See
Registration Act (1908), Section 49 (c)

Andh Pra 242 (C N 76) (FB)

—Ss. 49 (c), 17 — Unregistered partition
deed — Though cannot be looked for terms
of partition, can be looked into for establish-
ing severance in status — AIR 1962 Andh
Pra 443, Overruled and L. P. A. No. 44 of
1963, dated 1-10-1965 (Andh Pra), Partially
Overruled Andh Pra 242 (C N 76) (FB)

**REGULATIONS FOR THE MEDICAL
SERVICES OF THE ARMY IN INDIA**

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RATEABLE DISTRIBUTION

See Civil P. C. (1908), S. 73.

**REPRESENTATION OF THE PEOPLE ACT
(43 of 1951)**

—S. 9-A — Only two contesting candi-
dates — Returned candidate under statu-
tory disqualification at date of filing nomi-
nation paper — No fresh poll is necessary
— The other contesting candidate can be
declared elected — See Representation of
the People Act (1951), Section 84

SC 604 (C N 119)

—S. 53 — Only two contesting candidates
— Returned candidate under statutory dis-
qualification at date of filing nomination
paper — No fresh poll is necessary — The
other contesting candidate can be declared
elected — See Representation of the People
Act (1951), Section 84

SC 604 (C N 119)

—S. 83 (1) (c) — Corrupt practice by un-
due influence must be pleaded — Pleadings
must set out full facts — See Representa-
tion of the People Act (1951), Section 123
(2)

SC 583 A (C N 114)

—Ss. 84, 101, 9-A and 53 (as amended by
Act 47 of 1966) — Only two contesting

REPRESENTATION OF THE PEOPLE ACT
(Contd.)

— candidates — Returned candidate found to be under statutory disqualification at date of filing nomination paper — Votes cast in his favour may be regarded as thrown away, irrespective of whether voters who voted for him were aware of the disqualification — No fresh poll is necessary — The other contesting candidate can be declared elected — AIR 1960 SC 131, Overruled SC 604 (C N 119)

—S 100 — Absence of proof of free conveyance of voters in particular vehicle — Election of returned candidate cannot be declared as void — See Representation of the People Act (1951), Section 123 (5)

SC 586 A (C N 115)
—S 100 — Election petition — Pleas — Contention about wrong refusal of demand of general recount — Absence of plea in this regard — Mention of general recount only in relief clause of petition — Held, under the circumstances that there was no room for further count — See Representation of the People Act (1951), Section 116-A

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—S 100 — Costs in Supreme Court Appeals — Dismissal of election petition as well as appeal therefrom — Prevarications of returned candidate not attempted to be explained by his counsel — Petitioner not allowed any costs either in Supreme Court or in High Court — See Civil P C (1908), Section 35 SC 586 C (C N 115)

—S 101 — Only two contesting candidates — Returned candidate under statutory disqualification at date of filing nomination paper — Votes cast in his favour may be regarded as thrown away — No fresh poll is necessary — The other contesting candidate can be declared elected — See Representation of the People Act (1951), Section 84 SC 604 (C N 119)

—Ss 116-A, 100 — Election Petition — Pleas — Contention about wrong refusal of demand of general recount — Absence of plea in this regard — Mention of general recount only in relief clause of petition — Held, under the circumstances, that there was no room for further count — Representation of the People (Conduct of Election and Election Petition) Rules (1951) Rules 58, 64 SC 586 B (C N 115)

—S 116-A — Costs in Supreme Court Appeals — Dismissal of election petition as well as appeal therefrom — Prevarications of returned candidate not attempted to be explained by his counsel — Petitioner not allowed any costs either in Supreme Court or in High Court — See Civil P C. (1908), Section 35 SC 586 C (C N 115)

—Ss 123 (2) and 83 (1) (c) — Corrupt practice by undue influence must be pleaded — Pleadings must set out full facts

SC 583 A (C N 114)
—S 123 (4) — Publication of statement of some fact which is false is essential SC 583 B (C N 114)

REPRESENTATION OF THE PEOPLE ACT
(Contd.)

—Ss 123 (5), 100 — Scope — Proof of ingredients — Burden lies on election petitioner — Absence of proof of free conveyance of voters in particular vehicle — Election of returned candidate cannot be declared void SC 586 A (C N 115)

SALE OF GOODS ACT (3 of 1930)

—S 4 — Transfer of right to exhibit film is not sale but lease — See Sales Tax — Madras General Sales Tax Act (1959), Section 2 (4) and (j)

Mad 284 C (C N 65)

SALES TAX**CENTRAL SALES TAX ACT (74 of 1956)**

—S 2 (j) and (4) — Determination of turnover under — All deductions allowed under State Law to be made from the gross turnover in determining the net turnover shall be liable to deduction in determining the taxable turnover under the Central Sales Tax Act 1956 — Kerala General Sales Tax Rules (1950), Rule 7 (1) (a) — AIR 1965 SC 1510, AIR 1966 Ker 60, AIR 1969 SC 147, (1966) 17 STC 396 (Mad), Diss from Ker 205 (C N 48)

—S 9 — Penalty — Levy of — Basis of — See Sales Tax — M P General Sales Tax Act 1958 (2 of 1959), Section 19

Madh Pra 134 B (C N 37)

KERALA GENERAL SALES TAX RULES (1950)

—R 7 (1) (a) — Determination of turnover under Central Act — Deductions — See Sales Tax — Central Sales Tax Act (1956), Section 2 (j) and (4)

Ker 205 (C N 48)

M. P. GENERAL SALES TAX ACT, 1958 (2 of 1959)

—S 19 — Escaped turnover for period of 19 days only proved — Authorities cannot estimate taxable turnover for entire period of the relevant year on its basis — Penalty, levy of — Basis of, under Central Act — Sales Tax — Central Sales Tax Act (1956), Section 9 Madh Pra 134 B (C N 37)

—S 19 (1) — There can be best judgment assessment under Section 19 (1) — Sales Tax — M P General Sales Tax Rules (1959), Rule 33 (1) (2) — Evidence Act (1872), Section 3 "Proved"

Madh Pra 134 A (C N 37)

M. P. GENERAL SALES TAX RULES (1959)

—R 33 (1) and (2) — See Sales Tax — M P General Sales Tax Act 1958 (2 of 1959), Section 19 (1)

Madh Pra 134 A (C N 37)

MADRAS GENERAL SALES TAX ACT (1 of 1959)

—Ss 2 (j) and 2 (n) — Section 2 (j) and (n) is not ultra vires — See Constitution of India Article 306 (12) Mad 284 B (C N 65)

—S 2 (i) (h) — Levy of Sales Tax on

SALES TAX—MADRAS GENERAL SALES TAX ACT (Contd.)

incorporeal moveable property is not ultra vires Article 366 (12) — See Constitution of India, Article 366 (12)

Mad 284 B (C N 65)

—S. 2 (n) and (j) — Right to exhibit film — Transfer of, by owner of film to distributor — Whether amounts to sale — Held, on construction of agreement, that it amounted to lease and not outright sale

Mad 284 C (C N 65)

—S. 3 (2), Sch. I, Entries 6, 7 — Exposed film is different article from raw film — Exposed film can be taxed under Section 3 (2), although it has suffered tax as raw film

Mad 284 D (C N 65)

—S. 12 (3) — Scope and validity — Power to impose penalty — Power is ancillary to taxing power — Assessing authority is to exercise power with proper judicial discretion — Can be exercised only in cases of wilful non-disclosure intended to evade tax

Mad 284 E (C N 65)

—Sch. 1, Entry 6 — Exposed film is not raw film — See Sales Tax — Madras General Sales Tax Act (1959), S. 3 (2)

Mad 284 D (C N 65)

—Sch. 1, Entry 7 — Exposed film is not raw film — See Sales Tax — Madras General Sales Tax Act (1959), S. 3 (2)

Mad 284 D (C N 65)

—MADRAS GENERAL SALES TAX (THIRD AMENDMENT) ACT (19 of 1967)

—S. 2 — Act is not unconstitutional — See Constitution of India, Art. 14

Mad 265 (C N 59)

—S. 4 — Act is not unconstitutional — See Constitution of India, Art. 14

Mad 265 (C N 59)

STAMP ACT (2 of 1899)

—Sch. 1, Art. 1 — Acknowledgment must be stamped Raj 192 D (C N 38) (FB)

STATES REORGANISATION ACT (37 of 1956)

—S. 115 (7) — Scales of pay made available to employees of State Government could no longer be revised to their disadvantage

Madh Pra 143 A (C N 39)

—S. 115 (7) — Government of new State by order creating, with retrospective effect, new scales of pay governing permanent employees to their disadvantage — Held, order was not rule framed under Art. 309 of Constitution and therefore, not in conformity with S. 115 (7). (Obiter)

Madh Pra 143 B (C N 39)

SUCCESSION ACT (39 of 1925)

—S. 57 — Execution taken out by legatee of deceased decree-holder — Genuineness of will can be considered in execution itself — Sections 213 and 57 did not oust jurisdiction of executing Court—ILR (1964) 2 Mad 363, Dissented from — See Civil P. C. (1908), S. 47 Mad 271 (C N 67)

—S. 74 — Will — Construction — General principles — Testator bequeathing his entire

SUCCESSION ACT (Contd.)

properties to wife and after her death to his children by making allotments — Will held created only life-estate in favour of wife — (Will — Construction)

Ker 207 A (C N 49)

—Ss. 131 and 132 — Condition subsequent in defeasance of vested interest — To be construed strictly — Breach of condition — Clear and very strong evidence of its breach essential to operate as forfeiture of vested interest — (T. P. Act (1882), Ss. 28, 29)

Ker 207 B (C N 49)

—S. 213 — Execution taken out by legatee of deceased decree-holder — Genuineness of will can be determined in execution itself — Ss. 213 and 57 did not oust jurisdiction of executing Court — ILR (1964) 2 Mad 363, Dissented from — See Civil P. C. (1908), S. 47 Mad 271 (C N 61)

TENANCY LAWS**—ANDHRA INAMS (ABOLITION AND CONVERSION INTO RYOTWARI) ACT (37 of 1956)**

—S. 2 (e) — Tank can be an object of charity — Inam in favour of the "uracheruvu" (tank) — Tank must be considered a charitable institution within the meaning of Andhra Act 37 of 1956 — See Hindu Law — Charitable endowments

SC 563 A (C N 108)

—BERAR REGULATION OF AGRICULTURAL LEASES ACT (24 of 1951)

—Ss. 16, 16-A and 16-B as amended in 1953 — Sections do not apply to appeals pending when Amendment Act of 1953 came into force — Civil P. C. (1908), S. 9 — Exclusion of jurisdiction of Civil Court must be explicitly expressed or necessarily implied

SC 560 A (C N 107)

—S. 16-A — Section as amended in 1953 does not apply to appeals pending when amending Act came into force — See Tenancy Laws — Berar Regulation of Agricultural Leases Act (1951), S. 16

SC 560 A (C N 107)

—S. 16-B — Section as amended in 1953 does not apply to appeals pending when amending Act came into force — See Tenancy Laws — Berar Regulation of Agricultural Leases Act (1951), S. 16

SC 560 A (C N 107)

—BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (67 of 1948)

—S. 31 (3) (as amended by Bombay Act 38 of 1957) — Section 31 (3) deals with disabled persons — Notice to be given within one year of the end of disability — See Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948) (as amended by Bombay Act 38 of 1957), S. 32-F (1) (a), Proviso, 32-G Bom 210 (C N 35)

—Ss. 32-F (1) (a), Proviso, 32-G, 31 (3) (as amended by Bombay Act 38 of 1957) — Expression "such person" in proviso to Section 32-F (1) (a), meaning of — Require-

TENANCY LAWS — BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (Contd)

ments of proviso — Share of widow in joint family property other than agricultural land not separated by metes and bounds in partition — Partition held, did not satisfy requirements of proviso and could not have effect of postponing date on which tenant of lands allotted to widow would be entitled to become statutory purchaser of those lands Bom 210 (C N 35)

—CALCUTTA THIKA TENANCY ACT (2 of 1949)

—S 3 — Thika tenancy held by late karta of joint family in absolute severalty — Tenancy devolves by succession — Only heirs to be impleaded — See Civil P C (1908), O 1, R 13 Cal 360 (C N 60)

—MAHARASHTRA AGRICULTURAL LANDS (CEILING ON HOLDINGS) ACT (27 of 1961)

—S 16 — Scope and applicability indicated — See Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), S 33 Bom 218 (C N 37)

—S 18 — No appeal against mere finding under S 18 — See Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961) S 33 Bom 218 (C N 37)

—S 20 — Matters specified under Sections 20, 18 and 19 — Decision on, before making declaration under S 21 — Necessity pointed out — See Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), S 33 Bom 218 (C N 37)

—S 21 — Before declaration under, collector must decide matters under Ss 18, 19 and 20 — See Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), S 33 Bom 218 (C N 37)

—Ss 33, 16, 18, 20 and 21 — Appeal under S 33 when lies — Findings given under S 18 — Appeal not maintainable Bom 218 (C N 37)

—U P. CONSOLIDATION OF HOLDINGS ACT (5 of 1954)

—Pre — Object and interpretation All 342 C (C N 59) (FB)

—S 11 — Decision of consolidation officer — Finality in matters dealt with in S 11 (1) — See Tenancy Laws — U P Consolidation of Holdings Act (5 of 1954), S 12 All 342 A (C N 59) (FB)

—Ss 12, 11, 19, 20, 21, 22, 23, 38 and 48 — Prior to amendment of 1958 — Scheme of S 12 — Objection under S 12 claiming sardari right in land under consolidation — Dismissal — Decision of Consolidation Officer not attaining finality due to pendency of revision under S 48 — Same objection cannot be raised under S 20 — Publication of statement of tenure-holders under S 19 does not operate as stay of proceedings

TENANCY LAWS — U. P. CONSOLIDATION OF HOLDINGS ACT (Contd)

under S 12 by virtue of S 22 (2) — Clerical error or error apparent on face of record — Power to correct under S 38 — When can be exercised 1965 RD 12, Overruled All 342 A (C N 59) (FB)

—S 12 — Consolidation proceedings — Applicability of principles of res judicata — See Civil P C (1908), S 11 All 342 E (C N 59) (FB)

—Ss 12, 54 — Rules under S 54, R 31 — Rule 34 (3) which provides for appeal against order of Consolidation Officer in proceedings under S 12 is as much part of the Act as any other provision of Act and is a valid provision in existence from very inception of Act All 342 G (C N 59) (FB)

—S 12 (7) — Scope and object — Section creates an estoppel by record and cannot be used to cut down application of doctrine of res judicata — (Civil P C (1908), S 11 — (Evidence Act (1872), Section 115) All 342 F (C N 59) (FB)

—S 19 — Publication of statement of tenure-holder under S 19 does not operate as stay of proceeding under S 12 — See Tenancy Laws — U P Consolidation of Holdings Act (5 of 1954), S 12 All 342 A (C N 59) (FB)

—S 20 — Objection under S 12 — Same cannot be raised under S 20 — See Tenancy Laws — U P Consolidation of Holdings Act (5 of 1954), S 12 All 342 A (C N 59) (FB)

—S 20 — Consolidation proceedings — Applicability of principles of res judicata — See Civil P. C. (1908) S 11 All 342 E (C N 59) (FB)

—S 21 — Section does not cover revision under S 48 — See Tenancy Laws — U P. Consolidation of Holdings Act (5 of 1954), S 12 All 342 A (C N 59) (FB)

—S 22 — Publication of statement of tenure holder under S 19 does not operate as stay of proceeding under S 12 by virtue of S 22 (2) — See Tenancy Laws — U P. Consolidation of Holdings Act (5 of 1954), S 12 All 342 A (C N 59) (FB)

—S 22 (2) — Term Court in S 22 (2) does not include consolidation authorities All 342 D (C N 59) (FB)

—S 23 — Statement of proposal attaining finality — Power to correct — See Tenancy Laws — U P. Consolidation of Holdings Act (5 of 1954), S 12 All 342 A (C N 59) (FB)

—S 38 — Power to correct any document prepared under the Act — See Tenancy Laws — U P Consolidation of Holdings Act (5 of 1954), S 12 All 342 A (C N 59) (FB)

—S 48 — Pendency of revision under S 48 — Decision of consolidation officer does not attain finality — See Tenancy Laws — U P. Consolidation of Holdings Act (5 of 1954), S 12 All 342 A (C N 59) (FB)

—S 54 — Rules under — Rule 34 (3) is a part of the Act — See Tenancy Laws —

TENANCY LAWS — U. P. CONSOLIDATION OF HOLDINGS ACT (Contd.)

U. P. Consolidation of Holdings Act (5 of 1954), S. 12 All 342 G (C N 59) (FB)

—U. P. CONSOLIDATION OF HOLDINGS RULES

See under Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 54.

TRADE AND MERCHANDISE MARKS ACT (43 of 1958)

—Ss. 18 (1), 45, 48 — Proprietor of a mark has to establish that the trade mark is used or proposed to be used by him—Exceptions to this section are those contained in S. 45 and S. 48 Cal 342 C (C N 59)

—S. 45 — Section provides exception to rule in S. 18 (1) — See Trade and Merchandise Marks Act (1958), S. 18 (1) Cal 342 C (C N 59)

—S. 46 (i) — "Trafficking in trade-marks" — What is — English and Indian Law — See Trade and Merchandise Marks Act (1958), S. 48 Cal 342 D (C N 59)

—S. 48 — Section provides exception to rule mentioned in S. 18 (1) — See Trade and Merchandise Marks Act (1958), S. 18 (1) Cal 342 C (C N 59)

—Ss. 48 and 46 (1) (a) — Expression "trafficking in trade marks" — Scope — Bona fide intention to use must be of the person registering — Difference between English and Indian Law stated Cal 342 D (C N 59)

—Ss. 56 and 109 — Trade Mark Rules, R. 121 — Limitation for filing appeal is three months — Application for rectification dismissed on 7-12-1964 — Order sent by post by registry on 22-12-1964 and received by appellant on 26-12-1964 — Certified copy applied for on 1-1-1965 and obtained on 21-1-1965 — Appeal filed on 25-3-1965 — Delay of 18 days condoned Cal 342 A (C N 59)

—S. 56 (2) — Expression "any person aggrieved" has to be liberally construed — Expression includes persons who are in some way or other substantially interested in having the mark removed and also includes those who are substantially damaged or prejudiced if mark remains on the register Cal 342 B (C N 59)

—S. 109 — Dismissal of application for rectification — Appeal — Limitation — Appeal delayed — Condonation — See Trade and Merchandise Marks Act (1958), S. 56 Cal 342 A (C N 59)

TRADE MARK RULES

—R. 121 — Dismissal of application for rectification — Appeal — Limitation — Appeal delayed — Condonation — See Trade and Merchandise Marks Act (1958), S. 56 Cal 342 A (C N 59)

TRANSFER OF PROPERTY ACT (4 of 1882)

—S. 5 — Family settlement — What constitutes Ker 214 B (C N 52)

T. P. ACT (Contd.)

—S. 8 — Transaction continued in more than one document between the same parties — Document must be read and interpreted together Ker 214 D (C N 52)

—S. 8 — Transfer of right to exhibit film held amounted to lease and not outright sale—See Sales Tax — Madras General Sales Tax Act (1959), S. 2 (4) and (i) Mad 284 C (C N 65)

—S. 28 — Condition subsequent in defeasance of vested interest must be strictly construed—See Succession Act (1925), Sections 131 and 132 Ker 207 B (C N 49)

—S. 29 — Condition subsequent in defeasance of vested interest must be strictly construed — See Succession Act (1925), Sections 131 and 132 Ker 207 B (C N 49)

—S. 67 — Civil Procedure Code (1908), O. 34, Rr. 1 and 4, First Schedule App. 'D' Form 5-A — Puisse mortgagee party in prior mortgagee's suit — Claim of prior mortgagee satisfied by payments made by mortgagor before sale — Puisse mortgagee is entitled to institute separate suit in respect of his mortgage — Effect of incorporation of relevant sections of T. P. Act in O. 34, Civil P. C. — (Civil P. C. (1908), Pre-Interpretation of Statutes — Operation of Acts) SC 600 A (C N 118)

—S. 73 — Suit by prior mortgagee — Puisse mortgagee not a party to suit intervening at the stage of sale — Property sold subject to puisne mortgage — Puisse mortgagee cannot claim payment out of surplus sale proceeds. AIR 1937 Pat 307 held no longer good law in view of AIR 1938 Pat 179 — (Civil P. C. (1908), O. 34, Rr. 1, 12 and 13) Guj 222 A (C N 40)

—Ss. 105 and 106 — Interest of a tenant from year to year as well as a tenant from month to month is heritable All 333 C (C N 58) (FB)

—Ss. 106 and 116 — Tenant remaining in possession of premises after expiry of stipulated period — Presumption under S. 106 and principle of holding over All 333 A (C N 58) (FB)

—S. 106 — Contract of tenancy — Formal notice for a definite period required to be served in case of termination by either party — Tenancy is not tenancy at will. AIR 1950 All 583, Overruled

All 333 B (C N 58) (FB)
—S. 106 — Interest of tenant from year to year and from month to month is heritable — See Transfer of Property Act (1882), Section 105 All 333 C (C N 58) (FB)

—S. 111 (g) — Provisions of section do not apply to grants under Government Grants Act (1895)—See Mines and Minerals (Regulation and Development) Act (1957), S. 5 Orissa 152 G (C N 53)

—S. 112 — Non-compliance with notice under R. 27 (5) Mineral Concession Rules, 1960 to make payment of rent and royalty—Right of forfeiture and to determine lease waived — Cancellation of lease on the

T. P. ACT (Contd)

ground is unauthorised — See Mineral Con-
session Rules (1960), R 27

—S 114 — Provisions of section do not
apply to grants under Government Grants
Act (1895) — See Mines and Minerals (Re-
gulation and Development) Act (1957) Sec-
tion 5 Orissa 152 G (C N 53)

—S 116 — Principles of holding over —
See Transfer of Property Act (1882), S 106

All 333 A (C N 58) (FB)

TRUSTS ACT (2 of 1882)

—S 82 — Benami transaction — Source
of consideration — Onus—See Evidence Act
(1872), Ss 101 to 104 Mad 252 A (C N 57)

—S 88 — Lien of partner's representa-
tive on assets of partnership after dissolution
is on surplus assets—Fiduciary relationship
between legal representative of deceased
partner and surviving partners — See
Partnership Act (1932), S 46

Mad 257 D (C N 58)

**UNITED KHASI AND JAINTIA HILLS
AUTONOMOUS DISTRICT (APPOINT-
MENT AND SUCCESSION OF CHIEFS
AND HEADMEN) ACT (2 of 1959)**

—Ss 3, 5 and 11 — Assam Autonomous
District (Constitution of District Councils)
Rules (1951), Rr 28 (1) and 29 (2) (f) —
Appointment of Syiem — After election of
Syiem executive committee must publish
the result and place the same for approval
before District Council — It has no jurisdic-
tion to issue notice for fresh election — Con-
stitution of India, Sch 6

Assam 94 A (C N 21)

—S 3 — Election of Syiem — Writ peti-
tion by person securing highest number of
votes on allegation of non-observance of pro-
cedure held maintainable — See Constitu-
tion of India, Art 226

Assam 94 B (C N 21)

—S 5 — Appointment of Syiem — Pro-
cedure — See United Khasi and Jaintia
Hills Autonomous District (Appointment and
Succession of Chiefs and Headmen Act (2 of
1959), S 3 Assam 94 A (C N 21)

—S 11 — Appointment of Syiem — Pro-
cedure — See United Khasi and Jaintia
Hills Autonomous District (Appointment and
Succession of Chiefs and Headmen Act (2 of
1959), S 3 Assam 94 A (C N 21)

**UTTAR PRADESH CONSOLIDATION OF
HOLDINGS ACT (5 of 1954)**

See under Tenancy Laws

U. P. MOTOR VEHICLES RULES (1940)

—R 44-A — Power of Regional Transport
Authority under S 44 (5) of the Act —
Delegation of to Secretary Member — Vali-
dity W P No 296 of 1963, D/- 7-8-1964 (All)
Overruled — See Motor Vehicles Act (1939),
S 44 (5) All 365 A (C N 61) (FB)

**U. P. STATE ROAD TRANSPORT SERVI-
CES (DEVELOPMENT) RULES (1958)**

—R 10 — Power of Regional Transport
Authority under S 44 (5) of the Act —
Delegation of to Secretary Member — Vali-
dity W P No 296 of 1963, D/- 7-8-1964 (All),
Overruled — See Motor Vehicles Act (1939),
S 44 (5) All 365 A (C N 61) (FB)

WILL

—Construction — See Succession Act
(1925), S 74

WORDS AND PHRASES

—"Ambiguous" — Word ambiguous means
obscure or of double meaning

Bom 231 B (C N 41)

—"Appoint" — See Arbitration Act
(1940), S 8 (1) (b) Bom 227 A (C N 40)

—"Charitable institution" — Meaning —
Meaning of the word institution that will
cover every use of it depends on the con-
text in which it is found — A tank can be
a charitable institution when there is dedica-
tion in favour of that tank

SC 563 B (C N 108)

—"Force majeure" — Meaning of — See
Contract Act (1872), S 56

Orissa 152 F (C N 53)

—"Person aggrieved" — See Electricity
Act (1910), S 50 Mad 280 (C N 64)

—"Professional misconduct" — See Notar-
ies Act (1952), S 10 (d) All 363 (C N 60)

—"Sulah and Supurd Salisi" — Meaning
of — See Contract Act (1872), S 186

Andh Pra 211 (C N 64)

—"Trafficking in trade marks" — See
Trade and Merchandise Marks Act (1953),
S 48 Cal 342 D (C N 59)

—"Word 'Assessed'" — See Income-tax Act
(1922), S 18-A (3) SC 543 A (C N 103)

—"Word 'day'" — Meaning of — See Crimi-
nal P C (1898), S 247
Andh Pra 222 A (C N 69)

**SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND
DISSENTED FROM, ETC. IN A. I. R. 1969 JULY**

DISS.=Dissented from in, Not F.=Not Followed in; OVER.=Overruled in, REVERS =Reversed in.

CIVIL PROCEDURE CODE (5 of 1908)

—S 34 — ('62) Appeal No 82 of 1959, D/
17-1-1962 (Cal) — REVERS AIR 1969 SC
600 B (C N 118).

—S 47 — ILR (1964) 2 Mad 363 — DISS
AIR 1969 Mad 271 (C N 61)

—S 47 — ('40) AIR 1940 Pat 176 — OVER.
AIR 1969 SC 575 A (C N 112).

CIVIL P. C. (Contd.) ■

—S 73 — AIR 1929 Nag 148 — DISS. AIR
1969 Guj 200 (C N 37)

—S 96 — ('40) AIR 1940 Pat 176 — OVER.
AIR 1969 SC 575 A (C N 112)

—S 146 — ILR (1964) 2 Mad 363 — DISS.
AIR 1969 Mad 271 (C N 61)

CIVIL P. C. (Contd.)

- S. 151 (as amended by Madras Amendment of 1930) — AIR 1937 Sind 279 — DISS. AIR 1969 Andh Pra 216 A (C N 67).
 —S. 151 (as amended by Madras Amendment of 1930) — AIR 1956 Raj 43 — DISS. AIR 1969 Andh Pra 216 A (C N 67).
 —O. 2 (2) — ('40) AIR 1940 Pat 176 — **OVER.** AIR 1969 SC 575 A (C N 112).
 —O. 21, R. 11 (2) (j) — AIR 1929 Nag 148 — DISS. AIR 1969 Guj 200 (C N 37).
 —O. 21, R. 16 — ILR (1964) 2 Mad 363 — DISS. AIR 1969 Mad 271 (C N 61).
 —O. 34, R. 2 — ('62) Appeal No. 82 of 1959, D/- 17-1-1962 (Cal) — **REVERS.** AIR 1969 SC 600 B (C N 118).
 —O. 34, R. 4 — ('62) Appeal No. 82 of 1959, D/- 17-1-1962 (Cal) — **REVERS.** AIR 1969 SC 600 B (C N 118).
 —O. 34, R. 11 — ('62) Appeal No. 82 of 1959, D/- 17-1-1962 (Cal) — **REVERS.** AIR 1969 SC 600 B (C N 118).
 —O. 41, R. 1 — ('40) AIR 1940 Pat 176 — **OVER.** AIR 1969 SC 575 A (C N 112).
 —O. 41, R. 23 — ('37) AIR 1937 Sind 279 — DISS. AIR 1969 Andh Pra 216 A (C N 67).
 —O. 41, R. 23 — ('56) AIR 1956 Raj 43 — DISS. AIR 1969 Andh Pra 216 A (C N 67).
COMPANIES ACT (1 of 1956)
 —S. 433 — ('68) Order of Datta J. D/- 23-4-1968 (Cal) — **REVERS.** AIR 1969 Cal 363 B (C N 61).
 —S. 483 — (1966) 70 Cal WN 516 — **HELD NOT GOOD LAW** in view of AIR 1965 SC 507, as Interpreted. AIR 1969 Cal 363 A (C N 61).
CONSTITUTION OF INDIA
 —Art. 226 — ('67) S. A. No. 322 of 1964, D/- 27-3-1967 (All) — **REVERS.** AIR 1969 SC 556 (C N 106).
 —Art. 226 — (1963) 2 Lab LJ 60 (Mad) — **HELD IMPLIEDLY OVERRULED BY AIR 1963 SC 779.** AIR 1969 Mad 275 C (C N 63).
 —Art. 311 — (1963) 2 Lab LJ 60 (Mad) — **HELD IMPLIEDLY OVERRULED BY AIR 1963 SC 779.** AIR 1969 Mad 275 C (C N 63).
CONTRACT ACT (9 of 1872)
 —S. 186 — ('47) AIR 1947 Nag 17 — **NOT F.** AIR 1969 Andh Pra 211 (C N 64).
 —S. 188 — ('47) AIR 1947 Nag 17 — **NOT F.** AIR 1969 Andh Pra 211 (C N 64).
CRIMINAL PROCEDURE CODE (5 of 1898)
 —S. 146, Sub-ss. (1-B) and (1-D) — AIR 1960 All 599 — DISS. AIR 1969 Assam 81 A (C N 17).
 —S. 146, Sub-ss. (1-B) and (1-D) — AIR 1959 Cal 366 — DISS. AIR 1969 Assam 81 A (C N 17).
 —S. 146 — AIR 1968 Punj 301 — DISS. AIR 1969 Assam 81 B (C N 17).
 —S. 435 — AIR 1960 All 599 — DISS. AIR 1969 Assam 81 A (C N 17).
 —S. 435 — AIR 1959 Cal 366 — DISS. AIR 1969 Assam 81 A (C N 17).
 —S. 439 — AIR 1960 All 599 — DISS. AIR 1969 Assam 81 A (C N 17).

CRIMINAL P. C. (Contd.)

- S. 439 — AIR 1959 Cal 366 — DISS. AIR 1969 Assam 81 A (C N 17).
EVIDENCE ACT (1 of 1872)
 —S. 3 — ('52) AIR 1952 All 506 — DISS. AIR 1969 Punj 244 A (C N 42).
 —S. 3 — AIR 1924 Mad 708 — DISS. AIR 1969 Punj 244 A (C N 42).
HOUSES AND RENTS — C. P. AND BERAR REGULATION OF LETTING OF ACCOMMODATION ACT (11 of 1946)
 —S. 2 — AIR 1959 Bom 98 — **OVER.** AIR 1969 Madh Pra 130 A (C N 36).
 —S. 2 — S. A. No. 357 of 1962, D/- 27-11-1962 (MP) — **OVER.** AIR 1969 Madh Pra 130 A (C N 36).
 —S. 6 — AIR 1959 Bom 98 — **OVER.** AIR 1969 Madh Pra 130 A (C N 36).
 —S. 6 — S. A. No. 357 of 1962, D/- 27-11-1962 (MP) — **OVER.** AIR 1969 Madh Pra 130 A (C N 36).
INCOME-TAX ACT (11 of 1922)
 —S. 10 (2-A) — ('65) I. T. Ref. No. 215 of 1961, D/-14-1-1965 (Cal) — **REVERS.** AIR 1969 SC 572 (C N 111).
LIMITATION ACT (9 of 1908)
 —S. 13 — AIR 1928 Mad 1088 — **HELD RIGHTLY OVERRULED** by AIR 1955 Mad 96 (FB), As Interpreted AIR 1969 SC 552 B (C N 105).
 —S. 13 — AIR 1944 Mad 437 — **HELD RIGHTLY OVERRULED** by AIR 1955 Mad 96 (FB), As Interpreted AIR 1969 SC 552 B (C N 105).
 —Art. 95 — AIR 1928 Mad 1088 — **HELD RIGHTLY OVERRULED** by AIR 1955 Mad 96 (FB), As Interpreted AIR 1969 SC 552 B (C N 105).
 —Art. 95 — AIR 1944 Mad 437 — **HELD RIGHTLY OVERRULED** by AIR 1955 Mad 96 (FB), As Interpreted AIR 1969 SC 552 B (C N 105).
LIMITATION ACT (36 of 1963)
 —S. 5 — ('68) 70 Pun LR (D) 332 — **REVERS.** AIR 1969 SC 575 B (C N 112).
 —S. 19 — AIR 1935 All 129 — **HELD OVERRULED** by AIR 1953 SC 225, As Interpreted AIR 1969 Raj 192 A (C N 38) (FB).
 —S. 19 — AIR 1912 Raj 7 (FB) — DISS. AIR 1969 Raj 192 A (C N 38) (FB).
 —S. 19 — AIR 1951 Raj 74 — **OVER.** AIR 1969 Raj 192 A (C N 38) (FB).
 —S. 19 — AIR 1956 Raj 12 — **OVER.** AIR 1969 Raj 192 A (C N 38) (FB).
MOTOR VEHICLES ACT (4 of 1939)
 —S. 44 (5) — W. P. No. 296 of 1963, D/- 7-8-1964 (All) — **OVER.** AIR 1969 All 365 A (C N 61) (FB).
 —S. 68 — W. P. No. 296 of 1963, D/- 7-8-1964 (All) — **OVER.** AIR 1969 All 365 A (C N 61) (FB).
 —S. 68-G — W. P. No. 296 of 1963 D/- 7-8-1964 (All) — **OVER.** AIR 1969 All 365 A (C N 61) (FB).

PAYMENT OF WAGES ACT (4 of 1936)

—S 2 (vi) (d) (as amended by Act 68 of 1957) — (1967) 1 Lab LJ 232 (Punj) — **OVER.** AIR 1969 SC 590 (C N 116)
 —S 15 (2) (as amended by Act 68 of 1957) — (1967) 1 Lab LJ 232 (Punj) — **OVER.** AIR 1969 SC 590 (C N 116).

PREVENTION OF FOOD ADULTERATION ACT (37 of 1954)

—S 20 — AIR 1963 Orissa 158 — **DISS.** AIR 1969 Delhi 198 B (C N 34)

REGISTRATION ACT (16 of 1908)

—S 17 — AIR 1962 Andh Pra 443 — **OVER.** AIR 1969 Andh Pra 242 (C N 76) (FB).
 —S 17 — L P A 44 of 1963, D/- 1-10-1965 (AP) — **PARTIALLY OVER.** AIR 1969 Andh Pra 242 (C N 76) (FB)
 —S 49 (c) — AIR 1962 Andh Pra 443 — **OVER.** AIR 1969 Andh Pra 242 (C N 76) (FB).

—S 49 (c) — L P A 44 of 1963, D/- 1-10-1965 (AP) — **PARTIALLY OVER.** AIR 1969 Andh Pra 242 (C N 76) (FB)

REPRESENTATION OF THE PEOPLE ACT (43 of 1951)

—S 9-A (as amended by Act 47 of 1966) — ('60) AIR 1960 SC 131 — **OVER.** AIR 1969 SC 604 (C N 119)
 —S 53 (as amended by Act 47 of 1966) — ('60) AIR 1960 SC 131 — **OVER.** AIR 1969 SC 604 (C N 119).
 —S 84 (as amended by Act 47 of 1966) — ('60) AIR 1960 SC 131 — **OVER.** AIR 1969 SC 604 (C N 119).

—S 101 (as amended by Act 47 of 1966) — ('60) AIR 1960 SC 131 — **OVER.** AIR 1969 SC 604 (C N 119)

SALES TAX — CENTRAL SALES TAX ACT (74 of 1956)

—S 2 (i) and (4) — AIR 1965 SC 1510 — **DISS.** AIR 1969 Ker 205 (C N 48)

SALES TAX — CENTRAL SALES TAX ACT (Contd)

—S 2 (i) and (4) — AIR 1969 SC 147 — **DISS.** AIR 1969 Ker 205 (C N 48)
 —S 2 (i) and (4) — AIR 1966 Ker 60 — **DISS.** AIR 1969 Ker 205 (C N 48)
 —S 2 (i) and (4) — (1966) 17 STC 396 (Mad) — **DISS.** AIR 1969 Ker 205 (C N 48)

TENANCY LAWS**—U. P. CONSOLIDATION OF HOLDINGS ACT (5 of 1954)**

—S 11 — 1965 RD 12 — **OVER.** AIR 1969 All 342 A (C N 59) (FB).
 —S 12 — 1965 RD 12 — **OVER.** AIR 1969 All 342 A (C N 59) (FB).
 —S 19 — 1965 RD 12 — **OVER.** AIR 1969 All 342 A (C N 59) (FB).
 —S 20 — 1965 RD 12 — **OVER.** AIR 1969 All 342 A (C N 59) (FB).
 —S 21 — 1965 RD 12 — **OVER.** AIR 1969 All 342 A (C N 59) (FB).
 —S 22 — 1965 RD 12 — **OVER.** AIR 1969 All 342 A (C N 59) (FB).
 —S 23 — 1965 RD 12 — **OVER.** AIR 1969 All 342 A (C N 59) (FB).
 —S 38 — 1965 RD 12 — **OVER.** AIR 1969 All 342 A (C N 59) (FB).
 —S 48 — 1965 RD 12 — **OVER.** AIR 1969 All 342 A (C N 59) (FB)

TRANSFER OF PROPERTY ACT (4 of 1882)

—S 73 — AIR 1937 Pat 307 — **HELD NO LONGER GOOD LAW** in view of AIR 1938 Pat 179 AIR 1969 Guj 222 A (C N 40)
 —S 106 — AIR 1950 All 583 — **OVER.** AIR 1969 All 333 B (C N 58) (FB)

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1969 JULY

DISS. = Dissented from in; **NOT F.** = Not followed in, **OVER.** = Overruled in, **REVERS** = Reversed in.

SUPREME COURT

- [60] AIR 1960 SC 131 (1960) 1 SCR 902, Keshav Laxman Borker v Devrao Laxman Anande — **OVER.** AIR 1969 SC 604 (C N 119).
 [65] AIR 1965 SC 1510 (1965) 16 STC 231, State of Mysore v Lekshminarasimhaiah Shetty and Sons — **DISS.** AIR 1969 Ker 205 (C N 48)
 [69] AIR 1969 SC 147 C A No 763 of 1967, D/- 18-4-1968, State of Madras v. Nataraja Mudaliar — **DISS.** AIR 1969 Ker 205 (C N 48)

ALLAHABAD

- [735] AIR 1935 All 129 ILR 57 All 434, Ghulam Murtaza v Fasihunnissa Bibi — **HELD OVERRULED** by AIR 1953

ALLAHABAD (Contd.)

- SC 225, As Interpreted in AIR 1969 Raj 192 A (C N 38) (FB).
 [50] AIR 1950 All 583 1951 All LJ 179, Ramanlal v Bhagwan Das — **OVER.** AIR 1969 All 333 B (C N 58) (FB).
 [52] AIR 1952 All 506 1952 All LJ 696, Mst Sughra v Babu — **DISS.** AIR 1969 Punj 244 A (C N 42)
 [60] AIR 1960 All 599 1960 Cri LJ 1279, Chokhey Lal Moti Ram v. Babulal Behari Lal — **DISS.** AIR 1969 Assam 81 A (C N 17)
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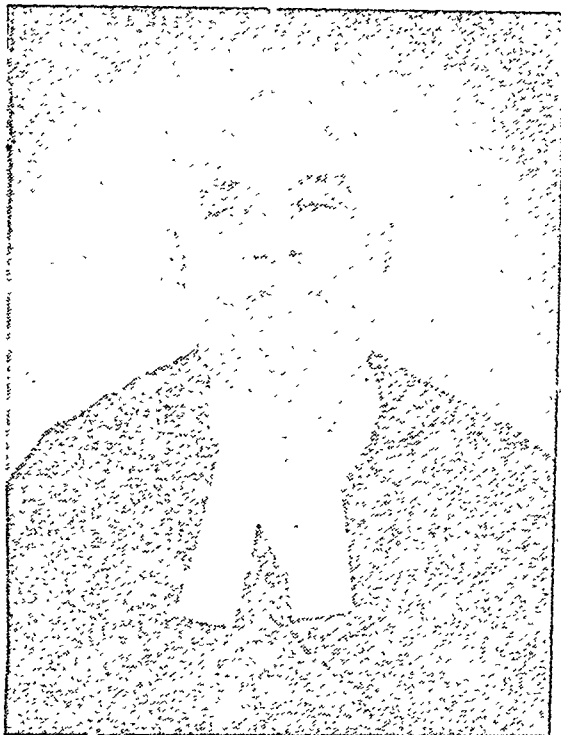
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REVISIONAL JURISDICTION UNDER SECTION 115, CIVIL P. C.

(By BALMOKAND VOHRA, Advocate, Chandigarh (Punjab))

In his article in AIR 1969 Journal section at page 24, Sri Mahendra Gill has expressed the view that the decision of the Supreme Court in *Prem Raj v. D. L. F. Housing and Construction (Pvt) Ltd*, AIR 1968 S O 1855 is completely antagonistic to the well settled law on the scope of S. 115, Civil P. C. and requires to be expressly reversed by the Supreme Court at the earliest opportunity. The object of the present article is to examine as to how far this view is correct.

(2) Section 115 of the Code of Civil Procedure reads:—

"115 Revision — The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

(3) The following Supreme Court authorities explain the scope of S. 115, Civil P. C.—

(i)

"The provisions of S. 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under S. 115, it is not competent to the High Court to correct errors of fact, however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the suit itself. As Cls. (a) (b) and (c) of S. 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points in law may arise in proceedings in-

stituted before subordinate Courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of S. 115 of the Code. But an erroneous decision on a question of law reached by the subordinate Court which has no relation to questions of jurisdiction of that Court cannot be corrected by the High Court under S. 115." *Pardurang Dhondt v. Maruti Hari Jadhav* (AIR 1966 S O 159).

(ii)

"Section 115, Civil P. C. applies to matters of jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it, and if a subordinate Court had jurisdiction to make the order it has made and has not acted in breach of any provision of law or committed any error of procedure which is material and may have affected the ultimate decision, the High Court has not power to interfere however profoundly it may differ from the conclusions of that court on question of fact or law." *Vide Keshardeo Chamaria v. Radha Kissen Chamaria* (AIR 1958 S O 29).

(4) Before advertng to the *Prem Raj*'s case, it would be appropriate to refer to R. 11 of O. 7, Civil P. C. which is also relevant for the purpose of this article. The rule reads—

"Rejection of plaint — The plaint shall be rejected in the following cases.—

(a) Where it does not disclose a cause of action

(b) Where the relief claimed is unvalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so.

(c) Where the relief claimed is properly valued, but the plaint is written upon paper

insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so.

(d) Where the suit appears from the statement in the plaint to be barred by any law."

(5) In Prem Raj's case, AIR 1968 S C 1355 the plaintiff had sued firstly for a declaration that a certain contract was void on account of undue influence and had secondly, in the alternative, asked for the specific performance of the very same contract. In the trial court a preliminary objection was raised to the effect that the plaintiff having claimed that the contract was void and inoperative, could not in the same suit pray for the specific performance of the same contract. The trial Court rejected the preliminary objection whereupon the High Court of Punjab was approached in its revisional jurisdiction under S. 115, C. P. C. The High Court allowed the revision application holding that the applicant having sued for a declaration that the contract was void, cannot in the alternative be permitted to sue for specific performance of the contract and, therefore, suit must fail so far as the relief for specific performance was concerned. The Supreme Court after discussing the various provisions of the Specific Relief Act etc., also upheld the decision of the High Court.

6. In the Supreme Court it was argued on behalf of the appellant that the High Court had no jurisdiction to interfere with the order of the trial Court under S. 115, Civil P. C. It was said that the finding of the trial Court did not involve any question of jurisdiction and the High Court has fallen into an error in reversing the finding of the trial Court on issue No. 4, whether the relief for specific performance was open to the appellant in the alternative. This argument was, however, repelled by the Supreme Court by the following observations:

Said Ramaswami J.

"In our opinion there is no warrant for the argument put forward on behalf of the appellant. It is manifest that in holding that the appellant was entitled in the alternative to ask for the relief for specific performance, the trial Court had committed an error of law and so had acted with material irregularity or illegality in the exercise of its jurisdiction within the meaning of S. 115 (c), Civil P. C. It was, therefore, competent to the High Court to interfere in revision with the order of the trial Court on this point. To put it differently the decision of the trial Court on this question was not a decision on a mere question of law but it was a decision on a question of law upon which the jurisdiction of

the Court to grant the particular relief depended. The question was, therefore, one which involved the jurisdiction of the trial Court; the trial Court could not, by an erroneous finding upon that question, confer upon itself a jurisdiction which it did not possess and its order was, therefore, liable to be set aside by the High Court in revision."

Shri Mahendra Gill concedes that the plaint in Prem Raj's case was not maintainable when he says in his article in AIR 1969 Journal 24 that no fault can be found with the view taken by the High Court that the plaintiff could not claim specific performance when he was not ready and willing to perform his part of the contract as was unequivocally embodied in his prayer for the avoidance of the contract. He, however, attacks the decision of the High Court in a round-about way. He assumes from the decision of the Supreme Court that the High Court exercised powers analogous to those laid down in O. 7, R. 11 (a), C. P. C., whereunder the trial Court is enjoined to reject the plaint if it discloses no cause of action. He contends that the trial Court had undoubtedly jurisdiction to decide whether the plaint disclosed a cause of action or it did not and, if the Court took one view out of the two possible views, it cannot be said that it acted in the exercise of its jurisdiction illegally or with material irregularity and thus rendered itself amenable to the revisional jurisdiction of the High Court under S. 115, C. P. C.

Shri Mahendra Gill draws a wrong analogy when he says in his article that the observations of the Supreme Court in Prem Raj's case (reproduced earlier in the present article) lend themselves to this view that in a suit where the plaintiff prays for a decree on a debt the trial Court has jurisdiction to pass a decree only if such debt is proved and would have no jurisdiction to pass a decree if such debt is not proved; and that, if the trial Court errs in the finding as to whether a debt existed, such an error could be corrected by the High Court in its revisional jurisdiction. He then concludes that if this view were correct, the revisional jurisdiction would be as wide as the jurisdiction exercisable by the High Court in the first Appeal: there will be no limit of whatever nature on the scope of such jurisdiction, for anything under the sun could be done by the High Court under cl. (c) of S. 115, C. P. C.

8. In his article, Shri Mahendra Gill has ignored cl. (a) of S. 115, C. P. C., altogether. It is obvious that by the acceptance of a plaint not maintainable in law, the erroneous decision in this case has resulted in exercising by the trial Court a jurisdiction not vested in it by law. Therefore, the decision is undoubtedly

amenable to the revisional jurisdiction of the High Court under cl. (a) notwithstanding the fact whether the trial Court has acted illegally or with material irregularity or not. It is with respect to such cases that the Privy Council observed in *Joy Chand Lal v. Kama. Lakha Chaudhri* A I R 1949 P O 289 (repealed in A I R 1966 S O 489 at page 441) "... High Courts have not always appreciated that although error in a decision of a subordinate Court does not by itself involve that the subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b) and sub-section (c) can be ignored."

9 The analogy drawn by Shri Mahendra Gill is also not sustainable. In a suit for a decree for debt, if the trial Court errs in the finding as to the existence or non-existence of the debt, the error cannot be corrected by the High Court in its revisional jurisdiction, because such a finding is not related to the jurisdiction of the Court in any of the ways mentioned in Section 115, Civil P. O. It is only related to the rights of the parties. The correct analogy in this case would be the plea of limitation or res judicata, which pleas are covered by clause (d), whereas Prem Raj's case is covered by clause (a) of Rule 11 of Order 7. It is well settled law that a finding on a plea of limitation or res judicata is amenable to the revisional jurisdiction of the High Court. So should be, on analogy, a plea of non-disclosure of a cause of action in the plaint.

10 I may now add a few words on the scope of Rule 11 of Order 7 also. This is a rule of procedure and by it an obligation is cast on the trial Court to scrutinize the plaint before accepting it. If it is found that the plaint suffers from any of the defects mentioned in the rule, the trial Court should reject it in limine. If, however, the trial Court admits an imperfect plaint in contravention of the rule, it undoubtedly commits an error of procedure involving illegality or material irregularity in the exercise of its jurisdiction and clause (c) of Section 115 Civil P. O. is attracted. Therefore, any final decision given by a Subordinate Court in favour of the plaintiff in a suit based on such an imperfect plaint would be amenable to the revisional jurisdiction of the High Court under clause (c) provided other conditions of Section 115, Civil P. O. are satisfied. And if during the trial of such a suit the defendant raises an objection that the suit is not maintainable under Rule 11 of Order 7 and the trial Court erroneously rejects the objection, as in Prem Raj's case, the order of the trial Court rejecting the objection would also be amenable to revisional jurisdiction of the High Court under clause (c) of Section 115, C. P. O., because such an order in no way alters the nature of the error involved.

11 In my respectful submission, therefore, the decision of the Supreme Court in Prem Raj's case A I R 1968 S O 1355 is completely in accord with the well settled law on the scope of Section 115, C. P. O.

All authorities cited by Shri Mahendra Gill in his article also support this view and not the view expressed by him.

SPECIAL LEAVE TO APPEAL — THE SUPREME COURT

(By OM PRAKASH, ADVOCATE, SUPREME COURT, New Delhi)

The Constitution of India has conferred wide powers on the Supreme Court in the matter of granting special leave to appeal from any judgment or order in any matter decided by any Court or tribunal in India.

In *Durga Shanker Mehta v. Thakur Raghu. raj Singh*, (1955) 1 S O R 267 at p 272; A I R 1954 S O 120 at p 522, Mukherjee, J. (as he then was) observed :—

"The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where 'the ends of justice demand' interference by the Supreme Court of the

land. The article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals by granting of special leave, against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws."

(Note :—The underlines (here in single quotation) in this article are by the author).

The learned Judge further observed :—

"This overriding power, which has been vested in the Supreme Court under Art. 136

of the Constitution, is in a sense wider than the prerogative right of entertaining an appeal exercised by the Judicial Committee of the Privy Council of England."

In Dhakeshwari Cotton Mills, Ltd. v. The Commissioner of Income-Tax, West Bengal, (1955) 1 S O R 941 : (A I R 1955 S O 65), Mahajan, C. J. at p. 949 (of S C R) : (at p. 69 of A I R) observed :—

"It is not possible to define with any precision the limitations on the exercise of the 'discretionary jurisdiction' vested in this Court by the constitutional provisions made in Article 136. The limitations, whatever they may be, are implicit in the nature and the character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in the special and extraordinary situations. Beyond that it is not possible to fetter the exercise of this power by any set formulae or rule. All that can be said is that the Constitution having trusted the wisdom and good sense of the Judges of this Court in this matter, that itself is a sufficient safeguard and guarantee that the power will only be used 'to advance the cause of justice', and 'its exercise governed by well-established principles', which govern the exercise of overriding constitutional powers."

The learned Judge has further observed 'that the whole intent and purpose of this article is that it is the duty of this Court to see that injustice is not perpetuated or perpetrated'.

Article 136, Clause (1) of the Constitution reads :—Article 136.—Special leave to appeal by the Supreme Court : (1) Notwithstanding anything contained in this chapter, the Supreme Court may, 'in its discretion', grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India.

DISCRETION

The power to grant special leave to appeal under Article 136 is indeed very wide and appears, on the face of it, to be unfettered. If the words 'in its discretion' were omitted and the article read without them, there could be no question that the power would be unfettered. The article could then be interpreted to confer the power at the sweet will or pleasure or humour of the Court. But the very fact that these words are to be found in the article, appear, to put limitations on the exercise of that power. It is necessary therefore to discuss at some length the significance of the word 'discretion'.

In its ordinary meaning, the word signifies

unrestricted exercise of choice or will, freedom to act according to one's own judgment; unrestrained exercise of will, the liberty of power of acting without other control than one's own judgment. But when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong and therefore whoever hath power to act at discretion is bound by the rule of reason and law. (Tomlin's Law Dictionary.)

"Discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful; but legal and regular. And, it must be exercised within the limit to which an honest man, competent to the discharge of his office ought to confine himself. (Lord Halsbury L. C. Sharp v. Wakefield, 1891 A O 173). The very word discretion standing single and unsupported by circumstances signifies the exercise of judgment, skill or wisdom as distinguished from unthinking, folly, heady violence or rash injustice; evidently therefore a discretion cannot be arbitrary, but must be a result of judicial thinking, (1909) 93 Bom 334.

The word "discretion" in itself implies vigilant circumspection and care, therefore where the legislature concedes wide discretion it also 'imposes a heavy responsibility' AIR 1933 Sind 49 : 34 Cri L J 591.

Lord Camden appears, to be bitter when he says,

"The discretion of a Judge is the law of tyrants; it is always unknown. It is different in different men. It is casual; and depends upon constitution, temper, passion, in the best it is oftentimes caprice, in the worst it is every vice, folly and passion to which human nature is liable."

(Lord Camden L. C. J. Case of Hindson and Kersey (1680) 8 How St Tr 57).

Bowen L. J. in the case of Gardner v. Jay, (1885) 29 Ch D 50 observes that discretion must be exercised according to common sense and according to justice, 'and if there is any miscarriage in the exercise of it, it will be reviewed.'

Discretion, when applied to a Court of justice means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague, and fanciful,

but legal and regular. (Lord Mansfield, Case of John Wilkes (1770) 4 Burr 2127 (2589))

Discretion is to be exercised not capriciously, but on 'judicial grounds' and for 'substantial reasons'.

(Per Jessel M.R., *Re, Taylor*, (1877) 4 Ch D 160 and per Lord Blackburn, *Doherty v. Allman*, (1878) 3 A C 709 (728).)

'Legalis discretio' is merely to administer justice according to the prescribed rule of the law).

(Sir E. Coke in *Rorke's Case*, 5 Rep 100 a and *Keighley's case*, 10 Rep. 140 b).

LIMITATIONS

The use of the words 'in its discretion' would thus impose limitations on the exercise by the Court of the power to grant or refuse to grant special leave to appeal. The power or discretion must be exercised

(1) According to the rule of reason and law so that "the whole intent and purpose of the article that it is the duty of the Court to see that injustice is not perpetuated or perpetrated" (Per Mahajan G J)

(2) In a legal and regular way to advance the cause of justice

(3) According to judgment, skill and wisdom as distinguished from unthinking, folly, heady violence, rash injustice or haste.

(4) In a manner that if there is a miscarriage in the exercise of it, it will be reviewed.

(5) On 'judicial grounds' and for 'substantial reasons.'

The necessary conclusion appears to be that when a litigant seeks to demand justice from the Court, he is entitled to have his petition heard and decided on judicial grounds and to be told of the substantial reasons why his demand is rejected or accepted. If the order accepting or rejecting his petition contains the grounds of acceptance or rejection, the order would be open to review, provision for which is to be found in the very next article. Article 187 which lays down, —

Review of judgments or orders of the Supreme Court—

Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

Judges are, after all human. They are like every other man liable to err. The law takes full note of this human failing, and provides for a review in order that the errors, if any, may be set right. If the judicial grounds and the substantial reasons are mentioned in the order rejecting or allowing special leave to appeal, any omission, or error or slip can be brought to the notice of the court by a petition for review and rectified.

The litigant who spends large sums of money when he comes to the Supreme Court would have the satisfaction of knowing that all that could be said for him, and all the points raised on his behalf have been duly considered. It cannot be suggested that the same are not duly and judicially weighed, but in the absence of a 'speaking order' the satisfaction is not possible.

The litigant, moreover, indulges in a gamble and takes a mere blind chance by filing a petition for Special Leave. He has no set rules, principles of law or precedents to guide him. On the other hand, there are bound to arise wholesome principles and guiding rules for the litigant and also for the bar, if the orders on petitions for special leave were to mention the substantial reasons for the decision they contain.

The argument that it would require much more time in passing 'speaking orders' leading to an accumulation of arrears cannot be advanced with any seriousness by any one who is anxious that justice should not only be done but that it should also appear to be done.

The Latin maxim 'Fiat Justitia ruat cælum' (Let justice be done even though heavens fall) sets down the deciding factor on the issue. The remedy would obviously lie in increasing the number of Judges, if necessary, to meet the extra quantity of work involved, rather than in refusing to do what may appear to be just, equitable and conducive to the better administration of justice.

This article may be concluded by repeating what the great philosopher Socrates had said a long time back :—

Four things belong to a Judge :—

To hear courteously,

To answer wisely,

To consider soberly; and

To decide impartially.

WEALTH TAX ON AGRICULTURAL LANDS

(By P. RAMA RAO, Advocate Member, Regional Direct Taxes Advisory Committee, Hyderabad.)

The Central Legislature introduced a Bill seeking to impose Wealth Tax on the value of the agricultural lands. A close scrutiny of the provisions of the Constitution reveals that the proposed Bill is beyond the competence of the Central Legislature.

(2) The Constitution Makers must be presumed to have been aware of the levy of Wealth Tax on properties as the Wealth Tax enactments were prevailing in Sweden, Netherlands, Japan and other countries at the time when the Constitution was made. The Wealth Tax was levied in Sweden under the name of "State Capital Tax" and in Netherlands it is called "Tax on property." In Japan the annual tax on total wealth was levied under "Net Worth Tax law" before it was repealed in 1958. The power to levy wealth tax was conferred on Central Legislature by Entry No. 86 in List I of VIIIth Schedule to the Constitution. Entry No. 86 is as follows :

"Taxes on the Capital value of the assets exclusive of agricultural land of individuals and Companies, taxes on the capital of Companies."

For the first time in our Country the Wealth tax was introduced by the Wealth Tax Act, 1957 (Act No. 27 of 1957) imposing Wealth Tax on the capital value of the assets. This Act was passed under the powers conferred on the Central Legislature by Art. 246 read with Entry No. 86 of the Constitution of India. In consonance with the provisions of Entry 86 assets have been defined under S. 2 (e) of the Wealth Tax Act as including property of every description subject to certain exceptions of which the agricultural land is one of them. Now by the present Bill the Central Legislature seeks to impose Wealth tax on the value of agricultural lands also and this is sought to be justified on the ground that the levy can be made under the residuary powers of taxation vested in the Central Legislature by Art. 243 read with Entry 97 of the Constitution of India.

(3) The scheme of the distribution of the legislative powers between the Central Legislature and the State Legislatures followed the pattern set up by the Government of India Act, 1935. Articles 245 and 246 of the Constitution confer powers on the Parliament and State Legislatures to make laws enumerated in List I, List II and List III appended to the Seventh Schedule of the Constitution.

(4) The subjects assigned to the Central Legislature and State Legislatures are set out in List I and List II respectively and List III pertains to the subjects allocated to the Par-

liament and States as well and this list is called concurrent list. The subjects mentioned in the three lists have been more elaborately dealt with in the Constitution of India when compared with the subjects set out in the Government of India Act, 1935. In List I of the Constitution there are 97 Entries as against 59 in 1935 Act and there are 66 Entries in List II as against 54 in the 1935 Act and in List III there are 47 Entries in the Constitution as against 36 in 1935 Act.

(5) The entries relating to taxation in Lists I and II reveal that the taxing powers of the Central Legislature and of the States are mutually exclusive, and List III namely concurrent list contains no entry relating to tax. The intention appears to be to eliminate the element of overlapping and shading into each other. In List I, Entries 82 to 92A deal with taxes and in List II, Entries 45 to 62 deal with taxes. Entries 45 to 48 in List I deal with the powers of the State Legislatures to make laws imposing tax in respect of agricultural lands namely land revenue, taxes on agricultural income, duties in respect of succession to agricultural land and Estate Duty in respect of agricultural land and Entry 49 deals with taxes on lands and buildings. The taxing power of Parliament as conferred by Entries 82, 86, 87, 88 of List I provide for making laws in respect of taxes on income other than agricultural income, taxes on the capital value of the assets excluding agricultural land, Estate duty in respect of property other than agricultural property and duties in respect of succession to property other than agricultural land respectively. The anatomy of the lists above mentioned reveals that the powers have been conferred on the State Legislatures to make laws in respect of agricultural lands and the Central Legislature has been vested with powers to make laws in respect of lands other than agricultural lands.

(6) Now the levy of Wealth tax on agricultural lands by the Central Legislature is sought to be justified by invoking the aid of residuary power as adumbrated in Art. 248 read with Entry 97 in List I of the Constitution. Article 248 is as follows:—

"(i) Parliament has exclusive power to make any law with respect to any matter not enumerated in the concurrent list or State list.

(ii) Such power shall include the power of making any law imposing a tax not mentioned in either of those lists."

Entry 97 of List I is as follows:—

"Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists."

Entry 97 pertains to "any other matter" not covered in List II or List III and the implied limitation seems to be that the subjects must be other than those already mentioned in List I also. The residuary power has been conferred by way of abundant caution to meet the unforeseen circumstances and contingencies and to deal with topics which have not been dealt with by the Constitution in either of the lists. This power is conferred on the Parliament to make laws that may be necessitated by changing economic and social values. The question of invoking the residuary power does not arise in a case when the subject matter has been dealt with in either of the lists. When all the categories in these lists are exhausted in toto the Parliament is competent to invoke a "non descript". The expression "any other matter" occurring in Entry 97 means and includes the subject which has not been referred to in either of the lists.

(7) The condition precedent for invoking the residuary power is non-mention of the proposed legislation in either of the lists. The non-mention or omission arises when the proposed legislation was not under contemplation of Constitution-makers and omission may be attributed to inadvertence also. The levy of tax in respect of agricultural lands was under active consideration when the Constitution was made and this is amply demonstrated by the dichotomy maintained consistently between agricultural and non agricultural lands in relation to legislative powers of the State Legislatures and the Parliament and also by Entry 86 itself which excludes the agricultural lands from the domain of the Central Legislature. That exclusion or exception is deliberate. Further, this exclusion or exception is an integral part of Entry 86 and affords a clue to the extent of power conferred on the Central Legislature regarding the levy of tax on capital value of the assets. The power of the Central Legislature to levy Wealth tax is confined to properties other than agricultural land.

(8) The residuary power is supplemental and it is intended to supply omissions in either

of the lists. But it is not intended to confer powers on the Parliament in respect of any subject which has been excluded specifically from the realm of legislative power of the Parliament. Entry 86 confers powers on the Parliament to levy Wealth tax on the capital value of the properties except the agricultural lands. The power to levy Wealth tax on agricultural lands is a forbidden field so far as Parliament is concerned and therefore any attempt to bring within the ambit of residuary powers under Entry 97 is tantamount to exercise of powers not conferred under the Constitution.

(9) In the case of *A. G. for Ontario v. A. G. for Canada, 1912 A.C. 571* the Privy Council while interpreting the Canadian Constitution observed as follows:

"In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids".

In the case of *United States v. Classic, (1940) 818 U.S. 299* while interpreting the Constitution it was observed as follows:—

"For in setting up an enduring frame work of Government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of great purposes which were intended to be achieved by the Constitution as a continuing instrument of Government".

(10) The rates in Wealth tax under the Wealth Tax Act, 1957 are highest in the World and the tax realised from this source is considerable. It appears that the attempt to travel outside the powers conferred by the Constitution is prompted by the motive to collect more revenue with a view to meet the increased expenditure. Experimentation in taxation laws has become frequent and the proposed piece of legislation affords a striking illustration.

MARRIAGES OF HINDU MINORS

(By K. S. N. Murty, LL.M., Andhra University, Waltair)

Law of marriage is one of the most important branches of law in any society and usually social thinkers deemed the institution of marriage as a hall-mark of civilisation. Certain legal requirements are prescribed by the society for the validity of a marriage and they vary from society to society and even in

the same society from time to time. In all civilised systems of law, marriage is regarded both as a contract and as a ritual but the difference lies in the relative importance. For example, in the Shastrie Hindu Law, the Dharmashastras recognised that marriage is predominantly a *samskara* while the Muslim

notion of marriage is that it is a civil contract. Broadly speaking, every system prescribed a minimum age limit to the parties to a marriage and many systems recognised the violation of this condition as fatal to the validity of the marriage. But according to the old Hindu law, infancy, far from being a disability to marriage, with reference to brides was considered proper as is evidenced from the injunction of the Smritis that it is the duty of the father or the guardian in marriage, to give away a bride before she attained puberty.(1) But now the statutory Hindu law attempts to give a secular approach and attempts to do away with the spiritual aspect to the extent possible. In that direction the Hindu Marriage Act, 1955 prescribed a minimum age of parties as a requirement of marriage(2) and also prescribed punishment for the violation of that condition.(3) The purpose of this article is to examine whether the marriages in contravention of section 5 (iii) of the Hindu Marriage Act are void?

(2) Unfortunately the Bench and the Bar alike conceded in a recent Andhra Pradesh High Court case, in Raydu Pallamsetti v. D. Sriramulu(4) that a contract of Hindu marriage between minors is illegal and opposed to public policy. Fortunately enough, it is not a pronouncement on the validity of an accomplished marriage. In that case the plaintiff filed the suit for recovery of Rs. 3,000 as being the price of gold ornaments given to the defendants in connection with the contract of marriage between the minor son of the plaintiff and the minor daughter of the defendants 1 and 2. The 2nd defendant, wife of the 1st defendant who was then away at Rangoon, went to the house of the plaintiff to negotiate the marriage of her daughter with the son of the plaintiff. They agreed and there was an exchange of mutual courtesies. The plaintiff gave presents worth Rs. 2,955. The 1st defendant returned from Rangoon and even before that he ratified the action of his wife and the plaintiff in settling the marriage. The marriage fell through and the plaintiff, therefore laid action for recovery of the goldchain and other items presented to the daughter of the defendants or the value thereof. The contention of the parties was not about the nature of the contract, as counsel on both the sides and the Bench seem to have assumed, in the present writer's opinion erroneously, that the contract was illegal and opposed to public

policy, but on the question whether the case falls under the general rule of *in pari delicto* or the exception. The contention of the plaintiff was that the case fell under the exception as the marriage fell through, while the contention of the defendant was that it came within the general rule. For that reason, the reasons for the breach were not considered at all: on the other hand, if the marriage contract is held valid or even void but not illegal, the reasons for the breach would have assumed importance. It is respectfully submitted that the decision is just and right but it is perhaps necessary to reconsider the reasons for the decision.

(3) The interpretation of S. 5 (iii) of the Hindu Marriage Act, 1955 poses two questions namely, whether the marriage of a Hindu minor is valid, voidable, void or illegal and also the further question whether the Child Marriage Restraint Act, 1929, is still effective or impliedly repealed by the Hindu Marriage Act 1958?

Nature of Hindu Minor's marriage: — Under the Dharma Shastras and the old Hindu law a Hindu marriage is either valid as an indissoluble union or void which is a nullity in the eye of law but there is no such thing as a voidable marriage. But the Hindu Marriage Act, 1955 importing the English concepts in secularising the Hindu Law and disannexing the religious moorings classified the marriages into three kinds (a) valid, (b) void and (c) voidable. Now the subtle question is to which of these categories, a marriage of a minor Hindu belongs under the Hindu Marriage Act, 1955? There are only two provisions in the Hindu Marriage Act, 1955 dealing with these marriages. Section 5 which deals with conditions for a Hindu marriage states that the bridegroom shall have completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage.(5) The other provision in the Act is S. 18 (a) which states that every person who procures a marriage of himself or herself to be solemnized under that Act in contravention of the above condition shall be punishable with simple imprisonment which may extend to 15 days or with fine which may extend to one thousand rupees or with both. The validity or otherwise of a Hindu minor's marriage depends upon the construction of S. 18 (a) and its effect vis-a-vis S. 5 (iii) and these provisions may be looked at from different angles and by doing so we can arrive at results which are conflicting with each other in the following ways:

(a) Void: It may be argued that the policy of the modern Hindu law is to secularise the

1. Mayne, Hindu Law & Usage (10th Edn.) 150; Banerjee (5th Edn.) 47-48.

2. Hindu Marriage Act, 1955, S. 5 (iii).

3. Ibid S. 18 (a).

4. AIR 1968 Andh Pra 375.

5. Hindu Marriage Act, 1955, S. 5 (iii).

law and to make the marriage predominantly a contract. In such a case, in view of *Mohoribbi v. Dharmadas Ghose*(6) the consent of a minor is no consent at all and the marriage is void. Further S 5 prescribes the conditions for a valid marriage and the marriage in violation of this condition is made punishable under certain circumstances and so such a contract is not merely void but also is illegal. This is the view, one would perhaps get by a prima facie reading of S 5 (iii) with S. 18 (a) of the Hindu Marriage Act, 1955. In fact this has been the view that has been conceded by both the Bench and the bar in the above Andhra Pradesh High Court decision.(7)

It is respectfully submitted that this argument has some fallacies in it. It presumes that in every contract, the object of which is enjoined with punishment, the contract becomes not merely void but also illegal. The position is not so simple since the area of illegality in the law of contract is a wondrous maze which puzzles and perplexes one who studies the subject without analysis. It is said that basically there are four heads of illegality: namely (a) cases where the contract is in direct contravention of some rule of law (as in the case of a crime) (b) cases in which the object of the contract is contrary or opposed to morality as recognised by the law(8) (c) a vast mass of cases which we commonly class as contrary to public policy(9) and (d) contracts which offend against a statute. Our case comes under the last category. It may, at most be an unlawful contract and not an illegal contract as the object of the Statute is only intended to discourage the practice but not to prohibit the practice which is evident from the fact that it is not rendered void under S. 11 of the Hindu Marriage Act, 1955.

(b) Voidable:—Another possible argument may be that such a marriage contract is voidable. Since marriage is admittedly made consensual, free consent is a requirement. Further, it is expressly provided in the Act that in a case where the consent, either of the party or the guardian when the party is minor, is obtained by force or fraud it is made voidable (10). In the consensual concept, the

consent of a minor cannot be better than the consent obtained by force or fraud. Such a non-free consent renders the marriage voidable.

(8) This view, though more tolerable than the view that a Hindu minor's marriage contract is illegal and void, perhaps is not sound. A reference to the Hindu Marriage and Divorce Bill as amended by the Joint Select Committee would indicate that a marriage solemnised after the commencement of the Act was voidable inter alia on the ground that the marriage contravened the condition specified in Cl. (iii) of S. 5. Such a provision does not find place in the Act and the irresistible conclusion is that the legislature did not intend that such marriages could be avoided. Further the direct answer to the question whether a Hindu minor's marriage is voidable can be found in S. 12 of the Hindu Marriage Act which deals with the topic. This is not covered by S. 12 and hence it may be concluded that the marriage of a Hindu minor is not voidable.

(c) Valid: Yet another possible argument may be that a marriage of a Hindu minor is neither void nor voidable, as it is not covered either by S. 11 or S. 12 and hence the marriage is valid. This is the view taken by the Himachal Pradesh High Court (11). More weighty reasons can be given in support of this view. Some of the important reasons are proposed to be considered here:

(1) Though S 5 attempts to prescribe the conditions for a Hindu Marriage it does not necessarily mean that the marriage is invalid if any of the conditions is breached. If that be so, the title of the section would have been 'conditions for a valid Hindu marriage' instead of 'Conditions for a Hindu marriage'.

(2) Further, though the Act expressly dealt with the effect or the consequence of the violation of every other condition prescribed in S. 5 as rendering the marriage either void under S 11 or voidable under S. 12, it does not provide the consequence for the violation of the condition in S. 5 (iii). The violation of conditions in S. 5 clauses (i) (iv) and (v) renders the marriage void,(12) while that of the condition in Cl. (ii) of S. 5 renders the marriage voidable.(13) The violation of the condition in Cl. (iii) of S. 5 is conspicuously left out which leads to the irresistible conclusion that marriages in contravention of Cl. (iii) are neither voidable nor void which necessarily leads to the inference that they are valid.

11. *Smt. Naumi v. Narasim*, AIR 1963 Him Pra 15, following its earlier decision in AIR 1961 Him Pra 1 (FB).

12. Hindu Marriage Act, 1955, S. 11.

13. Hindu Marriage Act, 1955, S. 12.

6. (1903) ILR 80 Cal 589 (PC).

7. AIR 1963 Andh Pra 875.

8. *Peace v. Brookes*: a contract to let on hire a coach to a prostitute knowing it to be for the purpose of her display in her trade.

9. Such as sale of public offices, interference with administration of justice, individual liberty of trade etc.

10. Hindu Marriage Act, 1955, S. 12.

(3) It is trite knowledge that marriages of Hindu minors before the Hindu Marriage Act, 1955 were governed by the Child Marriage Restraint Act, 1929 (popularly known as Sharda Act). Under that Act also the minimum ages prescribed are the same as under the present Hindu Marriage Act, namely, 18 years for the bridegroom and 15 years for the bride. The marriages in contravention of the Sharda Act have always been held valid⁽¹⁴⁾ though the contravention entailed certain penalties to the persons connected with the marriages. This Act has not been repealed by the present Hindu Marriage Act, 1955 and on the other hand, it prescribed the same ages for marriage and also prescribed punishment for its violation. When the same ages have been prescribed on pain of similar sanction of imprisonment or fine by both the Acts, there is no reason why we should arrive at contradictory results in the consequences of such marriages.

(4) Where the bride is under 18 years of age consent of the guardian is required under S. 6 of the Hindu Marriage Act, 1955. Breach of this condition renders the party at fault, liable to a fine of Rs. 1,000 under S. 18 of the Hindu Marriage Act which indicates that the marriage is valid. In such cases where the bridegroom fails to obtain the consent of his father-in-law he would be liable to pay a fine. If consent is refused by the guardian or if no guardian is there, the necessity of the consent of the guardian is dispensed with which indicates that the requirement of age is only recommendatory and not mandatory and the doctrine of 'factum valet' still applies to such marriages.

(5) If it were to be held that doctrine of 'factum valet' would not apply such marriages would be void and the offspring of such marriages would be illegitimate. The Hindu Marriage Act, 1955 attempts to confer legitimacy on children under S. 16 but it restricts its benefits to children of marriages in respect of which a decree of nullity is granted under Ss. 11 and 12. As is already noted marriages of Hindu minors are not covered either by S. 11 or by S. 12. It is monstrous to suppose that the legislature intended to legitimise children of marriages in contravention of sapinda relationship or relationship of prohibited degrees but not the children of Hindu parents who married during their minority.

(4) Prior to the passing of the Hindu

Marriage Act, 1955 the children of marriages of Hindu minors were held legitimate and it cannot be presumed that the legislature intended to increase bastardy when by S. 16 it manifests its intention of conferring legitimacy on children of parents whose marriages have been even incestuous.

(5) For these reasons it is submitted that under the Hindu Marriage Act, 1955 the marriage of Hindu minors is valid; but the policy of the Act, in the interest of the society, is to restrain people from clinging to the old practice of child marriages by rendering the parties to the marriage liable for punishment.

(6) But before concluding, some thought may be bestowed on the desirability of leaving this area of the law unaffected by the modern statutory Hindu law which has its predominant objects of secularising or westernising the law. If the Hindu Marriage Act, 1955 is left as it is, it is giving scope to the courts, as it was done in the above Andhra Pradesh High Court decision, to take the extreme view that the marriage contract is void and illegal. In the Hindu society, where majority of the people are illiterate and whose minds have been moulded to adapt the judicial principle that custom decides everything and overrides even the written text of the law, marriages below the ages prescribed by the statute are frequent and in due course of time it would lead to the monstrous result of bastardising a major part of the Hindu society. To avoid this consequence, it is better to make it clear, instead of leaving it for interpretation, that such marriages are valid by introducing the clause 'notwithstanding the fact that marriages are valid' in the beginning of clause (a) of S. 18 of the Hindu Marriage Act. On the other hand, when there is a change over in the concept of marriage, when fatalistic philosophy is intended to be eliminated and when marriages are not indissoluble, child marriages are no more desirable. They encourage marriages brought about by parents when the institution of marriage is intended to be developed on the corner stone of mutual affection as is evidenced by the law of divorce based not only on faulty theory but also on the breakdown theory the law dealing with the validity of child marriages also should be changed. The Muslim theory of 'Khyar ul bulugh' may be more suitable to the modern Hindu society also. So it is submitted, that it is desirable to render such marriages as voidable and express provision may be made under S. 12 of the Hindu Marriage Act to that effect with a proviso that the right can be exercised only before the marriage is consummated.

REVIEWS

A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750. By Leon Radzinowicz, Published by Stevens & Sons, London, Agents in India N. M. Tripathi (P) Ltd., Princess Street, Bombay.

The series is designed to trace great movements in the evolution and enforcement of the English Criminal Law. This is the fourth volume dealing with the topic "Grappling for Control"

At the end of 18th Century the enforcement of law in England depended upon the unpaid parish Constable and the offer of rewards. Riots were quelled upon intervention of armed forces. Systematic enforcement of law replaced suspended terror as the basis of control only by 1861 when a network of professional police charged with prevention of crime, detection of offenders and maintenance of order, was spread.

The book under review follows through to their culminating points two protracted campaigns, on one side for the reform of the Capital laws, on the other for the establishment of regular police.

There is a Bibliography and useful index at the end. G.G.M.

LAW OF SESSIONS TRIAL. By Rao and Bhimiah, with a foreword by Hon-H. Hombe Gowda, Chief Justice, Mysore High Court. Published by Bharadwaj Publications Ltd., Bangalore 9.

This is the first Volume on the subject in which the learned authors have dealt with the offences affecting life and those relating to Government Stamp, Public Justice and Coins etc. The major portion of the book deals with offences affecting life

The book contains an analytical discussion of several sections in the Indian Penal Code. Every proposition stated is supported by a copious reference to case law. Further, to give the emphasis on the right aspect, extracts from the decisions have been given

The book is intended to spare the troubles of looking into various commentaries for the discussion on relevant law. It is hoped that the 2nd volume dealing with procedural aspects of Sessions trial based on Code of Criminal Procedure and the Evidence Act will be equally complete on the subject.

There is a very useful table of cases and an Index. G.G.M.

"FORMATION OF CONTRACTS" A Study of Common Core of Legal Systems. General Editor: Rudolf B. Schlesinger. Volumes 1 and 2, Pages 1701. Published by Oceana Publica-

tions, Inc. Dobbs Ferry, N. Y., U. S. A. and Stevens & Sons Ltd., London. Price \$ 35 00 (2 Volumes).

These two volumes on "Formation of Contracts" are the result of a research project carried on during the last ten years at the Law School of Cornell University. The project was undertaken with a view to ascertain in an important area of the law of contracts, the extent to which there exists common ground or a common core, among a major portion of the world's legal systems. The aim of the study is twofold, (1) to enhance professional knowledge in the selected area of the law of contract by finding common ground as well as differences among legal systems and (2) to test the feasibility of the research method developed and used in the course of the Cornell Project.

On going through the pages of these Volumes, even cursorily it becomes apparent that the attention of the scholars participating in the Project has been focussed on what the law is and not what it ought to be. It is as it ought to be, for the latter is the purpose of the legislatures and the law reformers. A research undertaking aimed at finding and formulating a multinational "common core" in a relatively wide area of the law must pose formidable difficulties and it is due to grant received from the Ford Foundation that it was made possible to undertake the study.

The subject of 'Formation of Contracts' is divided into two parts, (1) Offer and (2) Acceptance. Volume One deals with 'Offer' and Volume Two with 'acceptance'. Law is discussed in the form of reports based on the prevalent law from various nations, such as England and Commonwealth Countries including India, France, Germany, Austria etc. There are reports based on Communist legal systems, Italian legal system and African legal system. Every report is supplemented by Bibliographies

In the First Volume every aspect of the law of offer in various legal systems, is discussed. While discussing the Indian system it is pointed out that "proposal" in Indian law is 'proposition' which includes offer as well as invitation to deal. Distinction between 'offer' and 'invitation to deal' is very fine and subtle. This is discussed with the help of decided cases on the Indian Contract Act. Offer by correspondence is another aspect which also is discussed. (P. 875) On page 705 is discussed the topic of 'communication of offer', whether it is necessary under the Indian legal system, and the various stages of communication. Discussion as to when revocation of offer becomes effective is found on page 859. While discussing the question, whether communication

of revocation is necessary under the Indian law, (P. 824) the case of *Dickinson v. Dodds*, (1876) 3 Ch Div 463 is fully discussed and examined in all its aspects and how far it is still good law in India. In this respect "Pollock and Mulla's" opinion also has been examined.

The second division of Volume 1, is divided into 13 parts wherein all the aspects of the law of 'offer' are discussed. Part 1 deals with "Offer or Invitation to Deal". Then comes "Sale at Auction". Parts 3 and 4 embrace the subjects of "Definiteness of Terms" and "Offers Calling for a Promise and Offers Calling for an Act". Whether offer is one for entire contract or for several contracts is discussed in Part 5. 'Parties to Contract', 'Offers to the Public', "Communication of the Offer" and 'when offer becomes effective' are dealt with in parts 5 to 9. The next three parts are devoted to the subjects of revocable and irrevocable offers, whether communication of revocation is necessary and when does revocation become effective. The subject matter of the last part is "Termination of Offer by Death or Insanity."

Volume Two embraces the other part of the formation of contract, namely "acceptance" of the offer. Other problems concerning "conclusion of Contracts" are also discussed in this Volume. Like "Offer" in the first Volume, the topic of 'Acceptance' is discussed in 11 parts, beginning with 'who may accept an offer' and 'Assignability of offers,' followed by discussion on "Qualified or Unqualified Acceptance". "Rejection and Return Offers" is dealt with in the next part. Parts 5 and 6 deal with modes of acceptance, namely, acceptance by silence and by performance. Whether communication of acceptance is necessary, the means of declaring and communicating acceptance, when acceptance becomes effective, time limit for acceptance and the effect of late acceptance, are discussed in subsequent parts.

Other aspects concerning conclusion of contracts, are discussed in two parts. "Manifestation of Assent without Identifiable Sequence of Offer and Acceptance" and 'Effect of an agreement contemplating a writing or other formality'.

The complete law dealt with in these volumes is contained in Ss. 3 to 9 of our Contract Act. Under each part above mentioned, legal systems of various nations are discussed. Not only for International trade and commerce, the knowledge of various legal systems in the matter of formation of contracts is essential, but also for international understanding, this knowledge will go a great way. Importance of the study of comparative jurisprudence in understanding one's own legal system, cannot be denied. These two Volumes will be found of great use to international jurists and law-

yers and men of commerce. For Indian Students, in these days of internationalism, comparative study of commercial law is very essential. These Volumes will be found very useful.
R.G.D.

THE INDIAN CONVEYANCER, 7th Edition, 1968, by P. C. Mogha, Revised by Shri Ambika Prasad Srivastava published by Eastern Law House (P) Ltd. 54 Ganesh Chunder Avenue, Calcutta, Price Rs. 24/-

The book under review does not need any introduction at all. Mogha is a great name for the practitioners in India. No beginner in the profession can afford to ignore the name of Mogha. Like his book on *Precedents*, the *Conveyancer* is equally an indispensable work for the practitioner.

The book, a most reliable guide in conveyancing has removed the longfelt want of the profession. Complex legislation has resulted in emergence of various forms of deeds of every day use. The book covers a wide range adopting suitably the technical expressions of English precedents to Indian needs. The book is very helpful.
G.G.M.

A CASE BOOK ON TRUSTS—By O. R. Marshall, Published by Stevens and Sons, London, Agents in India N. M. Tripathi (P) Ltd. Bombay.

This is the fifth edition of the book originally written by J. A. Nathan in 1939.

The present edition has undergone many changes. In dealing with the distinction between Trusts and other relationships, the learned author has completely re-written the topic Trusts and Contracts.

The nature of the interest of a beneficiary under a trust is controversial. Whether the equitable interests arising under the trust could be said to be generally in personam but exceptionally in rem or wider than in personam but not quite in rem would depend on the meaning to be assigned to the terms right in personam and right in rem. This can be visualised by a reference to *Schalit v. Joseph Nadler Ltd.* (1933) 2 K B 79 and *Baker v. Archer Shee* (1927) A C 844. The learned author has commendably dealt with this topic by reference to other cases in the matter.

The changes have enabled the learned author to achieve a better balance between various parts of the book. There is an index and the table of cases.
G.G.M.

COMPANY LAW SIMPLIFIED —
(Second Edition) By Mrs. Khorshed
D. P. Madon Published by Progressive
Corporation Private Ltd. Bombay,
Price Rs 6/-

The Companies Act in India is a Statute around which has grown a labyrinth where there is no golden thread. Plight of students about to undertake an examination can be well imagined. Mrs Khorshed D P Madon with the experience as a Principal of the famous Davar's College of Commerce has been able to cater to the needs of the Students.

The book under review presents the provisions of Companies Act in a manner that would be none too difficult for students to follow. The 'contents' section contains, besides the title of Chapters the topics dealt with under those Chapters. There is an appendix containing questions that have been asked in various examinations so far.

The utility of the book is indicated by the fact that this second edition has come out within two years of the first edition in 1966.
G.G.M.

**THE LAW OF INDUSTRIAL DIS-
PUTES,** By O. P. Malhotra, B.A.,
B.L., Advocate, Supreme Court of
India, Foreword by M. C. Setalvad,
Published by N. M. Tripathi, Private
Ltd Princess Street, Bombay 2. 1968.
Pages 1085, Price Rs. 60-00

Law relating to investigation and settlement of industrial disputes between the employers and employees, is generally known as an industrial law which is also described as labour law. The two aspects of industrial law i.e. of legal principles governing the relations of labour and management seen as collective entities are, the law of industrial peace and industrial warfare. As said by Gajendragadkar J, in (1968) II L.L.J 496 (S.O) "the ultimate object of industrial adjudication is to help the growth and progress of national economy and it is with that ultimate object in view that industrial disputes are settled by industrial adjudication on principles of fair play and justice." In order that industrial adjudication should be completely free from the tyranny of dogmas or the subconscious pressure of pre conceived notions, it is of utmost importance that the temptation to lay down broad principles has to be avoided. Throughout the decided cases, these principles are adhered to in order to do social justice. In settling disputes between employers and the workmen, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and

privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them, which it considers essential for keeping industrial peace. From the study of cases decided by the Supreme Court of India and the various High Courts, it becomes obvious, that few problems in the law have given greater variety of application and conflict in results than the cases arising in the border land between what is clearly an employer-employee relationship and what is clearly one of, independent entrepreneurial dealing.

The purpose of the book is to make available, to the industrial lawyer as well as those who deal with the laws relating to industrial disputes, the exposition of this branch of jurisprudence, by their Lordships of the Supreme Court in their decisions. The philosophy of industrial adjudication and its purpose beginning with the decision in the case of Western India Automobile Association, AIR 1949 F O 111 and ending on the somewhat divergent views in the cases of Muir Mills, AIR 1955 S O 170 and J. K. Cotton & Spinning and Weaving Mills, AIR 1964 S O 787 have been traced through the differing shades of judicial pronouncement to which they have been subjected (pages 19, 24). The vexed question of the scope and extent of the definition of 'industry' in the Industrial Disputes Act, its contradistinction from other concepts and finally its characteristic attributes have received exhaustive treatment by the author, based on all the relevant decisions (Pages 65-79). Position of an independent contractor, and the tests to be applied in determining the relationship of employment have been fully investigated, the propositions being supported by a number of decided cases put in the form of illustrations (pages 151-162). The learned author's comprehensive treatment of Ss 88, 89A and 89C of the Act, deserves being specially noted. The author, in making his own comments on decisions, has not minced matters. His comments and suggestions deserve careful study. If the book is studied objectively, it must be said that the author has made a notable contribution to industrial laws by publication of this treatise.

As regards the scheme of the book the first Division deals with section-wise commentary on the Industrial Disputes Act (1947). The voluminous case law has been dealt with under appropriate headings. At the end of the division, appear two appendices, one giving the text of the Act and the other, rules under the Act. The second Division deals with Payment

of Wages Act, 1965. Division 3, has dealt with wages, dearness allowance, gratuity, non-statutory bonus and miscellaneous service conditions. "Disciplinary action" is found discussed in Division IV. Constitutional remedies against defective and arbitrary awards are dealt with in the last Division (Div. V). The book is written: both for a lawyer and for those who, whether as personnel officers of management or trade union officials are interested in industrial adjudication. We are confident, that the book will be well received and widely appreciated. R.G.D.

COMPANION VOLUME TO "GENERAL SALES TAX LAW IN MADHYA PRADESH" INCORPORATING UP-TO DATE AMENDMENTS. By: M.C. Gupta, B.A., LL.B., Advocate and Tax Consultant, 1968. Publishers: Wadhwa & Company, Law Book-sellers and Publishers, 27, Mahatma Gandhi Road, Rampurawala Building, Indore-2. Pages 187. Price 12.50

This is a companion volume to "General Sales Tax Law in Madhya Pradesh" which was published in March 1967, followed by a free supplement in January 1968. In addition to the various amendments in the Act, Rules and Notifications, this volume gives a legislative history of Sections and Rules of the M. P. General Sales Tax Act, 1958 from 1.4.1959 to 31.7.1968. This serves the purpose of a ready reference showing how the Sections and the Rules were amended. This volume also gives the text of the M. P. Vritti, Vyapar, Ajivika, Aur Sevayojan Kar (Samsodhan) Adhyadesh, 1968. This companion volume will be found very useful to those who possess a copy of the original book. R.G.D.

COMPANY LAW. By Robert R. Pennington, LL.D.; Solicitor; Senior Lecturer in Commercial Law at the University of Birmingham — Second Edition, 1967. Selling Agents in India — Eastern Law House Pvt. Ltd., Calcutta. Pages 815. Price in India Rs. 67-50.

As in India, during past recent years Company law in the United Kingdom has been increasingly affected by legislation. In this edition the learned author has discussed all the changes and the practices and usages, unaffected by legislation. The Companies Act of 1967 is, of course, fully treated. New changes, based on the recommendations of the Company Law Committee, are yet to come. But this is not expected to come earlier than

1969-70. Frequent changes in such a law are expected to meet ever-changing situations and needs. The present edition is divided into VII Parts. "Corporate personality, Rights and Liabilities" is the subject matter of Part I, which consists of five Chapters. Part II is headed "Share and Loan Capital." It consists of eleven Chapters. "Management and Control" is the topic of Part III consisting of six Chapters. First two Chapters deal with "Promoters" and "Directors and Secretaries." While discussing the principle of majority rule in another Chapter the rule in *Foss v. Harbottle*, (1843) 2 Hare 461 is examined threadbare along with the exceptions to the rule. Part IV is devoted to the Stock Exchanges. "Private Companies, Companies limited by Guarantee and Unlimited Companies" is subject matter of the next part. Winding up, reconstruction and amalgamation of companies are the topics of Part VI. The last Part is devoted to "Unregistered Companies and Unit Trusts."

To company lawyers and the company secretaries in India, this authoritative exposition of the English Company law will be found immensely useful in interpreting the law and practice in India. Our Companies Act of 1956, though not in every respect, follows the English law. Wherever there are differences, they are due to local conditions and practices. To the advanced students also the book will serve as a companion book to the Indian Companies Act. R.G.D.

A STUDY OF INDUSTRIAL LAW (Labour Laws) by Ganpatlal M. Kothari. Published by C. Jamnadas & Co. Educational & Law Publishers, 146-C, Princess Street, Bombay 2 and 1297/167, Relief Road, Ahmedabad 1 Pages 705. Price Rs. 20/-.

In today's economy of a nation, labour and industrial jurisprudence play a vital role, for, on good relationship between an employer and his workmen depends the whole fabric of industrial development. Of late therefore, a special class of legal practitioners specialising in labour and industrial laws has grown. In many big industrial establishments labour officers are appointed. Thus any good literature on the subject of these laws is always welcome. Already there are many good books having different approaches, all good in their own way. Mr. Kothari the learned author of this book is not new to the subject. As a former Judge and Labour Arbitrator he brings to the book the objectivity which is a very essential requisite for any balanced study. As a professor of Labour Law for LL.M., as professor of Merchantile Law for LL.B. he

fathoms deep into the currents of modern labour laws. He understands the needs of the students and he has written for them. Mr. Kothari is not new to the profession of legal writing. There are many books to his credit.

To understand the spirit of the modern labour and industrial laws, one should have a clear grasp of the historical background of social upheavals. Chapters on "Sociological Basis of Industrial Law" and on "Development of Industrial Law in India" have been added. We have no hesitation in saying that they form the best part of the book, for nowhere, one would get such a historical perspective so nicely written in a small compass of a very few pages.

The subject-matter is treated subjectwise and we think in a book written for students and laymen, such a treatment is always better. It enables the author to make the subject interesting. A sectionwise commentary gives an artificial appearance to the subject and is an headache to a student who is being introduced for the first time to the subject. Moreover to a layman topical treatment is always welcome.

We would, however, suggest one improvement for the next edition. We find that the definition Chapter and the Chapter dealing with notes thereon should have been near each other, so that the notes can be studied along with the definitions. For example definition of 'Retrenchment' appears on Page 65 and the Commentary or the Case law on it appears on page 165. As is wellknown by now, the definition has been greatly amplified by their Lordships of the Supreme Court, by giving the word its natural meaning. If both the matters were brought together, the understanding of the reader would have been easy. At least there should have been mutual cross reference by page numbers to the topics.

Our another suggestion is, to make the questions, given at the end more specific. Some of the questions are too general to mislead a

student. Question No. 194 is too general. It should have been made clear that the workmen whose conditions of service have been altered, have an interest in the pending dispute, to bring the question under the scope of S. 38 of the Industrial Disputes Act. One other improvement we would suggest, is to give references to pages where the answers to the questions would be found in the book.

Besides the Industrial Disputes Act, 1947, the book deals with the Factories Act 1911, Payment of Wages Act, 1936, Minimum Wages Act, 1948, Payment of Bonus Act, 1965, the Employees Provident Funds Act, 1952, Workmen's Compensation Act, 1923, the Employees State Insurance Act, 1948, the Industrial Employment (Standing Orders) Act, 1946, and other miscellaneous Labour laws.

There is one printing mistake we would like to point out. The matter on page 72 is repeated on page 73. This error is apparent and obvious and in no way detracts from the quality of the book. R.G.D.

HINDU LAW : 2nd Edition. By D. Pathak, LL.M (Lond.); Published by New Book Stall, Gauhati, Assam, Price Rs 11/-

The first edition of the book under review was published in the year 1962. Codification of some of the branches of the Hindu Law has introduced some features hitherto unknown to Hindu Jurisprudence. Divorce is one of these. The learned author has endeavoured to examine the impact of Statutes on the Hindu Law in the light of latest decisions of the Supreme Court and other High Courts. Like any other text book, the book deals conventionally with all the topics of Hindu Law starting with the sources, applicability and ending with the Charitable endowments.

Besides general index various statutes have been reproduced in the Appendices at the end G.M.

BOOKS RECEIVED

LAW QUARTERLY Vol. 5, No. 2 — June 68—Journal of the Indian Law Institute, West Bengal State Unit — Editor Amerendra Nath Mukherjee.

AIR 1969 N. S. C. 39 (V 56)

HEGDE, J. (SIKRI AND BACHAWAT, JJ. Concurring)

The Sub-Divisional Officer, Sadar, Faizabad v. Shambhoo Narain Singh.

C. A. No. 721 of 1966, D/- 31-3-1969.

Panchayats — U. P. Panchayat Raj Act (26 of 1947), Section 95 (1) (g).

On challenge to legality of the order of the Sub-Divisional Officer, Sadar, Faizabad suspending the elected Pradhan of the Gaon Sabha of Asapur under Section 95 (1) (g) of the U. P. Panchayat Raj Act, 1947, the Division Bench of Allahabad High Court, reversing the order of dismissal of the learned single Judge quashed the order of the S.D.O. holding that Sec. 95 (1) (g) did not empower the appellant to pass the impugned order.

Held, a Pradhan cannot be considered as a servant of the Government as he is an elected representative. There is no contractual relationship between him and the Government much less the relationship of a Master and servant. His rights and duties are laid down in the Act. The Gaon Sabha is itself a creature of Statute. There was no specific power to suspend the Pradhan conferred on the State Government under the Act. The power of suspension is not absolutely essential for the proper exercise of the power of punishment conferred by Section 95 (1) (g). The Court further held that the State Government could not in law delegate the power of suspension to the S. D. O. which power the State did not possess.

Cases relied upon—

Smt. Hira Devi v. District Board, Shahajanpur, (1952) SCR 1122 = AIR 1952 SC 362; The ratio of Babunandan v. S. D. O. Salempur, AIR 1966 All 158 was approved.

Cases distinguished—

Management of Hotel Imperial v. The Hotel Workers Union, (1960) 1 SCR 476 = AIR 1959 SC 1342; T. Cajee v. H. Jormanik Siem, (1961) 1 SCR 750 = AIR 1961 SC 276; R. P. Kapoor v. Union of India, (1964) 5 SCR 431 = (AIR 1964 SC 787); Balwantrai Ratilal v. State of Maharashtra, (1968) 2 SCR 577 = (AIR 1968 SC 800).

AIR 1969 N. S. C. 40 (V 56)

SIKRI, J. (BACHAWAT, HEGDE, JJ. Concurring)

Ranjitbhai Nathubhai Desai v. State of Maharashtra.

Cri. A. No. 235 of 1968, D/- 2-4-1969. Penal Code (45 of 1860), S. 302.

On a sentence of death passed against the accused by the Trial Court Judge and confirmed by the High Court the appeal was preferred to Supreme Court.

The Supreme Court found that the evidence was circumstantial and the circumstances led to one and only one conclusion that the appellant deliberately murdered his wife and stage-managed a suicide. The Court found that even if the statements objected to by the accused on the ground of violation of Section 162 of Cr. P. C. are excluded there was sufficient evidence to establish guilt of the accused. The Court did not find any justification to convert the sentence into imprisonment for life.

AIR 1969 N. S. C. 41 (V 56)

MITTER, J. (HIDAYATULLAH, C. J., SHAH, RAMASWAMI, GROVER, JJ. Concurring)

Union of India v. Jagjit Singh.

C. A. No. 1111 of 1965, D/- 1-4-69.

The Police Act (V of 1861), Section 4 — Punjab Police Rules, 1934, Rules 16 (1), 16.24, 16.38.

The dismissal of the respondent, a Sub-Inspector of Police, was challenged as being illegal on the grounds (1) that the officer who was entrusted with the Departmental Enquiry being an Officer re-employed after the retirement was not a Police Officer for the purposes of the Rules, (2) the said Police Officer was not a District Superintendent of Police as required by the Rules and (3) that there was no compliance of conditions laid down in Rule 16.38 of the Punjab Police Rules 1934.

Held, that the Officer after re-employed and posted in a different Department would still be a Deputy Superintendent of Police and in any case a superior officer within sub-rule (1) of Rule 16.24 of the Rules. The Court found that the words "Superintendent of Police" in the Rules and the words "District Superintendent of Police" in the Act refer to one and the same authority and that the distinction was made only for the sake of admini-

strative convenience. On facts the Court found that the requirements of Rule 16 38 sub-rules (1) and (2) were complied with before the dismissal was ordered.

Hyderabad State continued to operate by virtue of Article 85 (b).

AIR 1969 N. S. C. 42 (V 56)

HIDAYATULLAH, C. J. (SHAH, RAMA-SWAMI, MITTER AND GROVER, JJ.
Concurring)

A. V. S Narasimha Rao v. The State of Andhra Pradesh.

C. A. No. 45 of 1969, D/- 28-3-1969.

Public Employment (Requirement as to Residence) Act (44 of 1957), Section 3 — Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959

In exercise of the powers conferred by the Rules (1959) framed by Andhra State, under Section 3 of the Public Employment (Requirement as to Residence) Act, 1957, the Andhra Pradesh Government relieved all employees who were not domiciles of Telangana area from certain categories of posts reserved for the employees belonging to Telangana. They were to be employed in Andhra region of the State by creating new posts

On a writ petition challenging the constitutionality of the impugned order the Supreme Court held (1) that the legislative power to create residential qualification for employment is exclusively conferred on Parliament and not on State Governments, (2) Parliament can make any law which prescribes any requirement as to residence within the State or Union territory prior to the employment or appointment to an office in that State or Union Territory, (3) The rationale behind the reservation is sometimes respect for the local sentiments and sometimes the fear of inroad from more advanced States into the less developed States. (4) The Constitution speaks of a whole State as the venue for residential qualification and the Constitution-makers did not intend to allow reservations on the ground of residence in Districts, taluqas, cities etc. The Court further held that Section 8 of (Andhra Pradesh) Public Employment (Requirements as to Residence) Act, 1957, in so far as it relates to Telangana and Rule 3 of the Rules (1959) under it are ultra vires of the Constitution. The Court did not express any opinion on (i) whether the delegation of making reservations can be delegated by the Parliament either to Central or State Government and (ii) whether Muldi rules existing in the former

AIR 1969 N. S. C. 43 (V 56)

HEGDE, J. (SIKRI AND BACHAWAT, JJ. Concurring)

J. K. Choudhury v. Birendra Chandra Dutta.

C. A. No. 1702 of 1968 D/- 8-4-1969.

Representation of the People Act (43 of 1951), Section 123 (2).

The election of the appellant was set aside by the High Court on the following grounds—(1) procuring services of a Government Servant for the furtherance of the prospects of election, (2) discrimination between the two political parties in the matter of supply of supplementary voters list, (3) Terrorisation of voters materially affecting the result of the election, (4) appeal to communal feelings, (5) promoting feelings of enmity and hatred between different classes of citizens and (6) publication of false statement of facts relating to personal character or conduct of the respondent.

Held no witnesses examined on behalf of the respondent have testified that Mr. Chakravarty, a Government servant, canvassed on behalf of or at the instance of consent of the appellant. Want of proof is fatal to the respondent on the basis of *Shri Baruram v. Smt. Prasanni*, (1959) SCR 1403 = AIR 1959 SC 93. The respondent failed to prove that any inconvenience was caused to him by the non-supply of the Supplementary Voters list. The Court found that the charge of discrimination was not proved as neither the appellant nor the respondent was supplied with the supplementary list. The Court pointed out that the contravention of Article 14 of the Constitution even if it is true, is not the electoral offence. The Court further held that there was no evidence on record to show that the alleged assaults on the respondent's partymen were either engineered or were made with the consent of the appellant. The Court observed, "during election times when the emotions are roused and party feelings worked up it is not uncommon to have such incidence here and there but that does not mean to an undue influence under Section 123 (2) of the Act. It was held that the appellant's speech in which he had criticised the move of the Communist party to bifurcate Tripura and its effect on the refugees and the charge that the Communists

party had taken recourse to communalism in the speech does not mean to an appeal to vote or refrain from voting on the ground of religion, race, caste or community nor does it mean to promote feelings of enmity or hatred between different classes of citizens. Or also, the Court held that the pamphlet alleged to have been published by the appellant in which the Communist Party was criticised was a criticism of political party and not the personal character and conduct of the respondent. The Court relying on *Gangi Reddy v. Anjaneya Reddy*, (1960) 22 Ele LR 261 (SC) and *S. B. Jivatode v. Vithalrao*, (C. A. No. 1778 of 1967, D/- 19-11-1968 (SC)) held that a statement may be considered as one relating to personal character or conduct of a candidate if it relates to his mental and moral nature and not to his political opinion or activities. The statement that the respondent propagated the partition of Tripura was a political criticism. The Court further held that the alleged insinuations of murderous attack were against the Communist Party and not against the respondent. It was, therefore, held that no corrupt practice under Section 123 (2) was proved. It was held that an adverse effect on the Bengalis of the partition of Tripura adverted to in the pamphlet was not an appeal on the ground of religion, race, caste or community within the meaning of Sec. 123 (3). *Kulthar Singh v. Mukhtiar Singh*, 1969-7 SCR 790 was relied upon to test whether the speeches and the pamphlets would create in the mind of the ordinary voter the feelings of ill-will on the ground of caste, religion, creed etc.

AIR 1969 N. S. C. 44 (V 56)

**SHAH J. (RAMASWAMI,
AND GROVER JJ. concurring).**

Shrimati Sahodrabai Rai v. Ram Singh Aharwar and others.

C. A. No. 1576 of 1968 D/- 8-4-1969.

Representation of the People Act (43 of 1951), Section 123 (2) (a) (ii).

The appellant challenged the High Court's order dismissing his petition challenging the election of the respondent on the following grounds :— (1) The appellant could not produce all the evidence as the High Court had issued a contempt Notice to the appellant for his application to the Chief Justice for transferring the case to some other Judge. (2) The first respondent, his agents and workers circulated a pamphlet appealing to the voters in the name of religion. (3) Some votes were wrongly rejected and the ap-

plication for recount was unlawfully rejected. (4) That the respondent circulated rumour that the dacoits were likely to attack the voters on the polling day which resulted into the absention of large number of voters.

Held, that the appellant had not made out satisfactory ground, that she could not examine her witnesses or that the lawyer's help was not available to her. In fact the appellant had secured the services of another lawyer immediately after the original lawyer had resigned. It was held that pamphlet criticising the Congress Party as being responsible for the killing of cows, bullocks etc. did not violate Section 123 (2) (a) (ii) of the Act. *Pandit Shrikrishna Salot v. Ramchandra Pujari*, (C. A. No. 978 of 1968 D/- 21-1-1969 (SC)) was relied upon. On the basis of the evidence of the Returning Officer the Court found that there was no improper rejection of the ballot papers in blue ink (which in fact should be in red ink) and there was no discrimination shown to the appellant in the matter of counting. The plea of the appellant for recount based on *Rajaju v. Brij Kishore* (C. A. No. 1181 of 1968 D/- 25-2-1969 (SC)) was rejected by the Court by distinguishing the said decision on facts. In that case the Returning Officer had ordered a recount but after a partial recount the same was abandoned. Since the votes were not improperly rejected in the instant case there was no ground for recount. The Court also held that the respondent was not proved to be responsible for spreading any false rumour regarding the attack of the dacoits, the appellant's evidence was a hearsay evidence and suffered from serious infirmity.

AIR 1969 N. S. C. 45 (V 56)

**HIDAYATULLAH C. J., (RAMASWAMI
AND MITTER JJ. concurring)**

State of Punjab v. Chandu Lal Kishori Lal.

C. A. Nos. 2516-2519 of 1966 D/- 27-2-1969.

Sales Tax — Punjab Sales Tax Act (1948), Section 5 (2) (a) (vi) — Central Sales Tax Act, 1956, Sections 14 and 15.

The respondent firm had a business of purchasing unginned cotton and after ginning the cotton by mechanical process and removing the seeds to sell the ginned cotton to customers outside the State. In respect of cotton seeds sold by it to registered dealers the respondent claimed deductions from the purchase turn over under S. 5 (2) (a) (vi) of the Punjab Sales Tax Act, 1948 on the ground that cotton seeds was not a different commodity from cotton. The assessing authority rejected the claim. The High Court in

the writ petition filed by the Respondents quashed the assessment. Letters Patent Appeal preferred by the Appellant was dismissed.

The Supreme Court allowed the appeal and held "Declared goods" in Section 14 of the Central Sales Tax Act, 1956 are individually specified under separate items; "cotton ginned or unginned is treated as a single commodity under one item of declared goods. Therefore cotton ginned and un-ginned cannot be subjected to a tax exceeding 2% of the sale or purchase price thereof or at more than one stage under Section 15 (1) of the Central Sales Tax Act, 1956. By manufacturing process the cotton and the seeds are separated and become two distinct commercial goods. The respondent was not entitled to deduction in respect of cotton seeds sold under Section 5 (2) (a) (v)

AIR 1969 N. S. C. 46 (V 56)

BACHAWAT J

(SIKRI, HEGDE, JJ. concurring)

Mohd. Hussain Umar Kochra etc. v. K. S. Dalipsinghji and another.

Cr. A. Nos 139 to 144 (NC) of 1966 D/- 31-3-1969

Sea Customs Act (8 of 1878), Section 167 (81) — Foreign Exchange Regulation Act (1947), Sec. 8(1) Penal Code: Section 120 (b) Criminal Procedure Code — Section 503—Evidence Act, Section 114 III. (b) and Sections 133 & 124.

The appellants along with other accused were prosecuted for criminal conspiracy to import and deal in gold punishable under Section 120 (b) of the Indian Penal Code read with Section 167 (81) of the Sea Customs Act 1878 and for substantive offences punishable under Section 167 (81) The High Court dismissed the appeals filed against the convictions ordered by the Trial Court.

The Supreme Court acquitted the accused in appeals Nos. 140 and 141. In appeals Nos. 130, 142 and 143 and 144, the Supreme Court upheld the convictions but directed that all sentences should run concurrently. The Supreme Court held that there was a single general conspiracy to smuggle gold in India as each conspirator profited from the general Scheme and each one of them played his own part in the general conspiracy. The Court pointed out the difference between a single general conspiracy and a number of unrelated and separate conspiracies with the help of three cases, S. K. Khetwani v. State of Maharashtra, (1967) 1 S. C. R. 595 : AIR 1967 SC 450, S. Swaminathan v. State of Madras, (AIR 1967 S. C. 340 and R. v. Griffiths, (1965) 2 All ER 442. In answer to appellants' contention that the privilege under Section 124 in respect of the disclosure of

certain addresses and cables claimed by the Customs and Postal authorities was wrongly allowed by the Trial Magistrate, the Court held that the privilege was not properly claimed under Section 124 but held that the non-disclosure has not resulted into failure of justice. The Court also rejected the appellants' contention that the Magistrate wrongly refused to issue the commission to examine the witnesses staying abroad. The Court found that the application for commission was misconceived and no proper grounds were shown in it. The Court further held that the Magistrate was right in disallowing the plea for recalling one of the witnesses. The Court did not find it necessary to express the final opinion on the question whether a fraudulent evasion of the duty in imports and exports by Air was punishable under the Sea Customs Act, as the Court found that the fraudulent evasion of the restrictions imposed by Section 8(1) of the Foreign Exchange Regulation Act, 1947 was punishable under Section 167 (81) of the Sea Customs Act, 1878. The Trial Court and High Court had relied on the testimony of the accomplice. The Court explained the requirements of Section 133 read with Section 114, III. (b) of the Evidence Act and examined each of the cases to find out whether accomplice's testimony was corroborated by independent evidence.

Cases referred to—

(1963) 3 S. C. R. 831—AIR 1963 SC 599; (1916) 2 K. E. 639, (1954) A. C. 378; 70 Bom. L. R. 540 = AIR 1968 SC 832; L. R. 76 I. A. 146 = AIR 1949 PC 257.

AIR 1969 N. S. C. 47 (V 56)

SHAH, J (GROVER, J. concurring)

S. Jhansi Lakshmi Bai v. Pothana Apparao.

C. A. No 445 of 1966, D/- 17-3-1969. Indian Succession Act (39 of 1925), Section 105.

Under a will made by the deceased his wife as a legatee was obliged to apply one set of property for performing certain marriage and the balance to be remitted to a certain temple. The other set of the property was to be enjoyed by the wife absolutely throughout her life and afterwards was to pass to two legatees mentioned in the will. The wife died during the life time of the testator and the marriage mentioned in the will was performed when the testator was alive.

In modifying the decree passed against the appellant claiming the properties as the heirs of the testator the Supreme Court held that the two bequests regarding the first set of the property were not

joint bequests and therefore only a bequest regarding the marriage expenses had fallen? and could vest in the appellant by way of intestacy due to wife's death during the life time of the testator. But the bequest for the temple was valid. In respect of the second set of the properties the Supreme Court held that the rule in *Browne's case*, (L. R. 14 Equity Cases 343) did not apply to the cases covered by Section 105 of the Indian Succession Act, 1925. Section 105 (1) does not say nor does it imply that the testator must have expressly envisaged the possibility of lapse in consequence of the legatee dying during his life time and must have made a provision for that contingency. The Court further held that the gift in favour of two legatees was accelerated by the death of the wife during the life time of the testator.

Cases relied upon:

Jogeswar Narain Deo v. Ram Chund Dutt, (1896) 23 Ind App 37 = ILR 23 Cut 670 (PC); *Lowmans' Devinish v. Pester* (1885) 2 Ch. 348 = 64 LJ Ch. 567; *Dunstan v. Dunstan*, (1918) 2 Ch. 304 = 87 LJ Ch. 597.

AIR 1969 N. S. C. 48 (V 56)

MITTER, J. (HIDAYATULLAH C. J. AND RAMASWAMI J. concurring)

Malojirao Narasingh Rao Shitole v. State of M. P.

C. A. No. 302 of 1966, D/- 7-3-1969.

Tenancy Laws—Madhya Bharat Abolition of Jagirs Act; (28 of 1951), Sections 29, 30, Limitation Act, Ss. 12, 29(2) — Ryotwari Land Revenue and Tenancy Act, Sections 34 and 149(2).

An appeal filed by the appellant to the Board of Revenue, Madhya Pradesh against the compensation granted was dismissed by the Board as the same was filed after 20 days as prescribed by the Madhya Bharat Abolition of Jagirs Act, 1951. The Board did not allow the extension of time for filing the appeal to cover the time taken to obtain certified copies of the judgment. The High Court confirmed the order of the Board.

The Supreme Court held that the Jagir Act, 1951 did not provide for the extension of time but the limitation matters were governed by Section 34 and Section 149 (2) of the Ryotwari Act. The Court further held that "the principles of Limitation Act mentioned in Section 149 (2) of the Ryotwari Act include also the extension of time for filing an appeal if the delay is explained. Since neither the Jagirs Act nor the Ryotwari Act excluded S. 12 of the Limitation Act the said section was applicable to the appeals filed before the Board of Revenue. The Court found that the appellant was not guilty

of laches. The appeal was allowed and was remanded to the Board for disposal according to law.

AIR 1969 N. S. C. 49 (V 56)

GROVER, J. (SHAH J. concurring)
Sub-Divisional Officer, Mandla and others v. Pirma Gond and others.

C. A. No. 446 of 1966, D/- 10-3-1969.

Tenancy Laws — Madhya Pradesh Abolition of Proprietary Rights Act, 1950 (1 of 1951) Sections 5 and 251.

After taking over a tank on the abolition of Respondent No. 1's proprietorship rights of a village under the Madhya Pradesh Abolition of Proprietary Rights Act, 1950 the tank was given on lease for cultivation of singara under Section 5 (g) of the said Act. The State Government purporting to act under Section 251 of the Act granted the lease to another person. The High Court in allowing the writ filed by Respondent No. 1 held that the property vesting in the State Government under Section 5 (g) cannot revest in the State Government under Section 251.

Held:— Section 251 deals with the vesting of tanks which have not already vested at the commencement of the Act. The words in the Section are "if not already vested in the State Government". The Court held that the tank in question had already vested in the State Government under Section 5(g). High Court's order confirmed.

AIR 1969 N. S. C. 50 (V 56)

SHAH, J. (GROVER, J. concurring)
Radha Mohan v. Raj Kumar.

C. A. No. 346 of 1966, D/- 10-3-1969.

Tenancy Laws — U. P. Consolidation of Holdings Act, 1953 (5 of 1954) S. 5 (b) (i) & S. 16 (a)—U. P. Tenancy Act, Section 16 and Section 80.

A second appeal against the order of the District Court, involving a question of the validity of the sales, which were prohibited with retrospective effect by Section 16 (a) of the U. P. Consolidation of Holdings Act, 1953 and the effect of the said Act on the decrees passed under the U. P. Tenancy Act, was dismissed by the High Court in limine. The plea that the appeal in the Civil Courts is prohibited by Section 5 (b) (i) of the U. P. Consolidation of Holdings Act was taken for the first time in Supreme Court.

Held, whether the suit filed by the Appellant is of the nature of a suit filed under the terms of Section 5 is itself in dispute and since the plea has not been

raised at an earlier stage it cannot be raised for the first time in Supreme Court. The High Court was in error in summarily dismissing the appeal as questions of law of substantial importance were raised in the appeal. Matter remanded.

AIR 1969 N. S. C. 51 (V 56)

SHAH J. (RAMASWAMI, GROVER JJ. concurring)

Sanwal (dead) and others v. Chabila and others,

C. A. No. 872 of 1968, D/- 3-4-1969.

Transfer of Property Act (4 of 1882) Section 76 (a)—Punjab Security of Land Tenures Act, 1953, Sections 21, 32, 45, 8, 9 (1), 18, 22.

A suit filed by the respondent mortgagor for the possession of the mortgaged land after the redemption, from the appellants who were the tenants of the mortgagee, was decreed by the Civil Court. The Revenue Commissioner granted the application of the appellant tenant for the purchase of the land under Section 18 of the Punjab Security of Land Tenures Act, 1953. The High Court quashed the orders of the Commissioner. The Appellants contended that their tenancy rights acquired under the Punjab Security of Land Tenures Act, 1953 were enforceable against the mortgagors on redemption of the mortgage.

Held, where a Civil Court has in an action properly entertained, decided that the person who claims to exercise the right under Section 18 of the Punjab Security & Land Tenures Act is not the tenant, he cannot ignore that decision and claim the right to purchase the land occupied by him. The non obstante clause in Section 18 is intended to emphasise that the right of tenant to purchase the land is not defeated on account of the provisions contained in other laws, usage or contract prohibiting the tenants from acquiring the land, but the Section was not applicable where the rights are already adjudicated by the Civil Court. The Court also repelled the contention that Section 77 of the Punjab Tenancy Act, 1887 bars the jurisdiction of the Civil Court and pointed out that Section 77 of the Punjab Tenancy Act does not include the suit by an owner of land against the alleged trespasser. Appeal dismissed.

Cases relied upon:— (1952) S. C. R. 775; AIR 1952 SC 205; 1956 S. C. R. 1—AIR 1956 SC 305; 1958 S. C. R. 986—AIR 1958 SC 183; AIR 1966 S. C. 1721.

AIR 1969 N. S. C. 52 (V 56)

RAMASWAMI J. (SHAH AND GROVER JJ. concurring)

N. V. Narendranath v. Commissioner of Wealth Tax, Andhra Pradesh, Hyderabad. C. A. Nos. 1477-1478 of 1968, D/- 7-3-1969.

Wealth Tax Act (27 of 1957), Section 3.

On a reference by the Income-tax Appellate Tribunal under Section 27 (1) of the Wealth Tax Act, 1957 the High Court opined that the Appellant should be assessed as an individual in respect of the property received by him on partition with his father and brothers, and not in the status of a Hindu undivided family consisting of himself, his wife and two minor daughters.

Held, Under Hindu Law a joint family may consist of a single male member and his wife and daughters and there is nothing in the scheme of the Wealth Tax Act (Section 3) that a Hindu undivided family as an assessable unit must consist of at least two male members. Held, further, that when a coparcener having a wife and two minor daughters and no son receives his share of the joint family properties on partition, such properties in the hands of the coparcener, belong to the Hindu Undivided Family of himself, his wife and minor daughters and cannot be assessed as his individual property.

Cases relied upon—Gowall Buddanna's case ((1966) 60 I.T.R. 293)—AIR 1966 SC 1523, Attorney General of Ceylon v. A. R. Arunachalam Chettiar (1957) A. C. 540.

Case distinguished — T. S. Srinivasan v. Commissioner of Income-tax (1966) 60 I.T.R. 36 — AIR 1966 SC 984.

AIR 1969 N. S. C. 53 (V 56)

SHELAT J. (BHARGAVA

AND VAIDIALINGAM JJ. concurring) Bennett Coleman & Co. (P) Ltd. v. Runya Priya Das Gupta.

C. A. No. 1702 of 1968, D/- 2-4-1969.

Working Journalists (Conditions of Service) and Misc. Provisions Act (45 of 1955), Sections 2 (c), 5 and 17 — Industrial Disputes Act, Section 2 (RR) — Evidence Act, Section 115.

Discharged workmen were treated as workmen entitled to claim reinstatement under the Industrial Disputes Act. AIR 1957 SC 104 and AIR 1949 FC 111, Foll.

The Court after considering the schemes of all the enactments affecting the rights of workmen and particularly the provisions of the Working Journalists (Conditions of Service) and Misc. Provisions Act, 1955 came to the conclusion that the definition of "newspaper employee" and

"working journalist" being subject to a context to the contrary, the benefit of Sections 5 and 17 is available to an ex-employee though he has ceased to be in the employment for the purposes of gratuity. The Court found that in *Dharangadhra Chemical Works Ltd. v. State of Saurashtra*, AIR 1957 SC 264 that the appellants were not treated as workmen because they were the mere lessees holding licence for manufacture of salt. The Court also found that in the *Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate*, AIR 1958 SC 353 the question was whether a doctor in the employment of the respondents can be treated as a workman as he was covered by the expression "any person" appearing in the definition of workman in the Industrial Disputes Act before the amendment of 1956, and no question of the rights of ex-employee was involved in that case. The Court further held that there was no conflict between the decisions of the Supreme Court in the *Western India Automobile Co. Ltd. case* and *Central Provinces Transport Service cases* on the one hand and *Dharangadhra Chemical Works and Dimakuchi Tea Estate cases* on the other. The appellants plea of reference to the larger Bench was rejected.

On facts, the Court held, that the appellants had not discharged the burden of proving the ingredients of Section 115 of the Evidence Act. The rule of estoppel, was the rule of evidence only and does not create any substantive right or confer any cause of action on the other.

The Court on considering the definition of "wages" in Section 2 (RR) under the Industrial Disputes Act (since there is no definition of Wages in the Working Journalists Act) and on relying on the decision in *Hindustan Antibiotics Ltd. v. Workmen*, AIR 1967 SC 948 came to the conclusion that both, car allowance and benefit of free telephone and newspapers, were allowed to the respondent to directly reduce the expenditure which would otherwise have gone into his family budget and therefore, held that the said items were relevant in the fixation of wages.

AIR 1969 N. S. C. 54 (V 56)

GROVER J. (SHAH,

RAMASWAMI, JJ. concurring)

Takhatray Shivdatrai Mankad v. State of Gujarat.

C. A. No. 409 (N-c) of 1966, D/- 9-4-69.

Constitution of India Art. 311—Removal, what amounts to—Saurashtra Covenanted States Servants (Superannuation Age) Rules 1955—Bombay Civil Service Rules (1959) Rule 161—Reorganization of States Act (1956), Section 115 (7).

The appellant who became the employee of the Gujarat State after the reorganization of the Bombay State, was retired at the age of 53 under Clause (c) (2) (ii) (1) of Rule 161 of the Bombay Civil Service Rules, 1959. Since his first recruitment was in the Junagarh State his superannuation matter was governed by the Saurashtra Covenanted States Servants (Superannuation Age) Rules, 1955 under which he could not be retired until the age of 55. In Special Leave Appeal before the Supreme Court the question was whether his retirement under the Bombay Rules, 1959 was less advantageous or disadvantageous as compared to the Saurashtra State Rules, 1955 and if so, whether the sanction of the Central Government as required by the proviso to Section 115 (7) of the State Reorganisation Act, 1956 was obtained.

Held, (i) that the High Court's interpretation that the words "only for special reasons otherwise directed by Government" in Rule 3 (1) of the Saurashtra Rules, 1955, empowered the State Government to retire a Government Servant before the age of 55, was incorrect.

(ii) The Bombay Rules of 1959 changed the conditions of service to the disadvantage of the appellant.

(iii) Since the sanction of the Central Government was not obtained, Bombay Rules, 1959 were not applicable.

(iv) Following — (1) *Moti Ram Deka v. General Manager N. E. F. Railways*—1964-5 SCR 683 = AIR 1964 SC 600

(2) *State of Bombay v. Saubhagchand M. Doshi*, 1958 SCR 572 = AIR 1957 SC 892.

(3) *Gurdev Singh v. State of Punjab*, 1964-7 SCR 587 = AIR 1964 SC 1585 = 1964 (2) Cri LJ 481.

The Court observed —

That the rule relating to compulsory retirement of a Government servant must not only contain the outside limit of superannuation but there must also be a provision for a reasonable period of qualified service indicated with sufficient clarity. Failure to do so would mean removal of civil servant in violation of Article 311 (2) of the Constitution. The question regarding the constitutionality of the Rules was left open.

Cases referred to — *Bholanath J. Thaker v. State of Saurashtra*, AIR 1954 S. C. 680.

AIR 1969 N. S. C. 55 (V 56)

RAMASWAMI, J.

(HIDAYATULLAH C. J., MITTER, J. concurring)

Beohar Rajendra Sinha and others v. State of M. P. and others.

C. A. No. 386 of 1966, D/- 11-3-1969.

Civil Procedure Code (1908), Section 80,

A Notice under Section 80 of the Code of Civil Procedure was given by the Karta of the Joint Hindu family. There was a disruption of the joint family between the date of the notice and the date of filing of the suit. The question before the Court was whether the erstwhile coparceners should give individual notices under Section 80 of the C. P. C. afresh after the disruption of the joint family.

On reading the contents of the notice the Court came to the conclusion that it was given by the Karta of the family although the Karta had not described himself as such in the notice. The Court found that the cause of action and the relief sought in the notice had remained unchanged even after the disruption. The Court held that—

(1) the divided coparceners must be deemed to be as much the authors of the notice as the Karta was, and there was substantial identity between the person giving the notice and the persons bringing the suit,

(2) in construing the notice the Court cannot ignore the object of the Legislature namely, to give to the Government or the public servant concerned an opportunity to clarify its or his legal position. If on a reasonable reading of the notice the plaintiff has shown to have given the information which the statutes require him to give, any incidental defects or irregularities should be ignored.

(3) The scrutiny of Section 80 notice should not be done in a artificial or pedantic manner.

Cases relied upon — Dhian Singh Subha Singh v. Union of India 1958-SCR 781 = AIR 1958 SC 274; Bhagchand Dagadusa v. Secretary of States 54 Ind App 338 = AIR 1927 P. C. 176; Jones v. Nicholls (1844) 13 M & W. 361 equivalent to 153 E.R. 149, Chandulal v. Govt. of Bombay, ILR (1943) Bom 128 = AIR 1943 Bom 138

The Court further relied on State of Andhra Pradesh v. Venkata Suryanarayana 1964-4 SCR 945 = AIR 1965 SC 11 in which the Supreme Court had held that where the notice was given by two persons but the suit was filed by only one, the Notice was not defective.

The Court distinguished Vellayan Chettiar v. Government of the Province of Madras, AIR 1947 P. C. 197 because one person had given notice and two persons (though one of them had not given the notice) had filed a suit. So also in the Government of the Province of Bombay v. Pastonji 76 Ind App 85 = AIR 1949 PC 143 two trustees who were parties to the notice had died and the new trustees and the surviving trustees had filed the suit without giving a fresh notice. This case was also distinguished.

AIR 1969 N. S. C. 56 (V 56)

SIKRI J. (BACHAWAT,
HEGDE, JJ. concurring)

Smt. Lalithamma v. Subbanna & others
C. A. No. 282 of 1966, D/- 9-4-69

Civil Procedure Code (1908), Order 20, R. 12 (c)—Mysore (Personal and Miscellaneous) Inams Abolition Act, Sections 3, 10, 5 — T. P. Act (1882), S. 150—Lease in favour of minor.

The appellant created a simple mortgage of a village in favour of a Bank in 1929. In 1932 he leased out the said lands to his daughter who was about 14 years old then, by a registered lease-deed. The Bank purchased the said lands in auction and sold them to the plaintiff respondent Under the Mysore (Personal and Miscellaneous) Inams Abolition Act, 1954, the inam-rights were abolished and the said village vested in the State Government. In 1963, the lessee respondent was declared a permanent tenant under Section 10 of the Inams Abolition Act. The questions for the decision before the Supreme Court, on Special Leave Appeal were—

(i) whether the plaintiff appellant was entitled to the possession of the land after coming into force of Inams Abolition Act, 1954.

(ii) whether the appellant was entitled to mesne profits and if so for what period.

(iii) whether the Civil Court can disturb the status of a permanent tenant confirmed by the Revenue authorities under the Inams Abolition Act.

(iv) whether the appellants had become owners by adverse possession.

Held, (i) the respondent was not entitled to possession as the lands were vested in the State Government by virtue of the notification under Sections 3 (1) (b) and 1 (4) of the Mysore Inams Abolition Act. Suraj Nath Ahir v. Prithinath Singh, 1963-3 SCR 290 = AIR 1963 SC 454 was relied upon.

(2) Under Section 3 (1) (d) of the Inams Act, rents of the land before the vesting of the lands in the State Government can be claimed by the erstwhile Inamdars.

(3) The lease deed of 1932 did not create any lease rights in the appellant as he was a minor. The appellant, therefore, could not be declared a permanent tenant under the Inams Abolition Act. The Civil Courts can ascertain the existence of the alleged status.

(4) Further held, that the appellants had not become the owners of the land by adverse possession as the respondents had filed a suit well in time.

Nagubai Ammal v. B. Shamarao 1956 SCR 451 = AIR 1956 SC 593, was followed.

AIR 1969 N. S. C. 57 (V 56)

SHAH J. (GROVER, J. concurring)

Nivarti v. Dadarao.

C. A. No. 306 of 1966, D/- 11-3-1969.

Constitution of India, Article 227.

Held, that the power conferred upon the High Court by Article 227 of the Constitution is merely a power of superintendence to be exercised sparingly and to keep the Tribunal within the limit of its authority. The power is not appellate. It cannot be exercised to correct mere errors of law or facts. The Court further held that instead of deciding the questions for itself the High Court should have remanded the case for the determination of the issues to the Tribunal. The High Court's order was set aside and the proceedings were remanded to the Tahsildar.

AIR 1969 N. S. C. 58 (V 56)

SHAH J. (GROVER, J. concurring)

Giasi Ram and others v. Ramji Lal & others.

C. A. No. 433 of 1966, D/- 11-3-1969.

Hindu Succession Act, 1956, Secs. 2, 4 (1) (a)—Punjab Custom (Power to Contest) Act, 1920, Sec. 6—Code of Civil Procedure (1908), Order 41, Rule 33.

The appellant's father had alienated certain ancestral lands in 1916. He died in 1959. On challenging the said alienation by the appellant, his two brothers, his mother and sisters, the following questions were raised for the decision of the Supreme Court:

(1) Whether after the death of the appellant's father the alienation could be challenged only by the appellant and his two brothers who were the coparceners, or whether mother and sisters as heirs of the deceased under the Hindu Succession Act, could challenge the alienation?

(2) Whether Section 6 of the Punjab Custom (Power to Contest) Act, 1920 which empowers only the male descendants to challenge the alienation stands in the way of the right of the widow and daughters since the deceased was governed by the Punjab Customary Law,

(3) Could the High Court correct the wrong decree passed by the Trial Court? The High Court had held that the widow and the daughters cannot obtain the benefit of decree due to prohibition of the Punjab Customs Act.

Held, (1) the alienated property reverted to the estate of the appellant's father at the point of his death by virtue of a declaration in the Suit No. 75 of 1920 and all persons who would but for the alienation had taken the estate, will be entitled to inherit the same.

(2) The succession with the death of the appellant's father, had opened in accordance with the provisions of the Hindu Succession Act, 1956 and had entitled the

females to inherit the property. The Punjab Customs Act, 1920 did not operate as a bar to the claim by the females.

(3) The Court found that it would have been grave injustice to deny the widow and the two daughters the share in the property and therefore, the High Court should have corrected the decree passed by the Trial Court under Order 41, Rule 33 of the Code of Civil Procedure.

AIR 1969 N. S. C. 59 (V 56)

SHAH, J. (GROVER, J. concurring)

Commissioner of Income-tax Bihar and Orissa, Patna v. M/s. Kirkend Coal Co.

C. A. No. 2486 of 1966, D/- 12-3-1969.

(The Indian) Income Tax Act, 1922, Sections 25 (1), (2); 26 (2); 28 (c); 44.

The question for the decision by the Court was whether penalty leviable under Section 28 (c) of the Indian Income-Tax Act, 1922 for the undisclosed receipts, should be levied against the original firm in the account year relevant to the assessment, or against the new firm reconstituted out of the original firm and continuing the same business. The High Court applied Section 44 of the Indian Income-Tax Act, 1922 and came to the conclusion that the penalty should be legally levied only upon the original firm and not against the new reconstituted one.

The Court pointed out that (i) the Tribunal and the High Court committed an error in applying Section 44 as the section applies to cases of discontinuance of business and not to cases of dissolution (without discontinuing the business).

(ii) Where the firm is dissolved but the business is not discontinued there being change in the situation of the firm, assessment has to be made under Section 26 (2).

Shivram Poddar v. I. T. O. Central Circle II, Calcutta 1964-51 ITR 823 = AIR 1964 SC 1095; Commissioner of Income-Tax, Madras v. S. N. S. Karupiah Pillai, 1941-9 ITR 1 = AIR 1941 Mad 255 (SB).

(iii) Where there is discontinuance of business with the dissolution of the firm Section 44 is applicable.

C. A. Abraham v. I. T. O. Kottayam, 1961-41 ITR 425 = AIR 1961 SC 609; Commissioner of Income-Tax, Madras v. S. V. Angidi Chettiar, 1962-44 ITR 739 = AIR 1962 SC 970.

Cases of reconstitution of the firm or succession to the business of the firm are covered by Section 25 (1) (2).

(iv) Expression "person" includes for the purposes of Section 28 a firm registered or un-registered if there is a reconstitution of the firm by virtue of S. 26 the Income-Tax Officer should proceed against the firm for imposing the penalty. If there is discontinuance of the business

penalty will be imposed against the partners of the firm.

AIR 1969 N. S. C. 60 (V. 56)

**GROVER J. (SHAH,
RAMASWAMI, JJ. concurring)**

The State of Gujarat v. R. G. Teredesai & others.

C. A. No. 961 of 1968, D/- 10-4-69.

Constitution of India, Art. 311 (2).

The question for the determination by the Supreme Court was, whether omission to supply to the first respondent a copy of the recommendations of the Enquiry Officer in the matter of punishment, amounted to a failure to provide reasonable opportunity within the meaning of Article 311 (2), although a copy of the Report of the Enquiry Officer containing the findings on various charges was supplied.

The Court referred to the Union of India v. H. C. Goel, 1964-4 SCR 718 = AIR 1964 SC 364 in which the Supreme Court had held that neither the findings nor the recommendations of the Enquiry Officer are binding on the Government. The Court held that in spite of this legal position if Enquiry Officer recommends a penalty or punishment which is likely to affect the mind of the punishing authority regarding the penalty to be imposed, a copy of the recommendation should be given to the delinquent officer. The right of representation under Article 311 (2) includes the right to prove that the punishment proposed to be inflicted was unduly severe. Since the requirements of Article 311 (2) were not followed the proceedings were vitiated.

AIR 1969 N. S. C. 61 (V. 56)

SHELAT J. (BHARGAVA, J. concurring)

The Tata Engineering & Locomotive Co. Ltd. v. S. C. Prasad and another

C. A. No. 868 of 1968, D/- 11-3-1969.

Industrial Disputes Act (1947), S. 7A — Powers of the Tribunal — Discharge simpliciter — Standing Orders.

On satisfaction that a worker had a hand in the grievous assault of one of its Officers, the worker was discharged simpliciter under Standing Order 47 by the Company on the grounds of loss of confidence and the retention being prejudicial to the interest of the company. The Industrial Tribunal agreeing with the workman's contention held that the discharge was mala fide and there was victimisation of the worker. Four other workers were dismissed after the enquiry on the charge of insubordination and incitement to defy the orders of the company. The Industrial Tribunal held that the principles of natural justice were violated in the enquiries by the domestic Tribunal and on that ground set aside

the orders of dismissal and ordered the reinstatement of the said workers. In a Special Leave Appeal the questions before the Supreme Court were—

(I) Whether the discharge of the workman was a discharge simpliciter and

(II) whether the Industrial Tribunal was right in setting aside the findings of the domestic Tribunal.

1. The Court came to the conclusion that the company was reasonably satisfied that the workman had a hand in the assault and he had the record of terrorising the officers of the company.

These were valid reasons for the loss of confidence in the workman and to treat his conduct prejudicial to the interest of the company. The Court came to the conclusion that the discharge was not mala fide and there was no truth in the allegation of victimisation.

2. The fact that the company chose to exercise its powers and discharge simpliciter under the Standing Order 47 instead of the dismissal on enquiry of misconduct, cannot render the order mala fide or colourable.

3. Even if the investigation has preceded the order there can be a discharge simpliciter (and not a punitive action for misconduct).

Jabalpur Electric Supply Co. v. Sambhu Prasad Shrivastava, 1963-3 SCR 453 = AIR 1966 SC 1288, was relied upon.

(ii) The Industrial Tribunal had held that in domestic enquiries against some workmen the finding was based on the extraneous matters not in evidence and on facts within the personal knowledge of the Inquiry Officer. The Court came to the conclusion that the extraneous matters were merely incidental and did not affect the finding.

The Court relied upon — (1) *India Marine Service Pvt. Ltd. v. Workmen*, 1963-3 SCR 575 = AIR 1963 SC 528, (2) *Kalindi v. Tata Locomotive Engineering Co. Ltd.*, 1963-SCR 407 = AIR 1960 SC 914; (3) *Calcutta Jute Manufacturing Co. v. Calcutta Jute Manufacturing Workers Union*, 1962 Supp 1 SCR 483 = AIR 1966 SC 1731.

The Court pointed out that the Industrial Tribunal while considering the findings of domestic enquiries must bear in mind that persons appointed to hold such enquiries are not lawyers and as such enquiries are of simple nature and rules as to the evidence and procedure do not prevail.

2. As regards some workers the Industrial Tribunal held that the dismissal order disclosed that the General Manager had relied on "other relevant information" which meant the extraneous matters and had not applied his mind although he was the final dismissing authority. The workers' allegation was that the evidence

regarding the habitual insubordination which was not proved, was used by the General Manager against them. The Court found that the charges against the said workman were — (1) disobedience of company's orders and (2) inciting other workmen, and not habitual disobedience. The Court came to the conclusion that the General Manager had not relied on the extraneous matters and had applied his mind in passing the dismissal order.

3. The Court held, that the Industrial Tribunal's finding that the refusal of the Inquiry Officer to summon the officers of the Company and some workmen on the request of the delinquent workman amounted to refusal of the opportunity to defend, was incorrect. The Court pointed out that the Inquiry Officer has no powers of a Court of law to summon witnesses. The workman should have made his arrangements to produce the witnesses.

Tata Oil Mills Co. Ltd. v. Its Workmen, 1964-7 SCR 555 = AIR 1965 SC 155 relied upon.

4. The Court further held, that the Industrial Tribunal committed an error in holding that the non-production of preliminary report on which the charges were alleged to have been founded vitiated the enquiry. The Court held that the Preliminary Report did not form the part of the evidence nor was it relied upon in arriving at the findings, in the domestic enquiry.

AIR 1969 N. S. C. 62 (V 56)
BHARGAVA, J. (SHELAT, J. concurring)

Workmen of the Calcutta Port Commissioners v. The Management and another.

C. A. No. 1219 of 1968, D/- 11-3-1969.

Industrial Disputes Act, 1947, Section 10.

There is a permanent Maintenance Section for the Railway tracks under the control of the Calcutta Port Commissioner. A Separate Port Development Section, which is a temporary section, was established under the Second Five Year Plan. On a grievance from the waymen in the Development Section that the waymen junior to them in service get confirmation and promotion in the Maintenance Section in exclusion of the waymen working in the Development Section, the question was referred to the Industrial Tribunal, Calcutta. The Tribunal recommended the common seniority-list with exception to few waymen who were confirmed between the date of reference and the date of the award. The Tribunal held that waymen in Port Development Section who had been working for longer period should get preference over the waymen working in the Maintenance Section.

Held, at time of recruitment, the position was that those who were recruit-

ed as temporary waymen in the Maintenance Section could look forward to confirmation as soon as permanent vacancies occurred in Maintenance Section. The Court held that the recruits in the Maintenance Section were preferred due to superior merits. The Court held that the Tribunal was wrong in recommending the seniority of the waymen in the Development Section on the basis of the length of service.

The Court further held that the practice of appointment of P. W. men of the Maintenance Section in the senior post in the Development Section was a fact of which P. W. men in the Development Section were aware of at the time of their recruitment.

The Court held that a combined seniority list should be prepared but P. W. men who were already working in the Maintenance Section should be confirmed on the basis of the old practice.

AIR 1969 N. S. C. 63 (V 56)

BHARGAVA, J.

(SHELAT, J. concurring)

Workmen of the Calcutta Port Commissioners v. Employers in relation to the Calcutta Port Commissioners and another.

C. A. Nos. 1220 and 1222 of 1968 D/- 11-3-1969.

Industrial Disputes Act, 1947, Section 2 (4) — Matters incidental — Section 10 (2) (iv).

The main question for the decision of the Court was whether Industrial Tribunal was within its jurisdiction to recommend the discontinuance of an ad hoc extra over-time, when the reference was a general reference on over-time paid to the crew within the jurisdiction of Port Commissioners of Calcutta. The extra ad hoc over-time was agreed to under the threat of a strike and was to be enforceable only upto the date of award by the Industrial Tribunal. The Tribunal on examination found that none of the crew in question was actually working in excess of the hours prescribed for a week. On this fact the Tribunal came to the conclusion that the rates of over-time prevalent before the ad hoc extra payment was agreed to, was fair and fully compensatory to the crew. It, therefore, recommended discontinuation of the ad hoc extra overtime.

The Court turned down the contention of the crew that the recommendation of discontinuance of the ad hoc extra over-time, was without jurisdiction. The Court found that the recommendation regarding the ad hoc extra overtime was a matter incidental to the reference within the

meaning of Section 2 (4) of the Industrial Disputes Act, 1947.

Cases relied on — *Aluminium Factory Workers' Union v Indian Aluminium Co. Ltd.*, (1962) 1 Lab LJ 210 (SC); *Delhi Cloth & Gen. Mills Co Ltd. v. The Workmen*, 1967-1 SCR 882 = AIR 1967 SC 469.

AIR 1969 N. S. C. 64 (V 56)

SHAH, J.

(GROVER J concurring)

Atam Das v. Suriya Prasad.

C A. No. 1706 of 1967, D/- 11-3-1969.

Representation of the People Act 1951, Section 9A.

The principal question for the determination by the Court was whether the appellant had a subsisting contract with the Archaeological Department of Government of India for raising the height of the Burj

On the appreciation of the evidence the Court found that after raising the height of the Burj to 35 feet the contractor was asked to stop the work and certain work was ordered to be done departmentally. The circumstances showed that the Archaeological Department had abandoned the original project of raising the height of the Burj to 46 feet. The Department had called upon the appellant to return certain materials and to carry out the necessary repairs.

The Court held that even if the commitment by the appellant to carry out the necessary repairs constituted a contractual relation there was no action on the part of the Government or the appellant for about 6 years after the demand. The Court held that this conduct of both the parties was a clear evidence of the abandonment of the contractual relationship before the filing of the nomination paper.

AIR 1969 N. S. C. 65 (V 56)

SHAH, J.

(GROVER, J concurring)

Smt. Swarna Lata Ghosh v. H. K. Banerjee and others.

C A. No. 662 of 1966, D/- 12-3-69.

Civil P. C. (1908), O. 20 R. 5; O. 41 R. 31 — Judgment without reasons.

Where the decree passed by the Trial Court was wrong in law not being supported by appropriate reasons and was upheld by the High Court: Held that in its original civil jurisdiction a chartered High Court is not bound by the Rules under Order 20, (Rules 1 to 8) by virtue of Order 49 Rule 3, but the question is not merely of power but the exercise of judicial discretion in the exercise of that

power. The function of the judicial trial is to hear and decide a matter in contest between the parties in open Court in the presence of parties according to the procedure prescribed for investigation of the disputes and the rules of evidence. The conclusion of the Court ought normally to be supported by reasons duly recorded. This requirement transcends all technical rules of procedure. The Supreme Court came to the conclusion that there was no real trial and remanded the matter for recording the evidence and deciding the matter according to law.

AIR 1969 N. S. C. 66 (V 56)

GROVER, J.

(SHAH, J. concurring)

S K. G. Sugar Mills Ltd. v. Shri D C. Merta, Official Liquidator Gaya Sugar Mills Ltd Patna.

C. A. No. 649 of 1966, D/- 12-3-1969.

Contract Act (1872), S. 10 — Deed — Construction.

One of the terms of the lease of the lands taken by the appellant was "in case the lease is cancelled at any time in the off season in accordance with the proviso in Clause (1) above the lessee shall be liable for the entire rent for the year ending 30th September following that off season". It was contended by the appellant that it was implicit if the lease came to an end for some reason or another in the crushing season the lessee would be absolved from the liability from payment of rent subsequent to the determination of lease.

Held, if the lease is cancelled during the crushing season the liability for the rent does not cease. The rent was fixed for the whole year but could be paid in 2 instalments. The Court held that a party cannot be absolved from the liability to perform its part of the contract on the ground of hardship.

Cases relied upon — *M/s. Alopi Parshad and Sons Ltd. v. Union of India*, AIR 1960 S. C. 588.

AIR 1969 N. S. C. 67 (V 56)

BACHAWAT, J.

(SIKRI, HEGDE, JJ. concurring)

Goppul v. Thakurji Shriji Dwarkadishji.

C. A. No. 53 (N) of 1969, D/- 12-3-1969.

Rajasthan Premises (Control of Rent and Eviction) Act, 1950, Section 13 (1) (e).

Four shops were let out to the appellant in 1944 and two more were let out in 1945 and enhanced consolidated rent was agreed to be paid in 1953. The High

Court ordered the eviction under S. 13 (1) of Rajasthan Premises (Control of Rent and Eviction) Act, 1950 in the second appeal, on the ground of subletting and arrears of rent. The High Court held, that there was one integrated tenancy and there was sub-letting of two shops done after 1947.

Held, the finding of the High Court on the integrated tenancy was wrong as the increase of rent does not import a new demise. The Court found that sub-letting of two shops was done without the permission of the landlord but disagreed with the High Court that sub-letting was done after the Jaipur Rent Control Order, 1947 was passed.

The Court construed Section 13 (1) (e) with the help of Sections 26 and 27 (1) and held that the words "has sub-let" in clause (e) does not restrict the right of ejectment to sub-letting after the Act. It covers the cases of sub-letting even before the Act came into force.

The Court turned down the argument that Section 13 (1) (e) takes away vested right and should not be given retrospective effect. The Court held that if the tenant has sub-let the premises without the permission of the landlord either before the Act or after the Act he is not protected and is liable to eviction under Section 13 (1) (e). It matters not he had the right to sub-let the premises under Section 108 (j) of the Transfer of Property Act. Eviction in respect of only two shops was confirmed.

AIR 1969 N. S. C. 68 (V. 56)

SHELAT, J.

(BHARGAVA, J. concurring)

Central Weaving & Manufacturing Co. Bombay v. Mill Mazdoor Sabha, Bombay.

C. A. No. 1240 of 1968, D/- 12-3-1969.

Payment of Bonus Act, 1965, Section 6 (d) read with Schedule 3.

As against the demand of 20% bonus demanded by the workmen the company was ready to accept the liability only to the extent of 4%. The appellant company contended that there was loss after deduction of the Customs duty refund and the return on the capital at 8.5%. The Tribunal held that though the amount of customs duty may not have been actually received it did not cease to be the earnings during the accounting year and therefore, that amount could not be deducted from the net profit. The Tribunal awarded a return at 8.5% as a prior charge only on the part of the amount claimed by the company.

Held, since the appellant company was maintaining the accounts on the Mercan-

tile system, the customs duty refund had to be credited as earnings when it was allowed and became payable and not when it was actually refunded. The Tribunal rightly refused the deduction of the amount of Customs duty refund.

Since no attempt was made to show that amounts on which the return was claimed as a prior charge, represented either paid-up equity share capital or capital invested by the proprietors at the commencement of the year, the Tribunal ought not to have allowed the return at 8.5% on the amount considered by the Tribunal and its deduction as a prior charge from the gross profits.

AIR 1969 N. S. C. 69 (V. 56)

SHELAT, J.

(BHARGAVA, J. concurring)

Heavy Engineering Mazdoor Union v. The State of Bihar and others.

C. A. No. 1463 of 1968, D/- 12-3-1969.

Industrial Disputes Act, 1947, Section 2 (a).

On a reference made by the State Government of Bihar to the Industrial Tribunal regarding certain demands of the workers the question was whether the State Government was the appropriate Government or the Central Government to make the reference and whether the reference was bad in law as the question was pending before the certifying authority under the Industrial Employment (Standing Orders) Act, 1946. The respondent company is a Government company and the shares are held by the President of India and certain Officers of the Government of India. The contention of the appellant was that the Heavy Engineering Company carrying on business under the authority of the Central Government.

Held, (1) the Company and shareholders being distinguishable entities, the fact that the President of India and certain Officers of the Government of India hold all its shares does not make the company, an agent either of the President of India or the Central Government. The Heavy Engineering Company was not carrying on its business under the authority of the Central Government.

(2) The power to give directions of the appointments of Directors by the Central Government flow from the company's memorandum and Articles of Association and not by reason of the company being the agent of the Central Government.

State Trading Corporation of India Ltd. v. Commercial Tax Officer, Visakhapatnam, 1964 (4) S. C. R. 99 p. 188 = AIR 1963 SC 1811 at pp. 1849-50.

(3) In absence of a statutory provision a commercial corporation is not presum-

ed to be a servant or agent of the State even though it is controlled wholly or partially by a Government Department.

Graham v. Public Works Commissioner (1901) 2 K. P. 781 relied upon.

(4) An inference that the Corporation is the agent of the Government may be drawn where it is performing in substance governmental and not commercial functions.

London County Territorial and Auxiliary Forces Association v. Nichols 1948 (2) All E. R. 432.

(5) The definition of employer in Section 2 (g) that the industry carried on by or under the authority of the Government means the industry carried on directly by the Government Department or through their agents. The appropriate government to make the reference was the State Government and not the Central Government.

(6) Pending matter before the Certifying authority under Section 10 of the Industrial Employees (Standing Orders) Act was no bar to a reference under the Industrial Disputes Act, 1947.

Management of Bengal Woollen, Cotton and Silk Mills Co. Ltd. v. Workmen, 1968 (1) S. C. R. 581—AIR 1968 SC 585; *Management of Shahdara (Delhi) Sahranpur Light Railway Co. Ltd. v. S. S. Railway Workers Union*, C. A. No. 27 of 1968 D/- 18-9-1968 (SC).

AIR 1969 N. S. C. 70 (V. 56)

GROVER, J.

(SHAH, J. concurring)

State of Uttar Pradesh and others v. Shah Mohammad and another.

C. A. No. 347-(N-C) of 1968, D/- 13-3-69.

Constitution of India, Articles 5, 6, 8, 11 and 21 — Acquisition of foreign citizenship — (Indian) Citizenship Act, (1955), Section 9 — Citizenship Rules, R. 30.

Respondent No. 1 was born on July 3, 1934. He went to Pakistan in October, 1950. Obtaining a visa from Indian High Commission in Pakistan he came to India on July 22, 1953. The Respondent claimed to be an Indian citizen as he was born in India of parents who were residing in India. He claimed that he was a minor when he went to Pakistan and never had any intention to settle there permanently. In an appeal filed before the High Court against the order of the Trial Court by the Union of India, the High Court remanded the matter to the Trial Court to ascertain whether the Respondent had

during his stay of one year in Pakistan obtained Pakistan citizenship. On finding by the Trial Court that the Respondent No. 1 had never secured Pakistan citizenship, the High Court dismissed the appeal. During the pendency of the proceedings, Indian Citizenship Act, 1955 was passed and the Rules thereunder were framed. The questions for the decision of the Court were—

(1) Whether Section 9 of the Indian Citizenship Act, 1955 read with Rule 30 of the Citizenship Rules has been made applicable to the pending proceedings so as to confer exclusive jurisdiction on the Central Government to decide the question of acquisition of foreign nationality.

(2) Whether the Citizenship Act, 1955 passed under Article 11 of the Constitution is inconsistent with other provisions of Part II of the Constitution.

(3) Assuming that Section 9 has retrospective operation, whether loss of citizenship is violative of the guarantee of personal liberty in Article 21 of the Constitution.

Held, (1) the words "or has at any time between the 26th January 1950 and the commencement of this Act, voluntarily acquired the citizenship of another country" in section 9 (1) of the Act clearly make the Act operative with retrospective effect.

(2) Articles 5, 6, 8, 9 of the Constitution deal with the cases of acquisition of foreign citizenship prior to the commencement of the Constitution.

Izhar Ahmad Khan v. Union of India, (1962) 3 Supp. S. C. R. 235 — AIR 1962 SC 1052.

Article 11 and Entry 17 List I of the Seventh Schedule empower the Parliament to pass laws regarding acquisition of permanent citizenship. Section 9 (2) of the Citizenship Act read with Rule 30 of the Citizenship Rules put the legal position beyond doubt that whether, when and how an Indian citizen has acquired the citizenship of any country has to be exclusively determined by the Central Government. The learned High Court was wrong in remanding the matter to the Trial Court which should have been decided by the Central Government. Citizenship Act or rules do not violate the other provisions of Part II of the Constitution. The new procedure prescribed by Section 9 of the Citizenship Act read with Rule 30 of the Citizenship Rules "is a procedure established by law within the meaning of Art. 21". There was no violation of Article 21 of the Constitution.

(3) The scope of the jurisdiction for the Central Government and the Courts is settled by the several rulings of the Supreme Court.

Akbar Khan Alam Khan v. Union of India (1962) 1 S. C. R. 779 = AIR 1962 SC 70; Izhar Ahmad Khan v. Union of India, (1962) 3 Supp. S. C. R. 235 = AIR 1962 SC 1052; Govt. of Andhra Pradesh v. Syed Mohd. Khan, (1962) 3 Supp. S. C. R. 288 = AIR 1962 SC 1778.

AIR 1969 N. S. C. 71 (V 56)

HEGDE, J. (SIKRI,

BACHAWAT, JJ. concurring)

Amrit Sagar Gupta and others v. Sudesh Biharilal and others.

C. A. No. 349 of 1966, D/- 13-3-1969.

Civil P. C. (1908), Section 11 — Res judicata — Suit by or against the Karta (Manager) of Joint family.

The High Court in reversing the judgment of the Trial Court had held that the suit property belonged to Jawala Prasad by way of gift from Krishan Gopal and not to Banwarilal Verma. This was confirmed by the Supreme Court. After several unsuccessful attempts to challenge the decision the sons of Banwarilal Verma filed a suit claiming partition of the suit properties on the ground that the same had been gifted by Krishan Gopal to the joint family. The question was whether the decision in the earlier suit operated as res judicata to the second suit.

The Court held, that the properties in dispute in both the suits were identical and Banwarilal had defended the earlier suit in his capacity of the Karta of the joint Hindu family and not in his individual capacity. It is not necessary in order that a decree against the manager may operate as res judicata against the coparceners who were not parties to the suit, that the plaint or written statement should state in express terms that he is suing as a Manager or is being sued as a Manager. It is sufficient that the Manager was in fact suing or being sued as a representative of the whole family.

Lalchand v. Sheo Govind—ILR 8 Pat 788 = AIR 1929 Pat 741; Ramkishan v. Gangaram, ILR 12 Lah 428 = AIR 1931 Lah 559. Prithipal v. Rameshwar, ILR 2 Luck 288 = AIR 1927 Oudh 27. Surendranath v. Shambunath, ILR 55 Cal 210 = AIR 1927 Cal 870.

Suit by or against the Manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the Manager of the family and the property involved in the suit is family property.

Mulgund Co-operative Credit Society v. Shidlingappa Ishwarappa, ILR (1941) Bom 682 = AIR 1941 Bom 385. Venkatanarayana

v. Venkata Somaraju, AIR 1937 Mad 610 (F B.)

AIR 1969 N. S. C. 72 (V 56)

HEGDE, (SIKRI,

BACHAWAT, JJ. concurring)

Ramchander Narsy & Co. v. Wamanrao V. Shenoy.

C. A. No. 361 of 1966, D/- 13-3-69.

Bombay Rents, Hotel and Lodging House Rates Control Act (1947), Section 12 (3) (b) — Whether the decree of ejectment can be passed in favour of the assignee of the arrears of rent together with the premises.

During the pendency of the civil suit filed by Respondent No. 1 for ejectment of the tenant for failure to pay rent due for more than six months, the suit premises along with the right to recover arrears was transferred to Respondent No. 2. The High Court dismissed revision petition filed by the tenant against the ejectment order. The points for the decision of the Court were—

(1) Whether the High Court was right in holding that it had no jurisdiction to order depositing the arrears of rent due, in a revision petition:

(2) Whether the notice of ejectment was invalid.

(3) Whether a decree for ejectment could be passed in favour of Respondent No. 2 for non-payment of arrears to Respondent No. 2, as the assignment of arrears of rent was merely a debt in law.

(1) The Court did not find it necessary to decide the question of jurisdiction in matters of extension of time for depositing the arrears under Section 12 (3) (b) of the Act as on facts the conduct of the tenant did not deserve the exercise of the discretion in his favour.

(2) The Court agreed with the two lower Courts that the notice was not invalid.

(3) The Court distinguished Sm. Daya Devi v. Chapala Devi AIR 1960 Cal 378 on the ground that the assignment of the rent in that case had taken place prior to the institution of the suit and therefore, no cause of action survived at the time of institution of the suit. The Court found that there was a cause of action for ejecting the appellant and the suit was validly instituted. The Court further held that paying or tendering the money under Section 12 (3) (b) is a mere concession to the tenant. Once it is esta-

blished that the payment is not made or tendered decree for ejectment follows.

Kanto M. Mullick v. Jyotish Chanda Mukherjee, 49 Cal W. N. 433 = AIR 1949 Cal 571 referred to.

which date was material for deciding the compensation in an appeal, provided under the Act against the order of the District Judge.

AIR 1969 N. S. C. 73 (V 56)

SHAH, J.

(GROVER, J. concurring)

Bhuthnath Chatterjee v. State of West Bengal and others.

C A. No 654 of 1966, D/- 14-3-1969.

Land Acquisition Act (1894), Ss. 4, 23—Successive notifications under Sec. 4—Constitution of India, Art. 227—Jurisdiction of the High Court does not extend to correct the finding of the District Court on the matter of compensation.

Successive notifications were issued in 1955, 1956 and 1958 under Section 4 (1) of the Land Acquisition Act, 1894. The District Court awarded the compensation at the market value prevailing in 1956 and 1958. The High Court set aside the order of the District Judge and directed the retrial of the reference with a direction that there was no absolute rule that where there are successive notifications issued under Section 4, compensation must be determined on the basis of market value prevailing on the date of the last notification.

Held: the High Court's order was wrong as the jurisdiction under Art. 227 is not appellate jurisdiction and the High Court's action correcting orders of law or fact in exercise of the said jurisdiction, was illegal.

For the first notification of 1955 no objections were invited nor any enquiry conducted by the Collector under Sec. 5. In the circumstances the reasonable inference was that the Notification of 1955 was not acted upon or was not intended to be acted upon. The question in each case is whether there was an intention to supersede the previous notification and if the Government does not choose to explain the reasons which persuaded it to issue a second notification, the Court may be justified in inferring that it was intended to supersede the earlier notification by the latter notification. The High Court proceeded on certain presumption without waiting for further investigation on the issue of fact. The High Court's order was set aside. The Court left it open to the High Court to decide

AIR 1969 N. S. C. 74 (V 56)

GROVER, J.

(SHAH, J. concurring)

S Kartar Singh v. Chaman Lal and others.

C. A. No. 661 (N) of 1966 dated 14-3-69.

Delhi and Ajmer Rent Control Act (1952), Section 13 (1) (h) — Delhi Rent Control Act, 1958, Section 14 (1) (h).

By a letter written on the same date of the rent deed, the landlord permitted the tenant, a lawyer, to use the premises as professional office along with the residence. After the death of the tenant, his sons continued the use of the premises for residence and lawyer's office. The landlord filed the suit for ejectment under Section 13 (1) (h) of the Delhi and Ajmer Rent Control Act, 1952 on the ground that the tenant respondents had built a large residential house. During the pendency of the suit, the Delhi Rent Control Act came into force. The question for the determination of the Court was, where the premises are used both for residence and commercial purposes whether ejectment of the tenant can be ordered under Section 13 (1) (h) of Delhi and Ajmer Rent Control Act and Section 14 (1) (h) of the Delhi Rent Control Act.

Held, the provisions of the Delhi and Ajmer Rent Control Act were applicable with modifications introduced by the Delhi Rent Control Act to the pending proceedings. The effect of the relevant provisions of both the enactments was same in the instant case.

On relying on Dr. Gopal Das Verma v. Dr. S. K. Bhardwaj, (1962) 2 S. C. R. 678 = AIR 1963 SC 337, the Court further held that the tenant using the premises for residence as well as for carrying on the profession, cannot be ejected by showing that the tenant had acquired a suitable residence. The Court further held that permission to use the premises for professional purposes to the father of the Respondents was not a mere personal licence to him and the legal position in respect of the ejectment with regard to heirs and legal representatives is the same.

5 of 1950 was passed by the House as it was contained originally in the validly introduced Bill and cannot, therefore, be held to be void for non-compliance with the proviso to Article 304. This section being valid, either the Prohibition Order of 1119 or the Prohibition Order of 1950 must be held to have been validly continued in force by this Act 5 of 1950 and to have continued to remain in force thereafter under the proviso to Section 17 (4) of the Essential Supplies (Temporary Powers) Act 24 of 1946. Under either of those Orders, the transactions entered into between the appellant and the respondent were prohibited and, having been entered into against the provisions of law, no party can claim any rights in respect of the three contracts in suit. The claim for damages for breach of those contracts by the respondent against the appellant was therefore, not maintainable.

15. The appeal succeeds and is allowed with costs throughout. The decree passed by the High Court is set aside and the suit is dismissed.

SSG/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 513 (V 56 C 101)

(From: Chief Labour Commr. (Central) and Appellate Authority, New Delhi)*

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

Management, Shahdara (Delhi) Saharanpur Light Railway Co. Ltd., Appellant v. S. S. Railway Workers Union, Respondent.

Civil Appeal No. 27 of 1968, D/- 18-9-1968.

(A) Civil P. C. (1908), Pre. — Interpretation of Statutes — Intention of legislature — Meaning of words — Duty of Court — Language to be given natural and literal meaning unless there is ambiguity or anomaly.

It is well settled that the meaning which words ought to be understood to bear is not to be ascertained by any process akin to speculation and the primary duty of a Court is to find the natural meaning of the words used in the context in which they occur, that context including any

* (No. IE 1 (11)/7/66-LSI, D/- 27-10-1967 — Chief Lab. Commr. (Central) & Appellate Authority, New Delhi.)

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other phrase in the Act which may throw light on the sense in which the makers of the Act used the words in dispute. The Court ought, therefore, to give a literal meaning to the language used by Parliament unless the language is ambiguous or its literal sense gives rise to an anomaly or results in something which would defeat the purpose of the Act. 1897 AC 22 & (1953) 1 QB 380 & (1889) 23 QBD 29, Rel. on. (Para 6)

(B) Industrial Employment (Standing Orders) Act (20 of 1946), Pre. — Object of Act — Is to require employers to define with certainty conditions of service in their establishments and to reduce them to writing and to get them compulsorily certified with a view to avoid unnecessary industrial disputes. (Para 7)

(C) Industrial Employment (Standing Orders) Act (20 of 1946), Ss. 4, 6 and 10 — Effect of amendment by Act 36 of 1956 — Act gave individual workman right to contest draft standing orders or to apply for their modification in addition to existing right to raise industrial dispute.

By amending Ss. 4 and 10, Parliament not only broadened the scope of the Act but also gave a clear expression to the change in its legislative policy. Parliament knew that the workmen, even as the unamended Act stood, had the right to raise an industrial dispute, yet, not satisfied with such a remedy, it conferred by amending Ss. 4 and 10 the right to individual workman to contest the draft standing orders submitted by the employer for certification on the ground that they are either not fair or reasonable, and more important still, the right to apply for their modification despite the finality of the order of the appellate authority under S. 6. Parliament thus deliberately gave a dual remedy to the workmen both under this Act and under the Industrial Disputes Act. (Para 9, 26)

(D) Industrial Employment (Standing Orders) Act (20 of 1946 as amended by Act 36 of 1956), Ss. 10, 4, 6, 11 and 12 — Scope — Certified standing orders — Modification of — Existence of new circumstances not a condition precedent to exercise of jurisdiction under S. 10 (2).

Per Shelat and Vaidialingam, JJ. — Section 10 does not state that once a standing order is modified and the modification is certified, no further modification is permissible except upon proof that new circumstances have arisen since the last modification. As a matter of fact the

legislature has not incorporated any words in the sub-section restricting the right to apply for modification except of course the time limit of six months in sub-section (1). Section 6 no doubt lays down that the order of the appellate authority in an appeal against the order of the certifying officer under S. 5 is final but that finality is itself subject to the right to apply for modification under S. 10(2). Therefore it cannot be urged that the finality of the order under Section 6 was indicative of a condition precedent to the jurisdiction under S. 10 (2) to entertain an application for modification on a new set of circumstances having arisen in the meantime. (Para 10)

Section 6, when read with S. 12, indicates that the finality given to the certification by the appellate authority is against a challenge thereof in a Civil Court. But the finality given to the appellate authority's order is subject to the modification of those very standing orders certified by him. Section 10 itself does not lay down any restriction to the right to apply for modification. Apart from the right to apply for modification under the Act, the workmen can raise an industrial dispute with regard to standing orders. There is nothing in the Industrial Disputes Act restricting the right to raise such a dispute only when a new set of circumstances has arisen. If that right is unrestricted it is not possible that the very legislature which passed both the Acts could have, while conferring the right on the workmen individually restricted that right. (Para 11)

The Act is a beneficent piece of legislation and therefore unless compelled by any words in it the Court would not be justified in importing in S. 10 through inference only a restriction to the right conferred by it on account of supposed danger of multiplicity of applications. The policy of S. 10 is clear that a modification should not be allowed within six months from the date when the standing orders or the last modifications thereof came into operation. The object of providing the time limit was that the standing orders or their modifications should be allowed to work for sufficiently long time to see whether they work properly or not. Even that time limit is not rigid because a modification even before six months is permissible if there is an agreement between the parties. (Para 12)

An application for modification would ordinarily be made where (1) a change of

circumstances has occurred, or (2) where experience of the working of the standing orders last certified results in inconvenience, hardship, anomaly etc., or (3) where some fact was lost sight of at the time of certification, or (4) where the applicant feels that a modification will be more beneficial. In category (1) there would be no difficulty as a change of circumstances has taken place. But in cases falling under the rest of the categories there will be no change of circumstances. But that does not mean that though the implementation of the standing orders has resulted in hardship, inconvenience or anomaly, no modification can be asked for because there is no change of circumstances. In an application for modification, the issue before the authority would be not as to the reasonableness or fairness of the standing orders or their last modification, but whether the modification now applied for is fair and reasonable. Therefore, the contention that a change of circumstances is a condition precedent to the maintainability of an application under S. 10 (2) or that an application for modification without proof of such a change amounts to review by the same authority of its previous order is not correct. (Para 14)

Per Bhargava, J. (dissenting) — When an application under S. 10 (2) of the Act is made, the Certifying Officer can modify Standing Orders already certified, only if the request is not made on the basis of the same material which existed at the earlier stage when the Standing Orders were certified. An interpretation which will completely do away with the finality of orders made under S. 6 of the Act by an Appellate Authority cannot be accepted. (Para 27)

A request for modification under S. 10 (2) can only be made on the basis of fresh facts or fresh circumstances arising subsequent to the passing of the order by the Appellate Authority under S. 6 confirming the Standing Orders for the first time. If on receiving an application for modification under S. 10 (2), the Certifying Officer is held to be authorised to reconsider the reasonableness or fairness of a Standing Order already certified and confirmed under Section 6, the finality envisaged under that section in respect of the decision of the Appellate Authority will be nullified. (Para 27)

(E) Civil P. C. (1908), S. 11 — Principle of res judicata — Applicability to industrial matters — Proceedings for modifi-

ification of Standing Orders under Industrial Employment (Standing Orders) Act — It is doubtful whether principles analogous to *res judicata* can properly be applied to such proceedings — AIR 1957 SC 38 & AIR 1959 SC 1279 & AIR 1964 SC 728 & AIR 1964 SC 914, Ref. to. — (Industrial Employment (Standing Orders) Act (20 of 1946), Ss. 6 and 10). (Paras 15, 24)

(F) Constitution of India, Art. 136 — Scope — Discretionary jurisdiction of Supreme Court — Exercise of — Modification of certified Standing Orders under Industrial Employment (Standing Orders) Act — Question as to fairness and reasonableness of modifications has been left by Legislature to the authorities empowered under the Act — Supreme Court would not be justified in interfering with conclusions of authorities under the Act unless an important principle of industrial law requiring elucidation is involved — AIR 1966 SC 1471 & AIR 1967 SC 948 & AIR 1959 SC 633, Applied — (Industrial Employment (Standing Orders) Act (20 of 1946), Ss. 4, 6 and 10). (Para 16)

(G) Industrial Employment (Standing Orders) Act (20 of 1946), Ss. 4, 6 and 10 — Modification of Standing Order requiring giving of reasons in cases of discharge of workman simpliciter — Modification is fair and reasonable and should not be interfered with under Article 136 — (Constitution of India, Art. 136).

Standing Order No. 9 (a) of the employer company provided that the employer had the right to terminate the services of a permanent workman on giving one month's notice in writing or one month's pay in lieu of notice. A modification of this Standing Order required the giving of reasons and communicating them to the workman concerned even in cases of discharge simpliciter.

Held that the conclusion of the authorities under the Act that the modification was fair and reasonable should not be interfered with. The right to contract in industrial matters is no longer an absolute right and statutes dealing with industrial matters abound with restrictions on the absolute right to contract. The doctrine of hire and fire, for instance, is now completely abrogated both by statutes and by industrial adjudication, and even where the services of an employee are terminated by an order of discharge simpliciter the legality and propriety of such an order can be challenged in industrial tribunals.

These restrictions on the absolute right to contract are imposed evidently because security of employment is more and more regarded as one of the necessities for industrial peace and harmony and the contentment it brings about a pre-requisite of social justice. If reasons for discharging an employee are furnished to the employee concerned, he not only has the satisfaction of knowing why his services are dispensed with but it becomes easy for him in appropriate cases to challenge the order on the ground that it is either not legal or proper which in the absence of knowledge of those reasons it may be difficult, if not impossible for him to do.

(Para 17)

(H) Industrial Employment (Standing Orders) Act (20 of 1946), Ss. 4 and 10 — Modification of Standing Order requiring the giving of second show cause notice at stage of imposing punishment of removal cannot be considered as fair or reasonable and should be set aside under Article 136 — To import such a requirement from Article 311 in industrial matters is neither necessary nor proper and would be equating industrial employees with Civil servants — (Constitution of India Arts. 136 and 311). (Para 18)

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Woollen, Cotton & Silk Co., Ltd.
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- (1964) AIR 1964 SC 728 (V 51) =
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v. Marsel Jones 6
- (1887) 2 Ex 115=36 LJ Ex 97, La-
tham v. Lafone 6

Mr H. R. Gokhale, Senior Advocate
(Mr. B. Parthasarathy, Advocate and M/s.
O. C. Mathur, J. B. Dadachani and Ravin-
der Narain, Advocates of M/s. J. B.
Dadachani and Co., with him), for Ap-
pellant, M/s. R. K. Garg and S. C. Agar-
wala, Advocates of M/s. Ramamurthi and
Co., and Mr. Anil Kumar Gupta, Advo-
cate, for Respondent.

The following judgments of the Court
were delivered by

SHELAT, J. (for himself and Vaidia-
lingam J.):— This appeal, by special
leave, is by the employer and raises the
question as to the scope of Section 10 (2)
of the Industrial Employment (Standing
Orders) Act, 20 of 1946, as amended by
Act 36 of 1956 (referred to hereinafter as
the Act).

2. The Standing Orders of the Appel-
lant-company were certified on August 7,
1962 by the Regional Labour Commis-
sioner, Central, under Section 4 of the Act.
Both the company and the workmen filed
appeals against the said order which were
disposed of by the Appellate Authority
under Section 6. Sometime thereafter the
respondent-union applied for certain mod-
ifications, some of which were certified by
the Regional Labour Commissioner by his
order dated December 28, 1963. The Ap-
pellant-company filed an appeal against
the said order which was disposed of by

the Chief Labour Commissioner in April
1964. On April, 25, 1965 the respondent-
union made a further application for
modifications. The Regional Labour Com-
missioner by his order dated September 2,
1965 allowed certain modifications but re-
jected the rest. The union thereupon ap-
pealed against the said order. After hear-
ing the parties the Chief Labour Com-
missioner passed his impugned order dated
October 27, 1967 ordering certification of
certain modifications. Though the Ap-
pellant-company objected at first to all
the modifications, Counsel pressed the ap-
peal in respect of four modifications only.
The first modification challenged is in
Standing Order 9, clause (a) which, as
unamended, read as follows.

"The railway under the terms of em-
ployment has the right to terminate the
services of a permanent workman on giv-
ing him one month's notice in writing or
one month's pay may be paid in lieu of
notice."

The union claimed that the management
should give reasons even when they ter-
minated the services of an employee by a
discharge simpliciter. The modification al-
lowed directed reasons to be recorded in
writing and communicated to the workman
if he so desires at the time of discharge
but not if the management considers it
inadvisable. The second modification is
in Standing Order 12, clause (A), which,
in its unamended form, read as follows:

"When any of the penalties specified in
O 9 is imposed upon a workman an appeal
shall lie to the authority next above that
imposing the penalty. An appeal shall lie
to the Managing Agents only on original
orders passed by the General Manager
....."

The union's plea was that some time limit
was necessary for the disposal of the ap-
peals as the Managing Agents who are the
Appellate Authority against the orders of
the General Manager took months to dis-
pose of such appeals thereby delaying the
workman from raising an industrial dis-
pute in time and seek timely relief. The
modification allowed was that every such
appeal shall be disposed of by the Appel-
late Authority within 60 days from the
date of its receipt. The third modification
is in Standing Order 11 (vi) which read
as follows

"Removal from service: A workman
shall be liable to be removed from service
in the following circumstances:

(a) Inefficiency.

.....

The modification allowed was as follows:

"In case of inefficiency due to physical unfitness the workman whom the management considers suitable for some alternative employment shall be offered the same on reasonable emoluments having regard to his former emoluments."

The modification contains, it will be noticed, four limitations: (1) it applies only to cases of removal on the ground of physical unfitness, (2) the consideration of suitability for an alternate employment is left to the management, (3) the existence of alternative post, and (4) the question as to what reasonable emoluments should be is left to the management. The fourth modification is in Standing Order 11 (vii) (c) which, in its unamended form, was as follows:

"Every person against whom departmental enquiry is being made shall be supplied with a copy of the findings in connection with his dismissal and removal from service. The workman shall also be supplied with a copy of the proceedings of the enquiry committee as soon as possible after the conclusion of the enquiry proceedings in his case and be allowed to defend his case through union's representative."

The modification allowed was as follows:

"In case the management propose to remove the workman from service they shall serve on the workman separate show cause notice to that effect."

3. Counsel for the company challenged the impugned order in its two facets: the scope of the power of modification under Section 10 (2), and on merits on the ground that the modifications did not stand the test of reasonableness and fairness. On the first question his contention was that the jurisdiction and powers of the authorities under the Act to certify modifications of the existing Standing Orders are limited to cases where a change of circumstances is established. In the course of his argument, counsel, however, qualified the contention by conceding that if at the time of the last certification certain circumstances were, for one reason or the other, omitted from consideration they would constitute a valid reason for modification and the modification would be granted even though in such a case a change of circumstances has not occurred. He next contended that in any case though Section 11 of the Code of Civil Procedure did not apply, principles analogous to *res judicata* would apply to an application for modification unless such

application is occasioned by new circumstances having arisen or is based on new facts. Briefly, the argument was that the object of the Act is to have conditions of service of workmen in an establishment defined with precision, and therefore, to have standing orders dealing with such conditions certified. For industrial harmony and peace it is necessary that those conditions are stable and do not remain undefined or fluctuating. In pursuance of this object the Act confers finality to such certified standing orders or modifications thereof under S. 6. The contention was that if modifications were allowed without any restraint, there would be multiple applications specially as individual workmen have been given the right to apply for modifications. Therefore, the word 'final' in Section 6, it was argued, must be so read as to mean that an application for modification under Section 10 (2) can only be maintainable if it is justified on the ground of a change of circumstances having occurred after the last certification, which of course, according to the concession made by counsel, also would include cases where certain circumstances were not taken into account at the time of the last certification.

4. The relevant provisions of the Act requiring consideration in this appeal are Sections 4, 6, 10, 11 and 12. Section 4 provides that standing orders shall be certified under the Act if (a) a provision is made therein for every matter set out in the Schedule, and (b) they are otherwise in conformity with the provisions of the Act. The section further provides that it shall be the function of the certifying officer or the Appellate Authority to adjudicate upon the fairness or reasonableness of the provisions of the standing orders. Section 6 provides that any person aggrieved by the order of the certifying officer passed under Section 5 (2) may appeal to the Appellate Authority and the Appellate Authority, "whose decision shall be final", shall by an order confirm the standing orders in the form certified under Section 5 (2) or amend or add thereto to render them certifiable under the Act. Section 10, whose interpretation is in question, provides by sub-section (1) as follows:

"Standing orders finally certified under this Act shall not, except on agreement between the employer and the workmen, be liable to modification until the expiry of 6 months from the date on which the standing orders or the last modifications thereof came into operation."

Sub-section (2) runs as follows:

"Subject to the provisions of sub-section (1), an employer or workman may apply to the certifying officer to have the standing orders modified"

Sub-section (3) provides that the foregoing provisions of the Act shall apply in respect of an application for modification as they apply to the certification of the first standing orders. Section 11 empowers the certifying officer and the Appellate Authority to correct clerical or arithmetical mistakes in an order passed by them or errors arising therein from any accidental slip or omission. Lastly, Section 12 provides that no oral evidence having the effect of adding to or otherwise varying or contradicting standing orders as finally certified under the Act shall be admitted in any Court.

5 Counsel conceded, and did so rightly, that there is no express provision in any one of these sections restricting the right to apply for modification or the power of the authorities to allow modification only on proof of a change of circumstances. The only limitations to the power are the reasonableness or fairness which of course must be established and the expiry of six months after the date of the standing orders or their last modifications coming into operation. In the absence of any such express restriction we should then ask ourselves whether there is in any of these sections anything which would indicate such a restriction by necessary implication. In that connection the only word which can point to such a restriction, according to counsel, is the word 'final' in Sec. 6 so that the contention reduces itself to this that by making the order of the appellate authority final under Section 6, Parliament intended by necessary implication that the bar of finality can only be removed if new circumstances arise which necessitate or justify modification.

6. But the intention of the legislature, as observed by Lord Watson in *Salomon v. A. Salomon and Co. Ltd.*, (1897) AC 22 at p 28 "is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact". It is well settled that the meaning which words ought to be understood to bear is not to be ascertained by any

process akin to speculation and the primary duty of a court is to find the natural meaning of the words used in the context in which they occur, that context including any other phrase in the Act which may throw light on the sense in which the makers of the Act used the words in dispute. In *R. v. Wimbledon Justices*, 1953-1 QB 380, Lord Goddard said: "Although in construing an Act of Parliament the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there" Similarly, in *R. v. Mansel Jones*, (1889) 23 QBD 29 Lord Coleridge said that it was the business of the courts to see what Parliament had said, instead of reading into an Act what ought to have been said. So too, in *Latham v. Lafone*, (1887) 2 Ex 115 at p. 121, Martin B. said: "I think the proper rule for construing this statute is to adhere to its words strictly; and it is my strong belief that, by reasoning on long-drawn inferences and remote consequences, the courts have pronounced many judgments affecting debts and actions in a manner that the persons who originated and prepared the Act never dreamed of". In the light of these principles we ought, therefore, to give a literal meaning to the language used by Parliament unless the language is ambiguous or its literal sense gives rise to an anomaly or results in something which would defeat the purpose of the Act.

7. The Act was passed because the legislature thought that in many industrial establishments the conditions of service were not uniform and sometimes were not even reduced to writing. This led to conflicts resulting in unnecessary industrial disputes. The object of passing the Act was thus to require employers to define with certainty the conditions of service in their establishments and to require them to reduce them to writing and to get them compulsorily certified. The matters in respect of which the conditions of employment had to be certified were specified in the schedule to the Act. As the Act stood prior to its amendment in 1958, Section 3 required the employer to submit to the certifying officer draft standing orders proposed by him for adoption in his establishment. Section 4 provided that standing orders shall be certifiable

if (a) provision is made therein for every matter set out in the Schedule, and (b) that they were otherwise in conformity with the provisions of the Act. The section, however, expressly provided that it shall not be the function of the certifying officer or the appellate authority to adjudicate upon the fairness or reasonableness of the standing orders. Under Section 5, the certifying officer was required to send a copy of the draft standing orders to the union, if any, or in its absence to the workmen in the manner prescribed together with a notice calling for objections by them, if any, and to give opportunity to the employer and the workmen of being heard and then to decide whether or not any modification of or addition to the draft standing orders was necessary to render them certifiable under the Act. Section 6 provided for an appeal by any person aggrieved by the order passed under S. 5. The appellate authority, whose decision was made final, had the power to confirm or amend or add to the standing orders passed by the certifying officer to render them certifiable under the Act. Though the order passed by the appellate authority was made final under Section 6, Section 10 provided for modification. Sub-section (1) of Section 10 provided that standing orders finally certified under this Act shall not, except on agreement between the employer and the workmen, be liable to modification until expiry of six months from the date on which they or the last modification thereof came into operation. Sub-section (2) read as follows:.

"An employer desiring to modify his standing orders shall apply to the Certifying Officer in that behalf". Sub-section (3) provided that the foregoing provisions of the Act shall apply in respect of an application under sub-section (2) as they apply to the certification of the first standing orders.

8. As the Act stood prior to 1956, there was thus a prohibition against the certifying officer going into the question of reasonableness or fairness of the draft standing orders submitted to him by the employer. His only function was to see that the draft made provisions for all matters contained in the Schedule and that it was otherwise certifiable under the Act. Therefore, though the workmen through the union or otherwise were served with the copy of the draft and had the right to raise objections, the

objections could be of a limited character, namely, that the draft did not provide for all matters in the Schedule or that it was not otherwise certifiable under the Act. Even in an appeal under Section 6 the only objections they could raise were limited to the two aforesaid questions. The workmen thus could not object that the draft standing orders were not reasonable or fair. Under Section 10, the right to apply for modification was conferred on the employer alone and in view of sub-section (3) the only consideration which the certifying authority could apply to such modification was the one which he could apply under Sections 4 and 6. Therefore, no question whether the modification was fair or reasonable could be raised. It is thus clear that the workman had very little say in the matter even if he felt that the standing orders or their modifications were either not reasonable or fair. They could, of course, raise an industrial dispute. But that remedy was hardly satisfactory. Such a dispute had to be first sponsored by a union or at least a substantial number of workmen; it had next to go through the process of conciliation and lastly the appropriate Government may or may not be prepared to refer such a dispute to industrial adjudication. Even if it did, the entire process was a protracted one.

9. In 1956, Parliament effected radical changes in the Act widening its scope and altering its very complexion. Section 4, as amended by Act 36 of 1956, entrusted the authorities under the Act with the duty to adjudicate upon fairness and reasonableness of the standing orders. The enquiry when such standing orders are submitted for certification is now two-fold: (1) whether the standing orders are in consonance with the model standing orders, and (2) whether they are fair and reasonable. The workmen, therefore, can raise an objection as to the reasonableness or fairness of the draft standing orders submitted for certification. By amending Section 10 (2) both the workmen and the employer are given the right to apply for modification and by reason of the change made in Section 4 a modification has also now to be tested by the yardstick of fairness and reasonableness. The Act provides a speedy and cheap remedy available to the individual workman to have his conditions of service determined and also for their modifications. By amending

Sections 4 and 10, Parliament not only broadened the scope of the Act but also gave a clear expression to the change in its legislative policy. Parliament knew that the workmen, even as the unamended Act stood, had the right to raise an industrial dispute, yet, not satisfied with such a remedy, it conferred by amending Sections 4 and 10 the right to individual workmen to contest the draft standing orders submitted by the employer for certification on the ground that they are either not fair or reasonable, and more important still, the right to apply for their modification despite the finality of the order of the appellate authority under Section 6. Parliament thus deliberately gave a dual remedy to the workmen both under this Act and under the Industrial Disputes Act. This fact has in recent decisions been recognised by this Court. (cf. Bangalore Woollen, Cotton & Silk Co., Ltd. v. Their Workmen, 1968-1 Lab LJ 555=(AIR 1968 SC 585), Buckingham & Carnatic Co. Ltd. v. Their Workmen, C A. No. 674 of 1968, D/- 25-7-1968 (SC) and Hindustan Brown Boveri Ltd v The Workmen, C A. No. 1631 of 1966 D/- 31-7-1967 (SC)).

10. It will be pertinent, while examining the question whether there is a restriction, as suggested by counsel, to the right to apply for modifications, to bear in mind the change in the legislative policy reflected in the amendments of Sections 4 and 10. It will be noticed that Section 10 does not state that once a standing order is modified and the modification is certified, no further modification is permissible except upon proof that new circumstances have arisen since the last modification. As a matter of fact the legislature has not incorporated any words in the sub-section restricting the right to apply for modification except of course the time limit of six months in sub-section (1). Section 6 no doubt lays down that the order of the appellate authority in an appeal against the order of the certifying officer under Section 5 is final but that finality is itself subject to the right to apply for modification under Section 10 (2). Even so, it was urged that the finality of the order under Sec. 6 was indicative of a condition precedent to the jurisdiction under Sec. 10 (2) to entertain an application for modification on a new set of circumstances having arisen in the meantime. The question is whether such is the position.

11. The finality to the order passed under Section 6 really means that there is no further appeal or revision against that order and no more. This view finds support from Section 12 which lays down that once the standing orders are finally certified, no oral evidence can be led in any Court which has the effect of adding to or otherwise varying or contradicting such standing orders. Section 6, when read with Section 12, indicates that the finality given to the certification by the appellate authority is against a challenge thereof in a Civil Court. But the finality given to the appellate authority's order is subject to the modification of those very standing orders certified by him. As already stated Section 10 itself does not lay down any restriction to the right to apply for modification. Apart from the right to apply for modification under the Act, the workmen can raise an industrial dispute with regard to the standing orders. There is nothing in the Industrial Disputes Act restricting the right to raise such a dispute only when a new set of circumstances has arisen. If that right is unrestricted, can it be possible that the very legislature which passed both the Acts could have, while conferring the right on the workmen individually, restricted that right as suggested by counsel? To illustrate, a new industrial establishment is set up and workmen are engaged therein. Either there is no union or if there is one it is not yet properly organised. The standing orders of the establishment are certified under the Act. At the time of certification, the union or the workmen's representatives had raised either no objections or only certain objections. If subsequently the workmen feel that further objections could have been raised and if so raised the authority under the Act would have taken them into consideration, does it mean that because new circumstances have since then not arisen, the workmen would be barred from applying for modification? Let us take another illustration. Where, after the standing orders or their modifications are certified, it strikes a workman after they have been in operation for some time that a further improvement in his conditions of service is desirable, would he be debarred from applying for further modification on the ground that no change of circumstances in the meantime has taken place? Where the standing orders provide 10 festival holidays, if counsel were right, the work-

men can never apply for an addition in their number as they would be faced with the contention that the festivals existed at the time of the last certification and there was therefore no change of circumstances.

12. The Act is a beneficent piece of legislation and therefore unless compelled by any words in it we would not be justified in importing in Sec. 10 through inference only a restriction to the right conferred by it on account of a supposed danger of multiplicity of applications. The policy of Sec. 10 is clear that a modification should not be allowed within six months from the date when the standing orders or the last modifications thereof came into operation. The object of providing the time limit was that the standing orders or their modifications should be allowed to work for sufficiently long time to see whether they work properly or not. Even that time limit is not rigid because a modification even before six months is permissible if there is an agreement between the parties.

13. The ground for urging that a restriction should be read in Section 10 was the apprehension that since workmen individually have the right to apply for modifications there would be multiple applications which an employer would have to face. Secondly, that an application without a change of circumstances would be tantamount to a review by the same authority of his previous order of certification. It was said that if no restriction is read in Section 10 it would mean that the same authority, who, on satisfaction of the fairness and reasonableness of a standing order or its last modification had certified it would be called upon to review his previous decision on reasonableness and fairness. Such a review, it was argued, is permissible only on well recognised grounds namely, discovery of new and important matter or evidence, a mistake or an error apparent on the face of the record or any other sufficient reason.

14. An application for modification would ordinarily be made where (1) a change of circumstances has occurred, or (2) where experience of the working of the standing orders last certified results in inconvenience, hardship, anomaly etc., or (3) where some fact was lost sight of at the time of certification, or (4) where the applicant feels that a modification will be more beneficial. In category (1)

there would be no difficulty as a change of circumstances has taken place. But in cases falling under the rest of the categories there will be no change of circumstances. Does it mean that though the implementation of the standing orders has resulted in hardship, inconvenience or anomaly, no modification can be asked for because there is no change of circumstances? As to multiplicity of applications we think that there is no justification for any such apprehension, for, unless there is a justification for modification the authorities under the Act would reject them on the ground that they are frivolous and therefore neither fair nor reasonable. Lastly, as to such an application being a review of the last certifying order an application under Section 10 is not a review. An application for review would be made in the proceedings in which the judgment or order sought to be reviewed is passed. That would not be so in the case of an application under Section 10 (2). Such an application is independent of the proceedings in which the last certifying order was passed and is made in the exercise of an independent right conferred upon the applicant by Section 10 (2). In an application for modification, the issue before the authority would be not as to the reasonableness or fairness of the standing orders or their last modification, but whether the modification now applied for is fair and reasonable. Therefore, the contention that a change of circumstances is a condition precedent to the maintainability of an application under Section 10 (2) or that an application for modification without proof of such a change amounts to review by the same authority of its previous order is not correct.

15. It has then argued that assuming that a modification without a change of circumstances is permissible though section 11 of the Code of Civil Procedure does not apply to industrial matters, sound policy dictates that principles analogous to res judicata must be applied and it must be held that unless circumstances have changed an application for modification would be barred. For this, counsel relied on *Burn & Co. v. Their Employees*, 1956 SCR 781 at p. 789= (AIR 1957 SC 38 at p. 43). There the demand was for wage scales fixed in an award by the Mercantile Tribunal instead of the scales in accordance with the scheme of the Bengal Chamber of Commerce. In a dispute previously raised by

labour an award was made in 1950 which accepted the wage scales according to the scheme of the Bengal Chamber of Commerce and rejected the demand for the scales according to those awarded by the Mercantile Tribunal which were more favourable. It was in these circumstances that this Court expressed the view that an award fixing wage scales should have fairly long range operation and should not be unsettled unless a change of circumstances has occurred justifying fresh adjudication. But with the constant spiralling of prices the principle would appear to have lost much of its efficacy. The trend in recent decisions is that application of technical rules such as *res judicata*, acquiescence, estoppel etc. are not appropriate to industrial adjudication. In *Guest, Keen, Williams Private Ltd. v. P. J. Sterling*, 1960-1 SCR 348=(AIR 1959 SC 1279) a modification of a standing order relating to the age of superannuation was sought by raising an industrial dispute. It was contended that the reference of that dispute was barred by acquiescence and laches. That contention was rejected, the Court observing that industrial tribunals should be slow and circumspect in applying technical principles such as acquiescence and estoppel. In *Workmen of Balmer Lawrie & Co. v. Balmer Lawrie & Co.*, 1964-5 SCR 344=(AIR 1964 SC 728) also it was observed that the question as to revision of wage scales must be examined on the merits of each individual case and technical considerations of *res judicata* should not be allowed to hamper the discretion of industrial adjudication. It is, therefore, doubtful whether principles analogous to *res judicata* can properly be applied to industrial adjudication.

16. On merits, Mr. Gokhale argued that the four modifications to which he objected were neither fair nor reasonable and that therefore we should set them aside. The question is, whether in an appeal under Article 136 we would be justified in interfering with conclusions as to reasonableness and fairness by authorities empowered by the Act to arrive at such conclusions. In *Rohtak Hissar District Electricity Supply Co. Ltd. v. State of Uttar Pradesh*, 1966-2 SCR 863=(AIR 1966 SC 1471) this Court prevented counsel for the employer from canvassing such a question on the ground that the matter of fairness and reasonableness was left by the legislature to the authorities constituted under the Act. In *Hindustan*

Antibiotics Ltd. v. The Workmen, 1967-1, SCR 652 at p. 658=(AIR 1967 SC 948 at p. 953) this Court repeated what it had earlier stated in *Bengal Chemical & Pharmaceutical Works v. Their Workmen*, 1959 Supp 2 SCR 136 at p. 140=(AIR 1959 SC 633 at p. 635) that though Article 136 is couched in widest terms, it is necessary to exercise discretionary jurisdiction of this Court only in cases where awards are made in violation of the principles of natural justice or are made in a manner causing grave injustice to parties or raise an important principle of industrial law requiring elucidation by this Court or disclose exceptional or special circumstances which merit consideration by this Court.

17. As aforesaid, the modifications objected by the appellant-company are (1) giving reasons and communicating them to the workmen concerned even in cases of discharge simpliciter, (2) insertion of time limit of 60 days in the disposal of appeals, (3) insertion in standing order II of a clause that where a workman is removed on the ground of inefficiency due to physical unfitness, the management should offer to such a workman alternative employment on reasonable emoluments, and (4) insertion of the clause requiring a second show cause notice at the stage when the decision of suitable punishment to be made. So far as modifications (2) and (3) are concerned, clearly no principle is involved and there would be no justification for us to interfere with the conclusion of the appellate authority on the question of their being fair and reasonable. As regards the first modification, the contention was that an employer has under the law of master and servant the right to terminate the services of his employee by a discharge simpliciter after giving a month's notice or a month's wages in lieu thereof, and is not required to give reasons for such an order. The Industrial Disputes Act also does not lay down any fetter to that right by requiring him to give reasons to the employee concerned and industrial adjudication has so far recognised such a right. To impose such a fetter by a change in the standing orders is therefore not warranted by any statute, and, therefore, cannot be said to be either fair or reasonable. It must, however, be borne in mind that the right to contract in industrial matters is no longer an absolute right and statutes dealing with industrial matters abound with restrictions on the

absolute right to contract. The doctrine of hire and fire, for instance, is now completely abrogated both by statutes and by industrial adjudication, and even where the services of an employee are terminated by an order of discharge simpliciter the legality and propriety of such an order can be challenged in industrial tribunals. These restrictions on the absolute right to contract are imposed evidently because security of employment is more and more regarded as one of the necessities for industrial peace and harmony and the contentment it brings about a pre-requisite of social justice. During the last decade or so statutes have been passed such as the Bihar Shops and Establishments Act, 1953 which require a reasonable cause for dispensing with the services of an employee by an order of discharge simpliciter. If reasons for discharging an employee are furnished to the employee concerned, he not only has the satisfaction of knowing why his services are dispensed with but it becomes easy for him in appropriate cases to challenge the order on the ground that it is either not legal or proper which in the absence of knowledge of those reasons it may be difficult, if not impossible for him to do. In these circumstances, if the authorities under the Act have come to the conclusion that such a modification is fair and reasonable we would hardly be justified to interfere with such a decision.

18. As regards the modification requiring a second show cause notice, neither the ordinary law of the land nor the industrial law requires an employer to give such a notice. In none of the decisions given by Courts or the tribunals such a second show cause notice in case of removal has ever been demanded or considered necessary. The only class of cases where such a notice has been held to be necessary are those arising under Article 311. Even that has now been removed by the recent amendment of that Article. To import such a requirement from Article 311 in industrial matters does not appear to be either necessary or proper and would be equating industrial employees with civil servants. In our view, there is no justification on any principle for such equation. Besides, such a requirement would unnecessarily prolong disciplinary enquiries which in the interest of industrial peace should be disposed of in as short a time as possible. In our view it is not possible to consider this modification as justifiable either on

the ground of reasonableness or fairness and should therefore be set aside.

19. The appeal, therefore, is partly allowed to the extent aforesaid and the impugned order to that extent is set aside. There will be no order as to costs.

20. BHARGAVA, J.:—The management of the Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. (hereinafter referred to as "the Company") has filed this appeal, by special leave, against an order passed by the Chief Labour Commissioner (Central) under Section 6 of the Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to as "the Act") as an appellate authority, granting partially an application made under Section 10 of the Act presented on behalf of the respondent, Shahdara-Saharanpur Railway Workers Union. The first draft Standing Orders submitted by the Company to the Certifying Officer under Section 4 of the Act were certified by him on 7th/8th August, 1962, after deciding objections that had been filed on behalf of the workmen. In appeal, the Chief Labour Commissioner (Central), New Delhi, modified those Standing Orders to some extent by his order dated 12th February, 1963. Subsequently, these certified Standing Orders were modified by the order dated 28th December, 1963 passed by the Certifying Officer and the appeal against his orders of modification was dismissed on the 23rd April, 1954. Then, on 25th April, 1965, an application was presented under Section 10 (2) of the Act on behalf of the respondent seeking modifications in a number of Standing Orders as they stood after original certification and first modification. The Certifying Officer passed his orders on this application and, against those orders, the respondent filed an appeal before the Chief Labour Commissioner (Central), New Delhi. The Chief Labour Commissioner, by his order dated 27th October, 1967, allowed modifications in a number of Standing Orders. The present appeal is directed against this order and challenges the modifications granted in Standing Orders Nos. 9 (a), 12 (A), 11 (ix), 11 (vii) and 13. The main ground urged by the Company before this Court in support of this appeal was that the Chief Labour Commissioner was not justified in directing modifications in the Standing Orders, already certified, in the absence of fresh material or fresh facts on the basis of which alone he was entitled to grant modifications under Section 10 of the

Act. Learned Counsel appearing on behalf of the Company, in the alternative, also put forward the plea that on principles analogous to the rule of *res judicata* it should be held that the Chief Labour Commissioner had no jurisdiction to grant these modifications under Section 10 in view of the previous decisions given when the Standing Orders were originally certified and modified for the first time.

21. So far as the argument of learned Counsel based on the applicability of principles analogous to the rule of *res judicata* is concerned, learned counsel conceded that there is no direct ruling of any Court laying down that such principles are applicable when a Certifying Officer is dealing with an application for modification of Standing Orders under Section 10 of the Act, or when an appeal against such an order is being heard by the Appellate Authority under Section 6 of the Act. Reliance was, however, placed on the decision of this Court in 1956 SCR 781=(AIR 1957 SC 38) where this Court was dealing with the applicability of the principle analogous to the rule of *res judicata* to proceedings before an Industrial Tribunal dealing with a reference under the Industrial Disputes Act. In that case, an earlier award had been given in an industrial dispute and the question arose whether, in the subsequent dispute for adjudication, the decisions given in the earlier award should be held as binding, unless it was shown that there had been a change of circumstances. In the appeal before this Court, it was urged that the Appellate Tribunal was in error in brushing aside the earlier award and in deciding the matter afresh, as if it arose for the first time for determination, and it was argued that, when once a dispute is referred to a Tribunal and that results in an adjudication, that must be taken as binding on the parties thereto, unless there was a change of circumstances, and, as none such had been alleged or proved, the earlier award should have been accepted, as indeed it was accepted by the Adjudicator. This Court held—

"In the instant case, the Labour Appellate Tribunal dismissed this argument with the observation that that was 'a rule of prudence and not of law'. If the Tribunal meant by this observation that the statute does not enact that an award should not be re-opened except on the ground of change of circumstances, that would be quite correct. But that is not

decisive of the question, because there is no provision in the statute prescribing when and under what circumstances an award could be re-opened. Section 19 (4) authorises the Government to move the Tribunal for shortening the period during which the award would operate, if "there has been a material change in the circumstances on which it was based." But this has reference to the period of one year fixed under S. 19 (3) and if that indicates anything, it is that that would be the proper ground on which the award could be re-opened under S. 19 (6), and that is what the learned Attorney-General contends. But we propose to consider the question on the footing that there is nothing in the statute to indicate the grounds on which an award could be re-opened. What then is the position? Are we to hold that an award given on a matter in controversy between the parties after full hearing ceases to have any force if either of them repudiates it under Section 19 (6), and that the Tribunal has no option, when the matter is again referred to it for adjudication, but to proceed to try it *de novo*, traverse the entire ground once again, and come to a fresh decision. That would be contrary to the well-recognised principle that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be reargued. It is on this principle that the rule of *res judicata* enacted in Section 11 of the Civil Procedure Code is based. That section is, no doubt, in terms inapplicable to the present matter, but the principle underlying it, expressed in the maxim '*interest rei publicae ut sit finis litium*', is founded on sound public policy and is of universal application. 'The rule of *res judicata* is dictated', observed Sir Lawrence Jenkins, C. J., in *Sheoparsan Singh v. Rammandan Prasad Narayan Singh*, 43 Ind App 91=(AIR 1916 PC 78), 'by a wisdom which is for all time'. And there are good reasons why this principle should be applicable to decisions of Industrial Tribunals also. Legislation regulating the relation between Capital and Labour has two objects in view. It seeks to ensure to the workmen, who have not the capacity to treat with capital on equal terms, fair returns for their labour. It also seeks to prevent disputes between employer and employees, so that production might not be adversely affected and the larger interests of the society might not suffer.

Now, if we are to hold that an adjudication loses its force when it is repudiated under Section 19 (6) and that the whole controversy is at large, then the result would be that far from reconciling themselves to the award and settling down to work it, either party will treat it as a mere stage in the prosecution of a prolonged struggle, and far from bringing industrial peace, the awards would turn out to be but truces giving the parties breathing time before resuming hostile action with renewed vigour. On the other hand, if we are to regard them as intended to have long term operation and at the same time hold that they are liable to be modified by change in the circumstances on which they were based, both the purposes of the legislature would be served. That is the view taken by the Tribunals themselves in *Army & Navy Stores Ltd., Bombay v. Their Workmen*, 1951-2 Lab LJ 31 (LATI-Bom) and *Ford Motor Co. of India Ltd. v. Their Workmen*, 1951-2 Lab LJ 231 (LATI-Bom) and we are of opinion that they lay down the correct principle, and that there were no grounds for the Appellate Tribunal for not following them."

22. As against this view expressed by this Court, learned Counsel for the respondent relied on the remarks made by this Court in a subsequent case, 1964-5 SCR 344=(AIR 1964 SC 728). In that case, the Court was dealing with the question of alteration in wage structure and had to consider the effect of an earlier award. The Court held:—

"When a wage structure is framed, all relevant factors are taken into account and normally it should remain in operation for a fairly long period; but it would be unreasonable to introduce considerations of *res judicata* as such, because for various reasons which constitute the special characteristics of industrial adjudication, the said technical considerations would be inadmissible. As the Labour Appellate Tribunal itself has observed, the principle of gradual advance towards the living wage which industrial adjudication can never ignore, itself constitutes such a special feature of industrial adjudication that it renders the application of the technical rule of *res judicata* singularly inappropriate. If the paying capacity of the employer increases or the cost of living shows an upward trend, or there are other anomalies, mistakes or errors in the award fixing wage structure, or there has been a rise in the wage structure in com-

parable industries in the region, industrial employees would be justified in making a claim for the re-examination of the wage structure and if such a claim is referred for industrial adjudication, the Adjudicator would not normally be justified in rejecting it solely on the ground that enough time has not passed after the making of the award or that material change in relevant circumstances had not been proved. It is, of course, not possible to lay down any hard and fast rule in the matter. The question as to revision must be examined on the merits in each individual case that is brought before an adjudicator for his adjudication."

23. Further support was sought by learned Counsel from the remarks made by this Court in *Associated Cement Staff Union v. Associated Cement Co., Ltd., Bombay*, 1964-1 Lab LJ 12=(AIR 1964 SC 914). The judgment in this case was given only about a month after the judgment in the case of *Workmen of Balmer Lawrie & Co.*, 1964-5 SCR 344=(AIR 1964 SC 728) (*supra*) by the same Bench of this Court which held:—

"It is true that too frequent alterations of conditions of service by industrial adjudication have been generally deprecated by this Court for the reason that it is likely to disturb industrial peace and equilibrium. At the same time, the Court has more than once pointed out the importance of remembering the dynamic nature of industrial relations. That is why the Court has, specially in the more recent decisions, refused to apply to industrial adjudications principles of *res judicata* that are meant and suited for ordinary civil litigations. Even where conditions of service have been changed only a few years before, industrial adjudication has allowed fresh changes if convinced of the necessity and justification of these by the existing conditions and circumstances. Where, as in the present case, in a previous reference the tribunal has refused the demand for change, there is even less reason for saying that that refusal should have any such binding effect. It is important to remember in this connection that working hours remained unchanged for many years in this concern and during these years, considerable changes have taken place in the country's economic position and expectations. With the growing realization of need for better distribution of national wealth has also come an understanding of the need for increase in production as an

essential pre-requisite of which greater efforts on the part of the labour force are necessary. That itself is sufficient reason against accepting the argument against any change in working hours if found justified on relevant considerations that have been indicated above."

24. These three decisions, which have been brought to our notice, *prima facie* indicate that the Court has expressed conflicting views on the question of applying the principle underlying the rule of *res judicata* to proceedings for adjudication of industrial disputes by an Industrial Tribunal under the Industrial Disputes Act. In the circumstances, I have felt some hesitation in applying this principle in the present case as urged on behalf of the Company. I consider that, in the present case, it would be much more appropriate to examine the scheme of the Act itself to find out the intention of the legislature and to arrive at a decision on that basis on the question whether a modification on an application under Section 10 of the Act should only be allowed on the basis of facts or circumstances appearing subsequent to the previous certification of the Standing Orders, or whether, in dealing with the application for modification, the Certifying Officer and the Appellate Authority can re-examine the entire position even as it existed at the time of the previous orders and arrive at a different decision.

25 The scheme of the Act was examined by this Court in 1966-2 SCR 863; (AIR 1966 SC 1471), where this Court held —

"The Act was passed on the 23rd April, 1946, and the Standing Orders framed by the U. P. Government under section 15 of the Act were published on the 14th May, 1947. The Central Act (the Industrial Disputes Act No. 14 of 1947) came into force on the 1st April, 1947, whereas the U. P. Act (U. P. Industrial Disputes Act No. 28 of 1947) came into force on the 1st February, 1948. It will thus be seen that the Act came into force before either the Central Act or the U. P. Act was passed. The scheme of the Act originally was to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to the workmen employed by them. The Legislature thought that in many industrial establishments, the conditions of employment

were not always uniform, and sometimes, were not even reduced to writing, and that led to considerable confusion which ultimately resulted in industrial disputes. That is why the Legislature passed the Act making it compulsory for the establishments to which the Act applied to reduce to writing conditions of employment and get them certified as provided by the Act. The matters in respect of which conditions of employment had to be certified were specified in the Schedule appended to the Act. This Schedule contains 11 matters in respect of which Standing Orders had to be made. In fact, the words 'Standing Orders' are defined by Section 2 (g) as meaning rules relating to matters set out in the Schedule. The 'Certifying Officer' appointed under the Act is defined by Section 2 (c), whereas 'Appellate Authority' is defined by Section 2 (a).

Originally, the jurisdiction of the Certifying Officer and the Appellate Authority was very limited; they were called upon to consider whether the Standing Orders submitted for certification conformed to the Model Standing Orders or not. Section 3 (2) provides that these Standing Orders shall be, as far as practicable, in conformity with such Model Standing Orders. Section 15, which deals with the powers of the appropriate Government to make rules, authorises, by clause (2) (b), the appropriate Government to set out Model Standing Orders for the purposes of this Act. That is how the original jurisdiction of the certifying authorities was limited to examine the draft Standing Orders submitted for certification and compare them with the Model Standing Orders.

In 1956, however, a radical change was made in the provisions of the Act. Section 4, as amended by Act 36 of 1956, has imposed upon the Certifying Officer or the Appellate Authority the duty to adjudicate upon the fairness or the reasonableness of the provisions of any Standing Orders. In other words, after the amendment was made in 1956, the jurisdiction of the certifying authorities has become very much wider and the scope of the enquiry also has become correspondingly wider. When draft Standing Orders are submitted for certification, the enquiry now has to be two-fold; are the said Standing Orders in conformity with Model Standing Orders; and are they reasonable or fair? In dealing with this latter question, the Certifying Officer and

the Appellate Authority have been given powers of a Civil Court by Section 11 (1). The decision of the Certifying Officer is made appealable to the Appellate Authority under Section 6 at the instance of either party. Similarly, by an amendment made in 1956 in Section 10 (2), both the employer and the workmen are permitted to apply for the modification of the said Standing Orders after the expiration of 6 months from the date of their coming into operation. It will thus be seen that when certification proceedings are held before the certifying authorities, the reasonableness or the fairness of the provisions contained in the draft Standing Orders falls to be examined."

It is in the light of this scheme of the Act explained by this Court that the decision has to be arrived at as to how, in what manner, and under what circumstances the Certifying Officer or the Appellate Authority should grant modifications when an application under Section 10 (2) of the Act is validly made after the expiry of period of six months laid down in Section 10 (1) of the Act.

26. The purpose of the Act, as it was originally passed in 1946, was merely to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to the workmen employed by them. To give effect to this purpose, Section 3 of the Act gave the power exclusively to the employers to submit draft Standing Orders for certification. The Certifying Officer had to certify the Standing Orders, if provision was made in them for every matter set out in the Schedule and the Standing Orders were otherwise in conformity with the provisions of the Act. In addition, sub-section (2) of Section 3 also laid down that the provision to be made was to be, as far as practicable, in conformity with Model Standing Orders prescribed by the appropriate State Government. Thus, the Act, in its original form, was designed only for the purpose of ensuring that conditions of service, which the employer laid down, became known to the workmen and the liberty of the employer in prescribing the conditions of service was only limited to the extent that the Standing Orders had to be in conformity with the provisions of the Act and, as far as practicable, in conformity with Model Standing Orders. The Certifying Officer or the Appellate

Authority were debarred from adjudicating upon the fairness or the reasonableness of the provisions of the Standing Orders. Then, as noticed in the case of Rohtak Hissar District Electricity Supply Co. Ltd., 1966-2 SCR 863=(AIR 1966 SC 1471) (supra), the Legislature made a drastic change in the policy of the Act by amending Section 4 and laying upon the Certifying Officer the duty of deciding whether the Standing Orders proposed by the employer were reasonable and fair, and also by amending Section 10 (2) so as to permit even a workman to apply for modification of the certified Standing Orders, while, in the original Act, the employer alone had the right to make such an application. It is, however, to be noticed that the preamble of the Act was not altered, so that the purpose of the Act remained as before. While the Act was in its unamended form, if the workmen had a grievance, they could not apply for modification of certified Standing Orders and, even at the time of initial certification, they could only object to a Standing Order on the ground that it was not in conformity with the provisions of the Act or Model Standing Orders. After amendment, the workmen were given the right to object to the draft Standing Orders at the time of first certification on the ground that the Standing Orders were not fair and reasonable and, even subsequently, to apply for modification of the certified Standing Orders after expiry of the period of six months prescribed under Section 10 (1) of the Act. These rights granted to the workmen and the powers conferred on the Certifying Officer and the Appellate Authority, however, still had to be exercised for the purpose of giving effect to the object of the Act as it continued to remain in the preamble, which was not altered. Before the amendment of the Act, if the workmen had any grievance on the ground of unfairness or unreasonableness of the Standing Orders proposed by the employer, their only remedy lay under the Industrial Disputes Act. By amendment in 1956, a limited remedy was provided for them in the Act itself by conferring on the Certifying Officer the function of judging the reasonableness and fairness of the proposed Standing Orders. These amendments cannot, however, affect the alternative remedy which the workmen had of seeking redress under the Industrial Disputes Act if they had grievance against any of the Standing Orders certified by the Certi-

fyng Officer (see 1968-1 Lab LJ 555= AIR 1968 SC 585) and C A. No. 674 of 1968, D/- 25-7-1968 (SC)). It is, therefore, clear that, after the amendment in 1956, the workmen have now two alternative remedies for seeking alterations in the Standing Orders proposed or already certified. They can object to the proposed Standing Orders at the time of first certification, or can ask for modification of the certified Standing Orders under Section 10 (2) on the limited ground of fairness or reasonableness. But, for the same purpose, they also have the alternative remedy of seeking redress under the Industrial Disputes Act, in which case the scope of their demand would be much wider. If the proceedings go for adjudication under the Industrial Disputes Act, the workmen can claim alterations of the Standing Orders not merely on the ground of fairness or reasonableness, but even on other grounds, such as further liberalisation of the terms and conditions of service, even though the certified Standing Orders may be otherwise fair and reasonable. The remedy provided by the Act has, therefore, a limited scope only.

27. In this background, the effect of Section 6, which lays down that, when the Appellate Authority gives its decision confirming the Standing Orders either in the form certified by the Certifying Officer or after amending the Standing Orders by making modifications thereof or additions thereto, his decision shall be final, has further to be considered. On the face of it, this provision means that, if the Appellate Authority confirms the Standing Orders at the time of first certification, that order is not to be subsequently questioned before any authority. There is, of course, the provision in Section 10 (2) permitting either an employer or a workman to apply for modification of the Standing Orders after the expiry of six months from the date of certification. It appears to me that, on the language of Section 6, it must be held that this request for modification under Section 10 (2) can only be made on the basis of fresh facts or fresh circumstances arising subsequent to the passing of the order by the Appellate Authority under Section 6 confirming the Standing Orders for the first time. If, on receiving an application for modification under Section 10 (2), the Certifying Officer is held to be authorised to reconsider the reasonableness or fairness of a Standing Order already certified and confirmed under Section 6, the finality

envisaged under that section in respect of the decision of the Appellate Authority will be nullified. Cases may arise where, on first application for certification of the Standing Orders, an objection may be raised by the workmen and a modification sought on the ground that the proposed Standing Order is not fair or reasonable. Such an objection may be dismissed both by the Certifying Officer and the Appellate Authority. Six months after the certification, a workman may apply for the same modification of the same Standing Order without any fresh facts or circumstances. If it be held that the power of the Certifying Officer on an application for modification is not limited at all and can be exercised even on the material which was originally before the Certifying Officer and the Appellate Authority, the Certifying Officer may, on the same material, come to a conclusion different from the conclusion arrived at by the Appellate Authority at the first stage under Section 6 of the Act. In that case, the Certifying Officer may allow the modification which was previously rejected by the Appellate Authority. The wide interpretation, urged by learned counsel for the workmen in this appeal that the power of a Certifying Officer on an application for modification is not limited at all, can thus result in orders being made which completely negative the finality of the decision given by an Appellate Authority under S. 6 at an earlier stage. In fact, if this interpretation is accepted and it is held that an order of modification can be made on the identical material which was available to the Appellate Authority at the time of its earlier order, it would mean that, merely because a period of six months has elapsed, a certifying officer would be competent to re-appraise the same facts and circumstances, take a different view and set aside the order passed by his superior authority and, thus, in effect, sit in judgment over an order made by a superior authority. Of course a Certifying Officer, being junior to the Appellate Authority, may hesitate to do so; but a successor Appellate Authority may very well hold views different from his predecessor and may come to a decision on identical material that a Standing Order held to be fair and reasonable by his predecessor at the stage of appeal under Section 6 was not fair and reasonable, and that a modification should be allowed on the ground of being fair and

reasonable, even though that modification was disallowed by his predecessor. It is also to be noted that the right to apply for modification is not confined to workmen alone, but that right is granted to the employers also. There can, therefore, be reversed cases where the draft Standing Order submitted by an employer may be modified by the Appellate Authority under Section 6 and, six months later, the employer may again apply for modification so as to result in restoration of his original draft in the hope that the successor Appellate Authority would hold the opinion that the original draft Standing Order proposed by the employer was fair and reasonable and that the modification made by his predecessor under Section 6 was not justified. Considering these circumstances, I am of the view that, when an application under Section 10 (2) of the Act is made, the Certifying Officer can modify Standing Orders already certified, only if the request is not made on the basis of the same material which existed at the earlier stage when the Standing Orders were certified. I am unable to accept an interpretation which will completely do away with the finality of orders made under Section 6 of the Act by an Appellate Authority.

28. This interpretation, of course, does not affect the right of the workmen to seek an amendment of the Standing Orders, even if certified as reasonable and fair by the Appellate Authority under Section 6, by appropriate proceedings under the Industrial Disputes Act. In fact, it appears to me that the power of a Tribunal dealing with an industrial dispute under that Act relating to direct alteration of a Standing Order held to be reasonable and fair by a Standing Order will, of course, be wide enough to permit the Tribunal to direct alteration of a Standing Order held to be reasonable and fair by the Appellate Authority under Section 6 of the Act, in case a dispute about it is referred to the Tribunal; and that is the only remedy available if either the workman or the employer desires to have modification without any fresh grounds, material or circumstances. The validity of the order of the Appellate Authority in the present appeal has to be judged on this basis.

29. I have already mentioned earlier the various Standing Orders in respect of which modifications allowed by the Appellate Authority were sought to be challenged in this appeal. The objections in

respect of some of these modifications, which were originally challenged, were not pressed by counsel during the hearing of the appeal and, consequently, those modifications need not be interfered with. At the stage of final hearing, learned counsel only pressed for setting aside four modifications mentioned by the Chief Labour Commissioner in his appellate order as items Nos. 1, 3, 5 and 6 relating to modifications of Standing Orders 9 (a), 12 (A) and 11 (vii). It may be mentioned that items 5 and 6 are both modifications in Standing Order 11 (vii). In each of these cases, the order passed by the Chief Labour Commissioner now impugned shows that he did not rely on any fresh facts, material or circumstances which were not available at the earlier stage when the Standing Orders were first certified or first modified. In effect, therefore, the present order amounts to passing order, different from earlier orders passed by the Appellate Authority, on a re-consideration of the same material which was available to both the Authorities. In fact, the modification at item No. 1 in Standing Order 9 (a) had been specifically disallowed in appeal by the Chief Labour Commissioner in his order dated 12th February, 1963, when he first heard the appeal under Section 6 and confirmed the certification of the original Standing Orders. Thus, in respect of item No. 1, what the present Chief Labour Commissioner has done is to permit the modification because he considered it reasonable and fair, even though, on the same material, his predecessor had disallowed this very modification on the basis that, in his opinion, the original draft Standing Order was fair and reasonable. On the principle enunciated above, it is clear that the order of the Chief Labour Commissioner, allowing all these four modifications, which is not based on any fresh facts, material or circumstances, is liable to be set aside.

30. As a result, I would partly allow the appeal and set aside the order of the Chief Labour Commissioner (Central), permitting modifications mentioned by him in his Order at items Nos. 1, 3, 5 and 6 relating to Standing Orders 9 (a), 12 (A) and 11 (vii). In the circumstances of this case, I would direct parties to bear their own costs of this appeal.

KSB

Appeal partly allowed.

AIR 1969 SUPREME COURT 530
(V 56 C 102)

(From: (1) Industrial Tribunal Madras*,
(2) Addl. Industrial Tribunal, Mysore)**

J. M. SHELAT AND K. S. HEGDE, JJ.

(1) In Civil Appeal No. 1630 of 1967

M/s. Sanghvi Jeevraj Ghewar Chand and others, Appellants v. Secretary, Madras Chillies, Grains and Kirana Merchants Workers Union and another, Respondents;

(2) In Civil Appeal No. 1721 of 1967
Indian Telephone Industries Ltd., Appellant v. The Workmen, Respondents.

Civil Appeals Nos. 1630 and 1721 of 1967, D/- 16-7-1968.

(A) Payment of Bonus Act (21 of 1965), Preamble — Interpretation — Reference to history of bonus and the background of the Act — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Reference to background of the Act).

Reference to the history of the subject of bonus, the background and the circumstances in which the Payment of Bonus Act was passed is permissible for the limited purpose of appreciating the mischief Parliament had in mind and the remedy which it wanted to provide for preventing that mischief and not for the purpose of aiding the Court in construing the provisions of the Act. (1584) 78 ER 637 and AIR 1955 SC 681 and AIR 1960 SC 675 and AIR 1957 SC 628, Ref: AIR 1960 SC 12 and AIR 1963 SC 1241 and AIR 1968 SC 682, Ref. (Para 2)

History of Bonus prior to the Act traced. (Para 3)

Bonus which was originally a voluntary payment acquired under the Full Bench formula the character of a right to share in the surplus profits enforceable through the machinery of the Industrial Disputes Act, 1947 and other corresponding Acts. Under the Payment of Bonus Act liability to pay bonus has now become a statutory obligation imposed on the employers. From the history of the legislation it is clear (1) that the Government set up a Commission to consider comprehensively the entire question of bonus in all its aspects, and (2) that the Commission accordingly con-

sidered the concept of bonus, the method of computation, the machinery for enforcement and a statutory formula in place of the one evolved by industrial adjudication. (Para 3)

(B) Payment of Bonus Act (21 of 1965), Sections 1 (3), 2 (16), 32 (x), 22, 39 — Claim to bonus by workers in establishments to which the Act does not apply — Scope of Sections 22 and 39 — Industrial Disputes Act does not provide for right to bonus — Act is exhaustive — Workers in establishments to which Act does not apply cannot claim bonus dehors the Act.

Section 22 provides that where a dispute arises between an employer and his employees (1) with respect to the bonus payable under the Act, or (2) with respect to the application of the Act, such a dispute shall be deemed to be an industrial dispute within the meaning of the Industrial Disputes Act, 1947 or any corresponding law relating to investigation and settlement of industrial disputes in force in a State and the provisions of that Act and such law, as the case may be, shall, save as otherwise expressly provided, apply accordingly. An industrial dispute under the Industrial Disputes Act would be between a workman as defined in that Act and his employer and the dispute can be an industrial dispute if it is one as defined therein. But the definition of an "employee" under Sec. 2 (13) of Payment of Bonus Act is wider than that of a "workman" under the Industrial Disputes Act. A dispute between an employer and an employee, therefore, may not fall under the Industrial Disputes Act and in such a case the Act would not apply and its machinery for investigation and settlement would not be available. That being so, and in order that such machinery for investigation and settlement may be available, Section 22 has been enacted to create a legal fiction whereunder such disputes are deemed to be industrial disputes under the Industrial Disputes Act or any other corresponding law. For the purposes of such disputes the provisions of the Industrial Disputes Act or such other law are made applicable. But the application of Section 22 is limited only to the two types of disputes referred to therein and not to others.

Section 39, on the other hand provides that "save as otherwise expressly provided" the provision of the Act shall be in addition to and not in derogation of the

* (Industrial Dispute No. 78 of 1966, D/- 28-4-1967—Madras)

** (A. I. D. No. 29 of 1966, D/- 14-7-1967, —Mysore)

Industrial Disputes Act or any corresponding law relating to investigation and settlement of industrial disputes in force in a State. Except for providing for recovery of bonus due under a settlement, award, or agreement as an arrear of land revenue as laid down in Sec. 21, the Act does not provide any machinery for the investigation and settlement of disputes between an employer and an employee. (Para 6)

As the Act does not provide any machinery for investigation and settlement of remaining disputes, Parliament by enacting Section 39 has sought to apply the provisions of the Industrial Disputes Act or such other corresponding law for investigation and settlement of the remaining disputes, though such disputes are not industrial disputes as defined in those Acts. The distinction between Section 22 and Section 39, therefore, is that whereas Section 22 by fiction makes the disputes referred to therein industrial disputes and applies the provisions of the Industrial Disputes Act and other corresponding laws for the investigation and settlement thereof, Section 39 makes available for the rest of the disputes the machinery provided in that Act and other corresponding laws for adjudication of disputes arising under the Payment of Bonus Act. Therefore, there is no question of a right to bonus under the Industrial Disputes Act or other corresponding Acts having been retained or saved by Section 39. Neither the Industrial Disputes Act nor any of the other corresponding laws provides for a right to bonus. Item 5 in Schedule 3 to the Industrial Disputes Act deals with jurisdiction of tribunals set up under Sections 7, 7A and 7B of that Act, but does not provide for any right to bonus. Such a right is statutorily provided for the first time by the Payment of Bonus Act.

(Para 6)

Provisions of sub-sections (3) and (4) of Section 1 do not necessarily mean that the Act was not intended to be a comprehensive and exhaustive law dealing with the entire subject of bonus and the persons to whom it should apply. Even where an Act deals comprehensively with a particular subject-matter, the legislature can surely provide that it shall apply to particular persons or groups of persons or to specified institutions only. Therefore, the fact that the preamble states that the Act shall apply to certain establishments does not necessarily mean

that it was not intended to be a comprehensive provision dealing with the subject matter of bonus. While dealing with the subject-matter of bonus the legislature can lay down as a matter of policy that it will exclude from its application certain types of establishments and also provide for exemption of certain other types of establishments even though such establishments would otherwise fall within the scope of the Act. The exclusion of establishments where less than 20 persons are employed in Section 1 (3) therefore is not a criterion suggesting that Parliament has not dealt with the subject matter of bonus comprehensively in the Act. There was until the enactment of this Act no statute under which payment of bonus was a statutory obligation on the part of an employer or a statutory right therefor of an employee. The right to the payment of bonus and the obligation to pay it arose on principles of equity and fairness in settling such disputes under the machinery provided by the Industrial Acts and not as a statutory right and liability as provided for the first time by the present Act. In providing such statutory liability, Parliament has laid down a statutory formula on which bonus would be calculated irrespective of whether the establishment in question has during a particular accounting year made profit or not. It can further lay down that the formula it has evolved and the statutory liability it provides in the Act shall apply only to certain establishments and not to all. Since there was no such statutory obligation under any previous Act, there would not be any question of Parliament having to delete either such obligation or right. In such circumstances, since Parliament is providing for such a right and obligation for the first time there would be no question also of its having to insert in the Act an express provision of exclusion. In other words, it has not to provide by express words that henceforth no bonus shall be payable under the Industrial Disputes Act or other corresponding Act as those Acts did not confer any statutory right to bonus.

(Paras 7, 7A)

Parliament by enacting Section 1 (3) excluded only petty establishments. If, while doing so, it expressly excluded as a matter of policy certain petty establishments in view of the recommendation of the Commission in that regard, viz., that the application of the Act would lead to harassment of petty proprietors and dis-

harmony between them and their employees, it cannot be said that Parliament did not intend or was not aware of the results of exclusion of employees of such petty establishments.

(Paras 10, 11)

The exemption of establishments in public sector is enacted with a deliberate object, viz., not to subject such establishments to the burden of bonus which are conducted without any profit motive and are run for public benefit. The exemption in Section 32 (x) is, however, a limited one, for, under Section 20 if a public sector establishment were in any accounting year to sell goods produced or manufactured by it in competition with an establishment in private sector and the income from such sale is not less than the 20 per cent of its gross income, it would be liable to pay bonus under the Act. Once again it is clear that in exempting public sector establishments, Parliament had a definite policy in mind.

(Para 12)

If the contention that the object of Section 32 was only to exempt the establishments therein enumerated from the application of the bonus formula enacted in the Act, but that the employees of those establishments were left at liberty to claim and get bonus under the machinery provided by the Industrial Disputes Act and other corresponding Acts were accepted the very object of enacting Section 32 would be frustrated.

(Para 14)

Besides, the acceptance of this contention would result in certain anomalies

(Para 15)

Considering the history of the legislation, the background and the circumstances in which the Act was enacted, the object of the Act and its scheme, it is not possible to accept the construction that the Payment of Bonus Act is not an exhaustive Act dealing comprehensively with the subject-matter of bonus in all its aspects or that Parliament still left it open to those to whom the Act does not apply by reason of its provisions either as to exclusion or exemption to raise a dispute with regard to bonus through industrial adjudication under the Industrial Disputes Act or other corresponding law.

Thus in view of the non-applicability of the Act to establishments, not being factories and which employ less than 20 persons therein and the exemption of employees in an establishment in public

sector though employing more than 20 persons the employees in both these establishments cannot claim bonus dehors the Act. (Para 18)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 662 (V 55) =
Writ Petns. Nos. 84, 174, 188 and
244 of 1966, D/- 20-10-1967,
S. Azeez Basha v. Union of India 2A
- (1963) AIR 1963 SC 1241 (V 50) =
(1964) 1 SCR 371, State of W. B
v. Union of India 2A
- (1962) AIR 1962 SC 1255 (V 49) =
(1962) 2 SCR 934, Ahmedabad
Miscellaneous Industrial Workers
Union v. The Ahmedabad Electric-
ity Co. Ltd. 3
- (1960) AIR 1960 SC 12 (V 47) =
(1960) 1 SCR 200, Central Bank
of India v. Their Workmen 2A
- (1960) AIR 1960 SC 675 (V 47) =
(1960) 2 SCR 942, Corporation of
the City of Nagpur v. Its Em-
ployees 2A
- (1959) AIR 1959 SC 967 (V 46) =
1959 SCR 925, Associated Cement
Co. Ltd. v. Its Workmen 3
- (1958) AIR 1958 SC 153 (V 45) =
1958 SCR 878, Sree Meenakshi
Mills Ltd v Their Workmen 3
- (1958) AIR 1958 SC 923 (V 45) =
1959 SCR 895, State of Mysore
v Workers of Gold Mines 3
- (1957) AIR 1957 SC 110 (V 44) =
1957 SCR 33, Baroda Borough
Municipality v. Its Workmen 3
- (1957) AIR 1957 SC 628 (V 44) =
1957 SCR 930, R. M. D. Chamar-
baugwalla v. Union of India 2A
- (1955) AIR 1955 SC 170 (V 42) =
(1955) 1 SCR 991, Muir Mills
Co. v. Suta Mills Mazdoor Union
Kanpur 3
- (1955) AIR 1955 SC 661 (V 42) =
(1955) 2 SCR 603, Bengal Im-
munity Company Ltd. v. State
of Bihar 2A
- (1954) 76 ER 637 = 3 Co Rep. 7a
Heydon's Case 2A

In C. A. No. 1630 of 1967

M/s E. C. Agrawala, Champat Rai
and Miss Santosh Gupta, Advocates, for
Appellants, M/s M. K. Ramamurthy and
M. V. Goswami, Advocates, for Respon-
dent No 1.

In C A. No. 1721 of 1967.

Mr. C. K. Daphtary, Attorney-General
for India, (M/s G. B. Pal and S. K.
Dholakia, Advocates and Mr. O. C.
Mathur, Advocate of M/s. J. B. Dada-

chanji and Co. with him), for Appellants; Mr. H. R. Gokhale, Senior Advocate (Mr. M. K. Ramamurthi, Mrs. Shyamala Pappu and Mr. Vineet Kumar, Advocates, with him), for Respondents.

The following Judgment of the Court was delivered by

SHELAT, J.: In Civil Appeal No. 1630 of 1967, workmen engaged by certain chillies and kirana shops in Madras and who were members of the respondent Union made a demand on December 13, 1965 for bonus for the year 1964-65 equivalent to four months' wages. Conciliation proceedings having failed, the dispute was referred to the Industrial Tribunal, Madras. In Civil Appeal No. 1721 of 1967, the appellant company is admittedly an establishment in public sector to which section 20 of the Payment of Bonus Act, 21 of 1965 (hereinafter referred to as the Act) does not apply. In both these cases, the Tribunals held that though the Act did not apply, in the first case by reason of Section 1 (3) and in the other by reason of section 32 (x), the employees were entitled to claim bonus and awarded their claims in C. A. No. 1630 of 1967. These appeals by special leave challenge the correctness of the view taken by the Tribunals as to the scope and nature of the Act.

2. The question for decision in both the appeals is whether in view of the non-applicability of the Act to establishments, not being factories and which employ less than 20 persons therein as the appellants in appeal No. 1630 of 1967 are, and the exemption of employees in an establishment in public sector though employing more than 20 persons as the appellant company in appeal No. 1721 of 1967, is under section 32 (x) of the Act, the employees in both these establishments could claim bonus dehors the Act. The question depends upon the true view of certain provisions and the scope of the Act. But before we take upon ourselves the burden of construing these provisions, it is necessary to refer briefly to the history of the question of bonus, the background and the circumstances in which the Act was passed. This is permissible for the limited purpose of appreciating the mischief Parliament had in mind and the remedy which it wanted to provide for preventing that mischief and not for the purpose of aiding us in construing the provisions of the Act.

2A. As early as 1584, in *Heydon's case*, (1584) 76 ER 637 it was said that "for the sure and true interpretation of all statutes in general" four things are to be considered: (i) What was the common law before the making of the Act, (ii) What was the mischief and defect for which the common law did not provide, (iii) What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and (iv) the true reason of the remedy. In *Bengal Immunity Company Limited v. The State of Bihar*, (1955) 2 SCR 603 = (AIR 1955 SC 661) this Court approved the rule in *Heydon's case*, (1584) 76 ER 637 (supra) and in construing Article 286 of the Constitution observed at p. 633 (of SCR) = (at p. 675 of AIR) as follows:—

"In order to properly interpret the provisions of that Article it is, therefore, necessary to consider how the matter stood immediately before the Constitution came into force, what the mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief."

In *The Corporation of the City of Nagpur v. Its Employees*, (1960) 2 SCR 942 = (AIR 1960 SC 675) the question was as to the meaning of the word "industry" in section 2 (14) of the C. P. and Berar Industrial Disputes (Settlement) Act (23 of 1947). This Court said that "if the word were to be construed in its ordinary sense every calling, service, employment of an employee or any business, trade or calling of an employer would be an industry. But such a wide meaning appears to overreach the object for which the Act was passed. The Court, therefore, found it necessary to limit the scope of the said word having regard to the aim, scope and the object of the Act. Relying on the four tests laid down in *Heydon's case*, (1584) 76 ER 637 the Court considered the fundamental basis of the definition of industry, viz., relationship between employees and employers, the long title and the preamble of the Act showing the object of passing the Act, the historical background for passing it and held that "it is manifest that the Act was introduced as an important step in achieving social justice, to ameliorate the conditions of service of the labour in organised activities than to anything else and therefore the Act was not intended to reach the personal services

which do not depend on the employment of labour force". Similarly in *R. M. D. Chamarbaigwalla v. The Union of India*, 1957 SCR 930 = (AIR 1957 SC 628) the question arose whether looking to the general words used in Section 2 (d) of the Prize Competitions Act, 42 of 1955 the words 'prize competition' included not merely competitions of a gambling nature but also those in which success depended to a substantial degree on skill. In construing the said definition, the Court gave a restricted meaning to the words "prize competition" as meaning only competitions as were of a gambling nature. In doing so, the Court approved the principles of construction stated in the case of the *Bengal Immunity Co. Ltd.* (1955) 2 SCR 603 = (AIR 1955 SC 661) and held that "in interpreting an enactment the Court should ascertain the intention of the legislature not merely from a literal meaning of the words used but also from such matters as the history of the legislation, its purpose and the mischief it seeks to suppress". For considering the intention of Parliament not merely from the literal meaning of the definition in Section 2 (d) but also from the history of the legislation the Court looked into the Bombay Lotteries and Prize Competitions Control and Tax Act, 1948, how it could be and was evaded by the promoters of lotteries by shifting the venue of their business to the neighbouring State of Mysore, the concerted action taken by the adjoining States, the resolutions passed by each of them calling upon Parliament to undertake legislation, the fact of Parliament having passed the law and its preamble reciting the fact of the State legislatures having asked it to pass such a law. Having done that, the Court observed at p. 938 (of SCR) = (at p. 632 of AIR):

"Having regard to the circumstances under which the resolutions came to be passed, there cannot be any reasonable doubt that the law which the State Legislatures moved Parliament to enact under Article 252 (1) was one to control and regulate prize competitions of a gambling character. Competitions in which success depended substantially on skill could not have been in the minds of the legislatures which passed those resolutions. Those competitions had not been the subject of any controversy in Court. They had not done any harm to the public and had presented no problems to the States and at no time had

there been any legislation directed to regulating them".

Though the Court refused to look at the statement of objects and reasons for the purpose of construing Section 2 (d), it held that "having regard to the history of the legislation, the declared object thereof and the wording of the statute" the words had to be given a restricted meaning. In *Central Bank of India v. Their Workmen*, (1960) 1 SCR 200 = (AIR 1960 SC 12) the Court in construing section 10 (1) (b) of the Banking Companies Act, 10 of 1949 again looked at the legislative history to ascertain the object of passing the Act and the mischief it sought to remedy, but declined to use the statement of objects and reasons to construe the section on the ground that the statement could not control the actual words used in the section. (Cf. also *State of West Bengal v. Union of India*, (1964) 1 SCR 371 = (AIR 1963 SC 1241).) In *S. Azeez Basha v. Union of India*, W. Ps. Nos. 84, 174, 188, 241 and 244 of 1966, D/- 20-10-1967 = (AIR 1968 SC 662) the petitioners challenged the validity of the Aligarh Muslim University (Amendment) Act, 62 of 1951 and the Aligarh Muslim University (Amendment) Act, 19 of 1965 as violating Article 30 (1) of the Constitution. This Court went into the history of the establishment of the University to ascertain whether it was set up by the Muslim minority and as such entitled to rights under Article 30 and held that it was not set up by the minority but in fact established by the Government of India by passing the Aligarh Muslim University Act, 1920 (Cf. Crawford on Statutory Construction (3rd Ed.) pages 482-483). There is thus ample authority justifying the Court in looking into the history of the legislation, not for the purpose of construing the Act but for the limited purpose of ascertaining the background, the conditions and the circumstances which led to its passing, the mischief it was intended to prevent and the remedy it furnished to prevent such mischief. The statement of objects and reasons also can be legitimately used for ascertaining the object which the legislative had in mind, though not for construing the Act.

3. What were the conditions prevailing at the time when the Act was passed and what was the object which Parliament had in mind in passing it? Bonus was originally regarded as a gratuitous

payment by an employer to his employees. The practice of paying bonus as an *ex gratia* payment had its early roots in the textile industry in Bombay and Ahmedabad. In 1917 and 1918 an increase of 10 and 15 per cent of wages was granted as war bonus to the textile workers by the employers. In October, 1920, a Committee appointed by the Bombay Millowners recommended to the member mills payment of bonus equal to one month's pay. Similarly bonus was declared in 1921 and 1922. It appears that trading conditions in the industry having deteriorated, the millowners declared in July 1923 that they would be unable to pay bonus for 1923. Thereupon a strike began which became general towards the end of January 1924. In February 1924, a bonus dispute Committee was appointed by the Government of Bombay to consider the nature of, the conditions and the basis of bonus which had been granted to the employees in the textile mills and to declare whether the employees had established any enforceable claim, customary, legal or equitable. The Committee held that they had not established any enforceable claim, customary, legal or equitable, to an annual payment of bonus which could be upheld in a Court. The years that followed were years of depression and no major dispute about bonus arose, although bonuses were given on *ad hoc* basis by a few industrial undertakings. During the Second World War, managements of textile mills paid cash bonus equivalent to a fraction of the surplus profit but this was also voluntary payment to keep labour contented. Disputes for payment of bonus for the years 1948 and 1949 arose in the Bombay textile industry. On the said dispute having been referred to the Industrial Court, that Court expressed the view that since both labour and capital contributed to the profits of the industry both were entitled to a legitimate return out of the profits and evolved a formula for charging certain prior liabilities on the gross profits of the accounting year and awarded a percentage of the balance as bonus. The Industrial Court excluded the mills which had suffered loss from the liability to pay bonus. In appeals against the said awards, the Labour Appellate Tribunal approved broadly the method of computing bonus as a fraction of the surplus profit. According to this formula, which has since been referred to as the

Full Bench formula, the surplus available for distribution is to be determined after debiting certain prior charges from gross profits, viz., (1) provision for depreciation, (2) reservation for rehabilitation, (3) return of 6 per cent on paid-up capital, and (4) return on working capital at a rate lower than the one on the paid-up capital. In *Muir Mills Company v. Suti Mills Mazdoor Union, Kanpur*, (1955) 1 SCR 991 = (AIR 1955 SC 170), *Baroda Borough Municipality v. Its Workmen*, 1957 SCR 33 = (AIR 1957 SC 110), *The Shree Meenakshi Mills Ltd. v. Their Workmen*, 1958 SCR 878 = (AIR 1958 SC 153) and *State of Mysore v. The Workers of Gold Mines*, 1959 SCR 895 = (AIR 1958 SC 923) this Court laid down (1) that bonus was not a gratuitous payment nor a deferred wage, and (2) that where wages fall short of the living standard and the industry makes profit part of which is due to the contribution of labour, a claim for bonus may legitimately be made by the workmen. The Court, however, did not examine the propriety nor the order of priorities as between the several charges and their relative importance nor did it examine the desirability of making any alterations in the said formula. These questions came to be examined for the first time in *Associated Cement Companies Ltd. v. Its Workmen*, 1959 SCR 925 = (AIR 1959 SC 967) where the said formula was generally approved. Since that decision, this Court has accepted in several cases the said formula. The principal features of the formula are that each year for which bonus is claimed is a self-contained unit, that bonus is to be computed on the profits of the establishment during that year, that the gross profits are to be determined after debiting the wages and dearness allowance paid to the employees and other items of expenditure against total receipts as disclosed by the profits and loss account, and that against such gross profits the aforesaid four items are to be deducted as prior charges. The formula was not based on any legal right or liability, its object being only to distribute profits after reasonable allocations for the aforesaid charges. Attempts were thereafter made from time to time to have the said formula revised but they were rejected first in *A. C. C's. case*, 1959 SCR 925 = (AIR 1959 SC 967) (*supra*) and again in *The Ahmedabad Miscellaneous Industrial Workers' Union v. The Ahmedabad*

Electricity Co Ltd, (1962) 2 SCR 934 = (AIR 1962 SC 1255) where it was observed that the plea for revision raised an issue which affected all industries and, therefore, before any change was made all industries and their workmen had to be heard and their pleas considered. The Court, therefore, suggested that the question of revising the formula should be 'comprehensively considered by a high powered Commission'. Taking up the aforesaid suggestion, the Government of India appointed a Commission, by its resolution dated December 6, 1961, the terms of reference whereof were, inter alia,

1 to define the concept of bonus and to consider in relation to industrial employment the question of payment of bonus based on profits and recommend principles for computation of such bonus and methods of payment,

2 to determine what the prior charges should be in different circumstances and how they should be calculated,

3 to determine conditions under which bonus payment should be made unitwise, industrywise and industry-cum-regionwise,

4 to consider whether there should be lower limits irrespective of loss in particular establishment and upper limits for distribution in one year and, if so, the manner to carry forward the profits and losses over a prescribed period, and

5 to suggest an appropriate machinery and method for settlement of bonus disputes.

After an elaborate enquiry, the Commission made the following amongst other recommendations

1 That bonus was paid to the workers as share in the prosperity of the establishment and that the basic scheme of the bonus formula should be adhered to viz., determination of bonus as a percentage of gross profits reduced by the following prior charges, viz., normal depreciation allowable under the Indian Income Tax including multiple shifting allowance, income tax and super tax at the current standard rate applicable for the year for which tax is to be calculated but not super profits tax, return on paid-up capital raised through preference shares at the actual rate of dividend payable, on other paid-up capital at 7 per cent and on reserves used as capital at 4 per cent. The Commission did not recommend provision for rehabilitation

2 That 60 per cent of the available surplus should be distributed as bonus

and excess should be carried forward and taken into account in the next year; the balance of 40 per cent should remain with the establishment into which should merge the saving in tax on bonus and the aggregate balance thus left to the establishment should be used for payment of gratuity, other necessary reserves, rehabilitation in addition to the provision made by way of depreciation in the prior charges, annual provision required for redemption of debentures, etc.

3 That the distinction between the basic wages and dearness allowance for the purpose of arriving at the bonus quantum should be done away with and bonus should be related to wages and dearness allowance taken together,

4 That minimum bonus should be 4 per cent of the total basic wage and dearness allowance paid during the year or Rs 40 to each employee, whichever is higher, and in the case of children the minimum should be equivalent to 4% of their basic wage and dearness allowance, or Rs 25 whichever is higher;

5 That the maximum bonus should be equivalent to 20 per cent of the total basic wage and dearness allowance paid during the year,

6 That the bonus formula proposed should be deemed to include bonus to employees drawing a total basic pay and dearness allowance upto Rs. 1600 p m. regardless of whether they were workmen as defined in the Industrial Disputes Act, 1947 or other corresponding Act provided that quantum of bonus payable to employees drawing total basic pay and allowance over Rs 750 p m should be limited to what it would be if their pay and dearness allowance were Rs. 750 p. m.

7. That the formula should not apply to new establishments until they recouped all early losses including arrears of normal depreciation subject to the time limit of 6 years, and

8. That the scheme should be applied to all bonus matters relating to the accounting year ending on any day in the calendar year 1962 except in those matters in which settlements had been reached or decisions had been given

The fact that the Government of India accepted the majority of the Commission's recommendations is clear from the Statement of Objects and Reasons attached to Bill No 49 of 1965 which they sponsored in Parliament. The Statement,

inter alia, states that a "tripartite Commission was set up by the Government of India by resolution dated 6th December 1961 to consider in comprehensive manner the question of payment of bonus based on profits to employees employed in establishments and to make recommendations to the Government. The Commission's report containing the recommendations was received by the Government on 24th January, 1964. By resolution dated 2nd September, 1964, Government announced acceptance of the Commission's recommendations subject to a few modifications as were mentioned therein". To implement these recommendations the Payment of Bonus Ordinance, 1965 was promulgated on May 29, 1965. Since the Ordinance was replaced by the present Act published on September 25, 1965, it is unnecessary to examine its provisions. Thus, bonus which was originally a voluntary payment acquired under the Full Bench formula the character of a right to share in the surplus profits enforceable through the machinery of the Industrial Disputes Act, 1947 and other corresponding Acts. Under the Act liability to pay bonus has now become a statutory obligation imposed on the employers. From the history of the legislation it is clear (1) that the Government set up a Commission to consider comprehensively the entire question of bonus in all its aspects; and (2) that the Commission accordingly considered the concept of bonus, the method of computation, the machinery for enforcement and a statutory formula in place of the one evolved by industrial adjudication.

4. We proceed next to examine some of the provisions of the Act and its scheme.

5. The preamble of the Act states that it is to provide for payment of bonus in certain establishments and for matters connected therewith. Section 1 (3) provides that it shall apply "save as otherwise provided in the Act" to (a) every factory and (b) every other establishment in which 20 or more persons are employed on any day during the accounting year. We may note that this sub-section is in consonance with one of the Commission's recommendations, viz., that its bonus formula should not be applied to small shops and establishments which are not factories and which employ less than 20 persons. Having made clear that the Act is to apply only to those establishments mentioned in sub-section (3), sub-

section (4) provides that the Act shall have effect in respect of the accounting year 1964 and every subsequent year. "Allocable surplus" under Section 2 (4) means 67 per cent in cases falling under clause (a) and 60 per cent in other cases of the available surplus. Section 2 (6) defines 'available surplus' to mean available surplus as computed under Sec. 5. Section 2 (15) defines "establishment in private sector" to mean any establishment other than an establishment in public sector. Section 2 (16) defines "establishment in public sector" as meaning (a) a Government company as defined in Section 617 of the Companies Act, 1956, and (b) a Corporation in which not less than 40 per cent of its capital is held by Government or the Reserve Bank of India or a Corporation owned by Government or the Reserve Bank of India. "Gross profits" as defined by Section 2 (18) means gross profits calculated under Section 4. Sections 4 and 5 provide for computation of gross profits and available surplus after deducting therefrom the sums referred to in Section 6, viz., depreciation admissible under Sec. 32 (1) of the Income-tax Act or the relevant Agricultural Income Tax Act, development rebate or development allowance admissible under the Income Tax Act and such other sums as are specified in the third Schedule. Section 7 deals with calculation of direct tax. Sections 8 and 9 deal with eligibility of and disqualification from receiving bonus. Sections 10 to 15 deal with minimum and maximum bonus and the provisions for 'set off' and 'set on'. Sections 18, 19, & 21 to 31 deal with certain procedural and allied matters. Section 20 deals with certain establishments in public sector to which the Act is made applicable in certain events. Section 32 excludes from the application of the Act certain categories of employees and certain establishments therein specified. Section 34 provides for the overriding effect of the Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in terms of any award, agreement, settlement or contract of service made before May 29, 1965. Section 35 saves the provisions of the Coal Mines Provident Fund and Bonus Schemes Act, 1948 or any scheme made thereunder. Section 35 empowers an appropriate Government having regard to the financial position and other relevant circumstances of any establishment or

class of establishments if it is of opinion that it would not be in public interest to apply all or any of the provisions of the Act thereto, to exempt for such period as may be specified by it such establishment or class of establishments from all or any of the provisions of the Act. Section 89 provides as follows:—

“Save as otherwise expressly provided, the provisions of this Act shall be in addition to and not in derogation of the Industrial Disputes Act, 1947 or any corresponding law relating to investigation and settlement of industrial disputes in force in a State.”

6. It will be noticed that Section 22 provides that where a dispute arises between an employer and his employees (1) with respect to the bonus payable under the Act, or (2) with respect to the application of the Act, such a dispute shall be deemed to be an industrial dispute within the meaning of the Industrial Disputes Act, 1947 or any corresponding law relating to investigation and settlement of industrial disputes in force in a State and the provisions of that Act and such law, as the case may be, shall, save as otherwise expressly provided, apply accordingly. An Industrial Dispute under the Industrial Disputes Act would be between a workman as defined in that Act and his employer and the dispute can be an industrial dispute if it is one as defined therein. But the definition of an “employee” under Sec. 2 (13) of this Act is wider than that of a “workman” under the Industrial Disputes Act. A dispute between an employer and an employee, therefore, may not fall under the Industrial Disputes Act and in such a case the Act would not apply and its machinery for investigation and settlement would not be available. That being so, and in order that such machinery for investigation and settlement may be available, Section 22 has been enacted to create a legal fiction whereunder such disputes are deemed to be industrial disputes under the Industrial Disputes Act or any other corresponding law. For the purposes of such disputes the provisions of the Industrial Disputes Act or such other law are made applicable. The effect of Section 22 thus is (1) to make the disputes referred to therein industrial disputes within the meaning of the Industrial Disputes Act or other corresponding law and (2) having so done to apply the provisions of that Act

or other corresponding law for investigation and settlement of such disputes. But the application of Section 22 is limited only to the two types of disputes referred to therein and not to others. Section 89, on the other hand, provides that “save as otherwise expressly provided” the provisions of the Act shall be in addition to and not in derogation of the Industrial Disputes Act or any corresponding law relating to investigation and settlement of industrial disputes in force in a State. Except for providing for recovery of bonus due under a settlement, award, or agreement as an arrear of land revenue as laid down in Section 21, the Act does not provide any machinery for the investigation and settlement of disputes between an employer and an employee. If a dispute, for instance, were to arise as regards the quantum of available surplus, such a dispute not being one falling under Section 22, Parliament had to make a provision for investigation and settlement thereof. Though such a dispute would not be an industrial dispute as defined by the Industrial Disputes Act or other corresponding Act in force in a State, Section 89 by providing that the provisions of this Act shall be in addition to and not in derogation of the Industrial Disputes Act or such corresponding law makes available the machinery in that Act or the corresponding Act available for investigation and settlement of industrial disputes thereunder for deciding the disputes arising under this Act. As already seen Section 22 artificially makes two kinds of disputes therein referred to industrial disputes and having done so applies the provisions of the Industrial Disputes Act and other corresponding law in force for their investigation and settlement. But what about the remaining disputes? As the Act does not provide any machinery for their investigation and settlement, Parliament by enacting Section 89 has sought to apply the provisions of those Acts for investigation and settlement of the remaining disputes, though such disputes are not industrial disputes as defined in those Acts. Though, the words “in force in a State” after the words “or any corresponding law relating to investigation and settlement of industrial disputes” appear to qualify the words “any corresponding law” and not the Industrial Disputes Act, the Industrial Disputes Act is primarily a law relating

to investigation and settlement of industrial disputes and provides machinery therefor. Therefore the distinction there made between that Act and the other laws does not seem to be of much point. It is thus clear that by providing in Section 39 that the provisions of this Act shall be in addition to and not in derogation of those Acts, Parliament wanted to avail of those Acts for investigation and settlement of disputes which may arise under this Act. The distinction between Section 22 and Section 39, therefore, is that whereas Section 22 by fiction makes the disputes referred to therein industrial disputes and applies the provisions of the Industrial Disputes Act and other corresponding laws for the investigation and settlement thereof, Section 39 makes available for the rest of the disputes the machinery provided in that Act and other corresponding laws for adjudication of disputes arising under this Act. Therefore, there is no question of a right to bonus under the Industrial Disputes Act or other corresponding Acts having been retained or saved by Section 39. Neither the Industrial Disputes Act nor any of the other corresponding laws provides for a right to bonus. Item 5 in Schedule 3 to the Industrial Disputes Act deals with jurisdiction of tribunals set up under Sections 7, 7-A and 7-B of that Act, but does not provide for any right to bonus. Such a right is statutorily provided for the first time by this Act.

GA. Mr. Ramamurti and Mr. Gokhale for the respondents, however, sought to make the following points:

1. The Act applies only to certain establishments and its preamble and Section 1 (3) show to which of them it is expressly made applicable;

2. Under Section 1 (3), the Act is made applicable to all factories and establishments in which 20 or more persons are employed except those "otherwise provided in the Act". It means that the Act does not apply (i) to factories and establishments otherwise provided in the Act, and (ii) to establishments which have less than 20 persons employed. The Act, therefore, is not a comprehensive Act but applies only to factories and establishments covered by Section 1 (3);

3. There is no categorical provision in the Act depriving the employees of factories and establishments not covered by or otherwise saved in the Act of bonus

which they would be entitled to under any other law;

4. That being so, the employees of establishments to which the Act is not made applicable would still be entitled to bonus under a law other than the Act although they are not entitled to the benefit of the Act;

5. Parliament was aware of the fact that employees in establishments other than those to which the Act applies were getting bonus under adjudication provided by the Industrial Disputes Act and other similar Acts. If it intended to deprive them of such bonus surely it would have expressed so in the Act;

6. Section 39 in clear terms saves the right to claim bonus under the Industrial Disputes Act or any corresponding law by providing that the provisions of this Act shall be in addition to and not in derogation of the provisions of those Acts.

7. It is true that the preamble states that the Act is to provide for payment of bonus to persons employed in certain establishments and Section 1 (3) provides that the Act is to apply, save as otherwise provided therein, to factories and every other establishment in which 20 or more persons are employed. Sub-section (4) of Section 1 also provides that the Act is to have effect in relation to such factories and establishments from the accounting year commencing on any day in 1964 and every subsequent accounting year. But these provisions do not, for that reason, necessarily mean that the Act was not intended to be a comprehensive and exhaustive law dealing with the entire subject of bonus and the persons to whom it should apply. Even where an Act deals comprehensively with a particular subject-matter, the legislature can surely provide that it shall apply to particular persons or groups of persons or to specified institutions only. Therefore, the fact that the preamble states that the Act shall apply to certain establishments does not necessarily mean that it was not intended to be a comprehensive provision dealing with the subject-matter of bonus. While dealing with the subject-matter of bonus the legislature can lay down as a matter of policy that it will exclude from its application certain types of establishments and also provide for exemption of certain other types of establishments even though such establishments would otherwise fall within the scope of

the Act. The exclusion of establishments where less than 20 persons are employed in Section 1 (3) therefore it is not a criterion suggesting that Parliament has not dealt with the subject-matter of bonus comprehensively in the Act.

7A. As already seen, there was until the enactment of this Act no statute under which payment of bonus was a statutory obligation on the part of an employer or a statutory right therefore of an employee. Under the Industrial Disputes Act, 1947 and other corresponding Acts, workmen of industrial establishments as defined therein could raise an industrial dispute and demand by way of bonus a proportionate share in profits and Industrial Tribunals could under those Acts adjudicate such disputes and oblige the employers to pay bonus on the principle that both capital and labour had contributed to the making of the profits and, therefore, both were entitled to a share therein. The right to the payment of bonus and the obligation to pay it arose on principles of equity and fairness in settling such disputes under the machinery provided by the Industrial Acts and not as a statutory right and liability as provided for the first time by the present Act. In providing such statutory liability, Parliament has laid down a statutory formula on which bonus would be calculated irrespective of whether the establishment in question has during a particular accounting year made profit or not. It can further lay down that the formula it has evolved and the statutory liability it provides in the Act shall apply only to certain establishments and not to all. Since there was no such statutory obligation under any previous Act, there would not be any question of Parliament having to delete either such obligation or right. In such circumstances, since Parliament is providing for such a right and obligation for the first time there would be no question also of its having to insert in the Act an express provision of exclusion. In other words, it has not to provide by express words that henceforth no bonus shall be payable under the Industrial Disputes Act or other corresponding Act as those Acts did not confer any statutory right to bonus.

8 It will be noticed that though the Industrial Disputes Act confers substantive rights on workmen with regard to lay off, retrenchment compensation, etc. it does not create or confer any

such statutory right as to payment to bonus. Bonus was so far the creature of industrial adjudication and was made payable by the employers under the machinery provided under that Act and other corresponding Acts enacted for investigation and settlement of disputes raised thereunder. There was, therefore, no question of Parliament having to delete or modify Item 5 in the Third Schedule to Industrial Disputes Act or any such provision in any corresponding Act or its having to exclude any right to bonus thereunder by any categorical exclusion in the present Act.

9. But the argument was that if the Act were to be held as an exhaustive statute dealing with the subject of bonus, three results would follow which could never have been expected much less intended by Parliament. These results would be: (i) that employees in establishments engaging less than 20 persons would get no bonus at all either under the Act or under industrial adjudication provided for by the Industrial Disputes Act and other corresponding Acts. Since such employees were so far getting bonus as a result of industrial adjudication, Parliament could never have intended to deprive them of such benefit, (ii) that employees in public sector Corporations and Companies would get no bonus either under the Act or under the Industrial Disputes Act or other corresponding law, and (iii) that such a construction would have the effect of impliedly repealing and negating the provisions of the Industrial Disputes Act and other corresponding laws.

10. Though Section 1 (3) excludes an establishment other than a factory having less than 20 employees from the application of the Act, all establishments which are factories irrespective of the number of persons employed therein and all establishments which are not factories but are having 20 or more employees are covered by the Act. Therefore, only small establishments having less than 20 employees and which are not factories are excluded. Even in such cases if any establishment were to have 20 or more persons employed therein on any day in any accounting year, the Act would apply to such an establishment. It is, therefore, clear that Parliament by enacting Section 1 (3) excluded only petty establishments.

11. We are not impressed by the argument that Parliament in excluding

such petty establishments could not have intended that employees therein who were getting bonus under the Full Bench Formula should lose that benefit. As aforesaid, Parliament was evolving for the first time a statutory formula in regard to bonus and laying down a legislative policy in regard thereto as to the classes of persons who would be entitled to bonus thereunder. It laid down the definition of an 'employee' far more wider than the definition of a 'workman' in the Industrial Disputes Act and the other corresponding Acts. If, while doing so, it expressly excluded as a matter of policy certain petty establishments in view of the recommendation of the Commission in that regard, viz., that the application of the Act would lead to harassment of petty proprietors and disharmony between them and their employees, it cannot be said that Parliament did not intend or was not aware of the results of exclusion of employees of such petty establishments.

12. It is true that the construction canvassed on behalf of the appellants leads, as argued by counsel for the respondents, to employees in public sector concerns being deprived of bonus which they would be getting by raising a dispute under the Industrial Disputes Act and other corresponding statutes. But such a result occurs in consequence of the exemption of establishments in public sector from the Act, though such establishments but for Section 32 (x) would have otherwise fallen within the purview of the Act. It appears to us that the exemption is enacted with a deliberate object, viz., not to subject such establishments to the burden of bonus which are conducted without any profit motive and are run for public benefit. The exemption in Sec. 32 (x) is, however, a limited one, for, under Section 20 if a public sector establishment were in any accounting year to sell goods produced or manufactured by it in competition with an establishment in private sector and the income from such sale is not less than the 20 per cent of its gross income, it would be liable to pay bonus under the Act. Once again it is clear that in exempting public sector establishments, Parliament had a definite policy in mind.

13. This policy becomes all the more discernible when the various other categories of establishments exempted from the Act by Section 32 are examined. An insurer carrying on general insurance

business is exempted under clause (i) in view of certain provisions of the Insurance Act, 1936 and the Insurance (Amendment) Act, 1950. In view of these provisions the Full Bench formula could not be and was not in fact applied at any time to such insurance establishments. The Life Insurance Corporation of India is exempted under clause (i) because of its being a public sector concern having no profit motive and conducted in public interest. Clause (ii) of Section 32 exempts shipping companies employing seamen in view of Section 159 (9) of the Merchant Shipping Act, 1958 under which the Industrial Disputes Act was inapplicable to such seamen, the disadvantages that Indian Shipping Companies vis-a-vis foreign companies engaged in shipping would be put to if they were made to pay bonus and the obvious difficulties in applying the Act to such foreign companies engaging Indian seamen. The exemption in respect of stevedore labour contained in clause (iii) also seems to have been provided for in view of the peculiar nature of employment, the difficulty of calculating profits according to the normal methods and other such difficulties. The rest of the categories of establishments set out in Section 32 appear to have been exempted on the ground of (a) absence of any profit motive, (b) their being of educational, charitable or public nature, and (c) their being establishments in public sector carried on in public interest. Building contractors appear to have been exempted because of their work being contract job work, the infeasibility of applying the formula evolved in the Act and the problem of employees of such contractors being more of evolving and enforcing a proper wage structure rather than of payment of bonus to them.

14. It seems to us that if we were to accept the contention that the object of Section 32 was only to exempt the establishments therein enumerated from the application of the bonus formula enacted in the Act, but that the employees of those establishments were left at liberty to claim and get bonus under the machinery provided by the Industrial Disputes Act and other corresponding Acts, the very object of enacting Section 32 would be frustrated. Surely, Parliament could not have intended to exempt those establishments from the burden of bonus payable under the Act and yet have left the door open for their em-

ployees to raise industrial disputes and get bonus under the Full Bench Formula which it has rejected by laying down a different statutory formula in the Act. For instance, is it to be contemplated that though the Act by Sec. 32 exempts institutions such as the Universities or the Indian Red Cross Society or hospitals, or any of the establishments set out in clause (ix) of that section, they would still be liable to pay bonus if the employees of those institutions were to raise a dispute under the Industrial Disputes Act and claim bonus in accordance with the Full Bench Formula? The legislature would in that case be giving exemption by one hand and taking it away by the other, thus frustrating the very object of Section 32. Where, on the other hand, Parliament intended to retain a previous provision of law under which bonus was payable or was being paid it has expressly saved such provision. Thus, under Section 35 the Coal Mines Provident Fund and Bonus Schemes Act, 1946 and any scheme made thereunder are saved. If, therefore, Parliament wanted to retain the right to claim bonus by way of industrial adjudication for those who are either excluded or exempted from the Act it would have made an express saving provision to that effect as it has done for employees in Coal Mines.

15. Besides, the construction suggested on behalf of the respondents, if accepted, would result in certain anomalies. Take two establishments in the same trade or industry, one engaging 20 or more persons and the other less than 20. The Act would be applicable to the former but not to the latter. If the respondents were to be right in their contention the employer in the former case would be liable to pay bonus at the rates laid down by the Act, i. e., at the rate of 4 per cent minimum and 20 per cent maximum, but in the latter case the Act would not apply and though his establishment is a smaller one, on the basis of the Full Bench Formula there would be a possibility of his having to pay bonus at a higher rate than 20 per cent, depending upon the quantum of profit made in that particular accounting year.

16. Section 32 (vi) exempts from the applicability of the Act those employees who have entered before May 29, 1965 into an agreement or settlement with their employers for payment of bonus linked with production or productivity

in lieu of bonus based on profits and who may enter after that date into such agreement or settlement for the period for which such agreement or settlement is in operation. Can it be said that in cases where there is such an agreement or settlement in operation, though this clause expressly excludes such employees from claiming bonus under the Act during such period, the employees in such cases can still resort to the Industrial Disputes Act and claim bonus on the basis of the Full Bench Formula? The answer is obviously in the negative for the object in enacting clause (vi) is to let the parties work out such an agreement or settlement. It cannot be that despite this position, Parliament intended that those employees had still the option of throwing aside such an agreement or settlement, raise a dispute under the Industrial Disputes Act and claim bonus under the Full Bench Formula. The contention, therefore, that the exemption under Section 32 excludes those employees from claiming bonus under the Act only and not from claiming bonus under the Industrial Disputes Act or such other Act is not correct. This conclusion is buttressed by the provisions of Section 38 which empower the appropriate Government to exempt for a specified period an establishment or class of establishments from the operation of the Act, if it is of the opinion that it is not in public interest to apply all or any of the provisions of the Act to such establishment or class of establishments. Since the appropriate Government can exempt such an establishment or establishments from the operation of the Act on the ground of public interest only, it cannot surely be that Parliament still intended that the employees of such exempted establishment or establishments can claim bonus through industrial adjudication under the Industrial Disputes Act or any such corresponding law.

17. We are also not impressed by the contention that the fact that Section 39 provides that the provisions of this Act are in addition to and not in derogation of the Industrial Disputes Act or any other corresponding law shows that Parliament did not wish to do away with the right to payment of bonus altogether to those who cannot either by reason of exclusion or exemption from the Act claim bonus under the Act. Such a construction is fallacious on two

grounds. Firstly because it assumes wrongly that the Industrial Disputes Act or any other law corresponding to it provided for a statutory right to payment of bonus. All that those Acts provided for, apart from rights in respect of lay out, retrenchment etc., a machinery for investigation and settlement of disputes arising between workmen and their employers. It is, therefore, incorrect to say that the right to bonus under this Act is in addition to and not in derogation of any right to bonus under those Acts. Secondly, Section 39 became necessary because the Act does not provide any machinery or procedure for investigation and settlement of disputes which may arise between employers and employees. In the absence of any such provision Parliament intended that the machinery and procedure under those Acts should be made available for the adjudication of disputes arising under or in the operation of the Act. If, for instance, there is a dispute as to the computation of allocable surplus or as to quantum of bonus, or as to whether in view of Section 20 an establishment in public sector is liable to pay bonus, such a dispute is to be adjudicated under the machinery provided by the Industrial Disputes Act or other corresponding Acts.

18. Considering the history of the legislation, the background and the circumstances in which the Act was enacted, the object of the Act and its scheme, it is not possible to accept the construction suggested on behalf of the respondents that the Act is not an exhaustive Act dealing comprehensively with the subject-matter of bonus in all its aspects or that Parliament still left it open to those to whom the Act does not apply by reason of its provisions either as to exclusion or exemption to raise a dispute with regard to bonus through industrial adjudication under the Industrial Disputes Act or other corresponding law.

19. We are, therefore, of the view that the construction given to the Act by the Tribunals was not correct and the orders passed by them have to be set aside. The appeals are allowed, but as the question as to the scope of the Act is raised in these appeals for the first time, there will be no order as to costs.

RGD

Appeals allowed.

AIR 1969 SUPREME COURT 543 (V 56 C 103)

(From Allahabad: (1968) 2 ITJ 388)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

The Income Tax Officer, District II (ii) Kanpur and others (In all the Appeals), Appellants v. Mani Ram and others, Respondents.

Civil Appeals Nos. 314 to 322 of 1966, D/- 20-8-1968.

(A) Income-tax Act (1922), Ss. 18A (3) and 23B — Expression “any person who has not hitherto been assessed” cannot be interpreted to include a person who has only been provisionally assessed under S. 23B — Word “assessed” has to be read in its ordinary sense including every kind of assessment.

Expression “any person who has not hitherto been assessed” in Sec. 18A (3) of the Income-tax Act, 1922 after the Income Tax Amendment Act (Act 67 of 1949) cannot be interpreted so as to include a person who has only been provisionally assessed under section 23B of that Act. In Sec. 18A (1) the expression “assessed” is used without any qualification or restriction as to whether the assessment should be a regular assessment or any other type of assessment under the Act. It is also manifest that in section 18A sub-section (5) the two expressions “provisional assessment” and “regular assessment” are expressly mentioned. The expression “regular assessment” is also repeatedly used in Section 18A, sub-sections (6), (7), (8) and (9). Therefore there is no warrant for restricting the meaning of the word “assessed” in Section 18A (1) so as to include only a “regular assessment” under Section 23 of the Act. There is no reason why Parliament did not add the word “regularly” in the sub-section so as to qualify the word “assessed”. Since there is no such qualification, the word “assessed” in Sec. 18A (3) should be read in its ordinary sense as including every kind of assessment including a provisional assessment under Section 23B of the Act. (Para 6)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Meaning of words — Subsequent Act does not afford any guidance for meaning of earlier Act unless both are laws on the same subject and earlier Act is ambiguous.

Generally speaking a subsequent Act of Parliament affords no useful guide

to the meaning of another Act which came into existence before the later one was ever framed. Under special circumstances, the law does however admit of a subsequent Act to be resorted to for this purpose but the conditions under which the latter Act may be resorted to for the interpretation of the earlier Act are strict, both must be laws on the same subject and the part of the earlier Act which it is sought to construe must be ambiguous and capable of different meanings (1955) AC 696 & (1951) AC 161 & (1952) AC 401, Rel. on.

(Para 8)

Cases Referred: Chronological Paras

(1955) 1955 AC 696=(1955) 2 All

ER 345, Kirkness (Inspector of Taxes) v John Hudson & Co. Ltd. 8

(1952) 1952 AC 401=(1952) 1 All

ER 531, Inland Revenue Commissioner v. Dowdall O'Mahoney & Co Ltd. 8

(1951) 1951 AC 161=94 SJ 687

In re, Mac Manasway 8

M/s S K. Aiyar and R. N. Sachthey, Advocates, for Appellants (in all the Appeals), M/s J. P. Goyal, Sobhag Mal Jain and P. N. Pachauri, Advocates, for Respondents (in all the Appeals).

The following Judgment of the Court was delivered by

RAMASWAMI, J.—In these appeals which have been heard together a common question of law arises for determination, that is, whether the expression "any person who has not hitherto been assessed" in Section 18A (3) of the Income-tax Act, 1922 (hereinafter called the Act) after the Income Tax Amendment Act (Act 67 of 1949) should be interpreted so as to include a person who has only been provisionally assessed under Section 23B of that Act.

2. The respondents in these appeals are four persons — Mani Ram, Jagmohan, Kishandas, Bhagratmal — partners of Shri Kishan Das, Dhankutti, Kanpur. They were members of a joint Hindu family carrying on business until they became divided in the middle of assessment year 1953-54. Thereafter they were carrying on the business in partnership. For the year 1953-54, the firm submitted a return showing loss. But in the next succeeding year 1954-55 it disclosed a profit and submitted a return. All the four partners filed returns individually on 27-9-1954 and they were provisionally assessed on their returns

on 14-10-1954. But the regular assessment was made for this year only on 27-2-1958. The firm continued to make profits in the subsequent years 1955-56, 1956-57, 1957-58 and 1958-59 and the partners filed returns for their income for each of these years and were regularly assessed for these years under Section 23 sometime after 27-2-1953. The assessment order for 1958-59 was in fact made on 19-2-1959. It is not disputed that none of the four partners sent any estimate of the tax payable on their income as required by Section 18A of the Income Tax Act, 1922 or pay the tax in advance. Therefore, the Income-tax Officer, Kanpur while assessing them under Section 23 of the Act held that they were liable to pay interest under Section 18A (8) and determined the amount payable by each in respect of each of the years on the basis of the income found taxable in the regular assessment. In addition he applied the provisions of Section 18A (9) (b) and imposed a penalty for each year of assessment by virtue of Section 28 read with Section 18A (9) (b) of the Act. The four partners preferred appeals to the Appellate Assistant Commissioner on the ground that the levy of interest and penalty was unauthorised. But the appeals were dismissed. The partners applied in revision to the Commissioner of Income-tax under Section 33A (2), but the revision applications were dismissed. The respondents thereafter moved the Allahabad High Court for grant of a writ to quash the orders of the Income-tax Officer and of the Appellate Assistant Commissioner in appeal. The applications for writ were allowed by Mr Justice S. C. Manchanda who held that Section 18A (3) could not apply to the facts of the case as there had been a provisional assessment under Section 23B in the year 1954. Against the decision of the Single Judge the appellants preferred appeals before the Division Bench. These appeals were dismissed by a common judgment of the Allahabad High Court dated 25th March, 1963. The present appeals are brought to this Court by special leave from the judgment of the Allahabad High Court dated 25th March, 1963 in the batch of appeals affirming the judgment of the Single Judge dated 25th May, 1956, in C. W. M. No 1591 of 1962 and the connected writ applications.

3. It is necessary at this stage to set out the provisions of Sections 18A, 23

and 23B of the Income-tax Act, 1922 as they stood at the material time:

"18A (1) (a). In the case of income in respect of which provision is not made under Section 18 for deduction of income-tax at the time of payment, the Income-tax Officer may, on or after the 1st day of April in any financial year, by order in writing, require an assessee to pay quarterly to the credit of the Central Government on the 15th day of June, 15th day of September, 15th day of December and 15th day of March in that year, respectively, an amount equal to one-quarter of the Income-tax and Super-tax payable on so much of such income as is included in his total income of the latest previous year in respect of which he has been assessed, if that total income exceeded the maximum amount not chargeable to tax in his case by two thousand five hundred rupees. Such income-tax and super-tax shall be calculated at the rates in force for the financial year in which he is required to pay the tax, and shall bear to the total amount of income-tax and super-tax so calculated on the said total income the same proportion as the amount of such inclusions bears to his total income or, in cases where under the provisions of sub-section (1) of Section 17 both income-tax and super-tax are chargeable with reference to the total world income, shall bear to the total amount of income-tax and super-tax which would have been payable on his total world income of the said previous year had it been his total income the same proportion as the amount of such inclusions bears to his total world income.

(2) * * * *

(3) Any person who has not hitherto been assessed shall, before the 15th day of March in each financial year, if his total income of the period which could be the previous year for an assessment for the financial year next following is likely to exceed the maximum amount not chargeable to tax in his case by two thousand five hundred rupees, send to the Income-tax Officer an estimate of the tax payable by him on that part of his income to which the provisions of Section 18 do not apply of the said previous year calculated in the manner laid down in sub-section (1), and shall pay the amount on such of the dates specified in that sub-sections as have not expired, by

instalments which may be revised according to the proviso to sub-section (2).

(4) * * * *

(5) * * * *

(6) Where in any year an assessee has paid tax under sub-section (2) or sub-section (3) on the basis of his own estimate, and the tax so paid is less than eighty per cent of the tax determined on the basis of the regular assessment, so far as such tax relates to income to which the provisions of Section 18 do not apply and so far as it is not due to variations in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made, simple interest at the rate of six per cent per annum from the 1st day of January in the financial year in which the tax was paid up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty per cent.

* * * *

(7) * * * *

(8) Where on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment.

(9) If the Income-tax Officer, in the course of any proceedings in connection with the regular assessment, is satisfied that any assessee—

(a) has furnished under sub-section (2) of sub-section (3) estimates of the tax payable by him which he knew or had reason to believe to be untrue, or

(b) has without reasonable cause failed to comply with the provisions of sub-section (3), the assessee shall be deemed in the case referred to in clause (a), to have deliberately furnished inaccurate particulars of his income and in the case referred to in clause (b) to have failed to furnish the return of his total income; and the provisions of Section 28, so far as may be, shall apply accordingly.

(23) (1) If the Income-tax Officer is satisfied without requiring the presence of the assessee or the production by him of any evidence that a return made under Section 22 is correct and complete, he shall assess the total income of the

assessee, and shall determine the sum payable by him on the basis of such return.

(2) If the Income-tax Officer is not satisfied without requiring the presence of the person who made the return or the production of evidence that a return made under Section 22 is correct and complete, he shall serve on such person a notice either to attend at the Income-tax Officer's Office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return.

(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points shall, by an order in writing assess the total income of the assessee and determine the sum payable by him on the basis of such assessment.

(4) If any person fails to make the return required by any notice given under sub-section (2) of Section 22 and has not made a return or a revised return under sub-section (3) of the same section or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment and, in the case of a firm, may refuse to register it or may cancel its registration if it is already registered.

23B (1) The Income-tax Officer may, at any time after the receipt of a return made under Section 22 proceed to make in a summary manner, a provisional assessment of the tax payable by the assessee, on the basis of his return and the accounts and documents, if any, accompanying it, after giving due effect to (i) the allowance referred to in paragraph (b) of the proviso to clause (vi) of sub-section (2) of Section 10, and (ii) any loss carried forward under sub-section (2) of Section 24.

(2) A partner of a firm may be provisionally assessed under sub-section (1) in respect of his share in the firm's income, profits and gains, if its return has been received, although the return of the

partner himself may not have been received.

(3) A firm may be provisionally assessed under sub-section (1) as if it were an unregistered firm, unless the firm fulfils such conditions as the Central Government may, by notification in the Official Gazette, specify in that behalf.

(4) There shall be no right of appeal against a provisional assessment made under sub-section (1).

(5) For the avoidance of doubt, it is hereby declared that the provisions of Section 45 (except the first proviso) and Section 46 apply in relation to any tax payable in pursuance of a provisional assessment made under sub-section (1) as if it were a regular assessment made under Section 23.

(6) Income-tax paid or deemed to have been paid under Section 18 or Section 18A in respect of any income provisionally assessed under sub-section (1), shall be deemed to have been paid towards the provisional assessment.

(7) After a regular assessment has been made under Section 23, any amount paid or deemed to have been paid towards a provisional assessment made under sub-section (1), shall be deemed to have been paid towards the regular assessment, and where the amount paid or deemed to have been paid towards the provisional assessment, exceeds the amount payable under the regular assessment, the excess shall be refunded to the assessee.

(8) Nothing done or deferred by reason or in consequence of any provisional assessment made under this section shall prejudice the determination on the merits of any issue which may arise in the course of the regular assessment under Section 23."

4. It was argued on behalf of the appellants that a mere provisional assessment under Section 23B of the Act will not satisfy the requirements of Section 18A (1) of the Act because the language of Section 18A (1) shows that the provisions of that sub-section only apply when the amount of tax to be deposited in advance is determined on the basis of the assessee's total income of previous year to which he has been assessed. It was contended that in the case of a provisional assessment under Section 23B of the Act, there is no computation of the total income of the previous year and that under Section 23B of the Act all

that is done is to determine provisionally the income-tax payable on the basis of the return filed without properly going through the process of assessing the total taxable income. It is not possible to accept this argument because even when the tax is provisionally assessed, there necessarily has to be a determination of the total income of the assessee. The only difference is that under Section 23 the total income is determined after the Income-tax Officer has satisfied himself fully about the correctness of the return filed by taking steps, if necessary, under Sections 22 (4) and 23 (2) of the Act. In the case of a provisional assessment under Section 23B of the Act, the powers under Sections 22 (4) and 23 (2) of the Act are not to be exercised and the Income-tax Officer has to determine the tax on the basis of the return filed by the assessee after taking into consideration the accounts and documents available, if any, and after giving effect to certain allowances and losses. In other words, what the Income-tax Officer has to do is to assess provisionally the total income of the assessee and thereafter he has to determine the tax payable on the basis of that provisionally assessed income.

5. The argument was next stressed that Section 18A (1) was introduced into the Act when Section 23B did not exist at all and consequently no inference should be drawn that the word "assessed" used in Section 18A (1) was meant to cover a provisional assessment under Section 23B of the Act also. In other words, the argument of the appellants was that when the word "assessed" was used in Section 18A (1) of the Act, Parliament could not have contemplated that this word would cover a case of provisional assessment as no section relating to provisional assessment existed in the Act at that time. We are unable to accept this argument as correct. It should be noticed that the Parliament introduced certain amendments in S. 18A of the Act consequential to the introduction of S. 23B of the Act. There is a reference to the provisional assessment made under Section 23B in sub-section (5) of Section 18A, but Parliament took no step to restrict the meaning of the word "assessed" in Section 18A (3) so as to exclude a reference to provisional assessment under Section 23B of the Act. If Parliament contemplated that Section 18A (3) should apply only in the case of a "regular

assessment", there was no reason why it did not put some qualifying words or expressions before or after the word "assessed" in Section 18A (1). It is not possible to accept the submission of the appellants that Parliament in fact intended to bring about such a decision but only accidentally omitted to do so. On the other hand, the language of section 18A (1) as it stands, can only lead to interpretation that the provisions contained in it would become applicable whenever a person has been assessed whatever be the nature of the assessment—whether it be a regular assessment or a provisional assessment.

6. It is important to notice that in section 18A (1) the expression "assessed" is used without any qualification or restriction as to whether the assessment should be a regular assessment or any other type of assessment under the Act. It is also manifest that in section 18A sub-section (5) the two expressions "provisional assessment" and "regular assessment" are expressly mentioned. The expression "regular assessment" is also repeatedly used in Section 18A, sub-sections (6), (7), (8) and (9). We see, therefore, no warrant for restricting the meaning of the word "assessed" in S. 18A (1) so as to include only a "regular assessment" under section 23 of the Act. There is no reason why Parliament did not add the word "regularly" in the sub-section so as to qualify the word "assessed". Since there is no such qualification, the word "assessed" in section 18A (3) should be read in its ordinary sense as including every kind of assessment including a provisional assessment under section 23B of the Act.

7. In the last place, counsel on behalf of the appellants referred to the language of sections 210 and 212 (3) of the Income Tax Act, 1961 which state:

"210. Order by Income Tax Officer:— (1) where a person has been previously assessed by way of regular assessment under this Act or under the Indian Income Tax Act, 1922 (11 of 1922), the Income Tax Officer may, on or after the 1st day of April in the financial year, by order in writing require him to pay to the credit of the Central Government advance tax determined in accordance with the provisions of sections 207, 208 and 209.

(2) The notice of demand issued under section 156 in pursuance of such order

shall specify the instalments in which the advance tax is payable under sec. 211.

(3) If, after the making of an order by the Income Tax Officer under this section and before the 15th day of February of the Financial year tax is paid by the assessee under Section 140-A or a regular assessment or a provisional assessment under Section 141 of the assessee or of the registered firm of which he is a partner is made in respect of a previous year later than that referred to in the order of the Income Tax Officer, the Income Tax Officer may make an amended order requiring the assessee to pay in one instalment on the specified date, or in equal instalments on the specified dates, if more than one, falling after the date of the amended order, the advance tax computed on the basis of the total income on which tax has been paid under section 140-A or in respect of which the regular assessment or the provisional assessment aforesaid has been made as reduced by the amount, if any, paid in accordance with the original order.

212. Estimate by assessee.—(1)

(3) Any person who has not previously been assessed by way of regular assessment under this Act or under the Indian Income Tax Act, 1922 (11 of 1922) shall, before the first day of March in each financial year, if his total income exclusive of capital gains of the period which would be the previous year for the immediately following assessment year is likely to exceed the maximum amount not chargeable to income-tax in his case by two thousand five hundred rupees, send to the Income Tax Officer—

(i) an estimate of the total income exclusive of capital gains of the said previous year,

(ii) an estimate of the advance tax payable by him calculated in the manner laid down in section 209,

and shall pay such amount as accords with his estimate, on such of the dates specified in section 211 as have not expired, by instalments which may be revised according to sub-section (2)."

8. The argument was that these sections apply to a case of a regular assessment and the enactment of these sections should be treated as a Parliamentary exposition of section 18A (3) of the earlier Act as referring only to a case of regular assessment. We are unable to accept this argument as correct. There is nothing

in the 1961 Act to suggest that Parliament intended to explain the meaning or clear up doubts about the meaning of the word "assessed" in section 18A (3) of the earlier Act. Generally speaking, a subsequent Act of Parliament affords no useful guide to the meaning of another Act which came into existence before the later one was ever framed. Under special circumstances, the law does however admit of a subsequent Act to be resorted to for this purpose but the conditions under which the later Act may be resorted to for the interpretation of the earlier Act are strict, both must be laws on the same subject and the part of the earlier Act which it is sought to construe must be *ambiguous and capable of different meanings*. For example, in *Kirkness (Inspector of Taxes) v John Hudson and Co. Ltd.*, 1955 AC 696 it was held by the House of Lords that the ordinary meaning of the word "sale" importing a consensual relation is to be attributed to the use of it in the context of S. 17 (1) (a) of the Act of 1945. Since there was no ambiguity in the section, it was not permissible to seek guidance in its construction from later Finance Acts, although it was directed by Parliament to be construed as one with them. At page 714 of the Report Viscount Simonds states

"I have looked at the later Acts to which the Attorney General referred to in order to satisfy myself that they do not contain a retrospective declaration as to the meaning of the earlier Act. They clearly do not, and I do not think that it has been contended that they do. At the highest it can be said that they may proceed upon an erroneous assumption that the word "sold in section 17 (1) (a) of the Income Tax Act, 1945, has a meaning which I hold it has not. This may be so and, if so, it is an excellent example of the proposition to which reference was made in the report of the Committee of the Privy Council. In *re, Mac Manusway*, 1951 AC 161 and again by my noble and learned friend Lord Radcliffe in *Inland Revenue Commissioners v. Dowdall, O'Mahoney and Co. Ltd.*, 1952 AC 401 that the beliefs or assumptions of those who frame Acts of Parliament cannot make the law."

9. For the reasons expressed above, we hold that the judgment of the High Court dated 25th March, 1963 is right and these appeals must be dismissed with costs. One set of hearing fee.

GGM/D.V.G.

Appeals dismissed.

AIR 1969 SUPREME COURT 549
(V 56 C 104)

(From Madhya Pradesh: AIR 1965
Madh Pra 11)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Commissioner of Sales Tax, Indore. (In both the Appeals), Appellant v. Mohammad Hussain Rahim Bux (In both the Appeals), Respondent.

Civil Appeals Nos. 628 and 629 of 1966,
D/- 28-8-1968.

Constitution of India, Arts. 286 and 264 (as they stood before the Constitution VIIIth Amendment Act, 1956) — Word "State" as used in Article 286 included a Part C State also. AIR 1955 SC 661, Rel. on; AIR 1951 SC 332, Ref.

(Para 9)

Cases Referred: Chronological Paras
(1955) AIR 1955 SC 661 (V 42) =

(1955) 2 SCR 603, Bengal Im-
munity Co. Ltd. v. State of
Bihar

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(1951) AIR 1951 SC 332 (V 38) =
1951 SCR 747, In re, Delhi Laws
Act case

2

Mr. I. N. Shroff, Advocate, for Appel-
lant (In both the Appeals); Mr. N. D.
Karkhanis, Senior Advocate (Mr. A. G.
Ratnaparkhi, Advocate, with him), for
Respondent (In both the Appeals).

The following Judgment of the Court
was delivered by

GROVER, J.: The common question
on which the disposal of these two ap-
peals by special leave depends relates to
the applicability of Article 286 of the
Constitution of India read with Art. 264
before the amendments made by the
Constitution (VIIIth Amendment) Act,
1956 to the erstwhile State of Vindhya
Pradesh during the relevant assessment
period for the purpose of imposition of
Sales Tax.

2. The respondent firm manufactures
and deals in bidis having head office at
Maihar which was a part of the erstwhile
United States of Vindhya Pradesh. The
Rajpramukh promulgated the Vindhya
Pradesh Sales Tax Ordinance No. II of
1949 for the levy of a tax on sales of
goods in Vindhya Pradesh. After Vindhya
Pradesh had been included in the list of
Part C States in the Schedule in the
Constitution the aforesaid Ordinance was
applied to the whole of Vindhya Pradesh
with effect from April 1, 1950 by a noti-
fication No. 2 March 28, 1950. The Parlia-

ment passed the Part C States (Laws) Act
1950. Section 2 of that Act authorised
the Central Government to extend any
enactment to Part C States, which was
in force in Part A States by a notification
in the official gazette with power to re-
peal and amend any corresponding law.
In exercise of that power, the Central
Government by a notification dated
December 29, 1950 extended to the State
of Vindhya Pradesh the Central Provinces
and Berar Sales Tax Act, 1947 as was in
force in the old State of Madhya Pradesh
subject to certain modifications. By that
notification a new section was added to
the C. P. and Berar Sales Tax Act, 1947.
The newly added section 29 provided for
the repeal and saving and the Vindhya
Pradesh Sales Tax Ordinance No. II of
1949 was repealed. On March 20, 1951,
the Central Government issued a notifi-
cation in exercise of the powers conferred
under sub-section (3) of Section 1 of the
C. P. and Berar Sales Tax Act, 1947 as
extended to the State of Vindhya Pradesh
ordering that, from April 1, 1951, the
extended Act would come into force in
the State of Vindhya Pradesh. There-
after the Parliament passed the Govern-
ment of Part C States Act, 1951. In view
of the decision of this Court in Delhi Laws
Act case, 1951 SCR 747 = (AIR 1951 SC
332) the Part C States (Miscellaneous Law
Repealing) Act, (Act LXVI of 1951) was
enacted by Parliament on October 31,
1951. By Section 2 of that Act Laws
declared in column 2 of its Schedule
were repealed or deemed to have been
repealed with effect from the dates speci-
fied in the corresponding entry in column
3 of that Schedule. In the Schedule the
Vindhya Pradesh Sales Tax Ordinance II
of 1949 was repealed from December 29,
1950. The Vindhya Pradesh Legislative
Assembly also passed the Vindhya Pra-
desh Laws (Validating) Act 1952 (Act VI
of 1952). Section 2 of that Act provided
that C. P. and Berar Sales Tax Act, 1947
would be deemed to be in force in
Vindhya Pradesh from April 1, 1951.
This entire history of legislation relating
to the sales tax in the erstwhile State of
Vindhya Pradesh has been given because
the periods of assessments involved in
both the appeals are from April 1, 1950
to June 30, 1950 and July 1, 1950 to
December 31, 1950 and January 1, 1951
to March 31, 1951.

3. The relevant facts in C. A. 619/68
need only be stated. In respect of the
period of assessment from April 1, 1950

to June 30, 1950 the respondent claimed that it was not liable to tax in respect of the sales of bidis of the value of Rs. 31,059-12-0 as the bidis sold were delivered outside the State of Vindhya Pradesh for consumption and that the transactions of the despatches of bidis of the value of Rs. 4,01,255-4-0 from its head office at Mafhar to its branches in U. P. were not sale transactions but were merely transfer of goods from the head office to its branches and could not be assessed to sales tax in view of the provisions of Article 286 of the Constitution. The Assistant Commissioner of Sales Tax of Rewa rejected the first claim of the assessee. It is unnecessary to give details of the decisions by the various departmental authorities, but the main controversy before them, as before the Sales Tax Tribunal which was the Board of Revenue, centred on the applicability of Article 286 of the Constitution to the former State of Vindhya Pradesh. It was held by the Tribunal that Article 286 was applicable. In the other appeal i.e. C. A. 628/66, also the same question arose. Certain questions of law were framed in both the cases and referred to the High Court by the tribunal. These questions need not be mentioned because in the present appeals it is common ground that the decision of the appeals would hinge on the point whether Article 286 applied to Part C States. It may be mentioned that the High Court had agreed with the tribunal that the said Article was applicable. If that view is affirmed it is not disputed that both the appeals will have to be dismissed.

4. Article 284 of the Constitution, as it stood before its amendment by the Constitution (VIIth Amendment) Act 1956 which appeared in Part XII, Chapter I provided:

"In this Part, unless the context otherwise requires.—

- (a)
 (b) "State" does not include a State specified in Part C of the First Schedule;
 (c)

Article 286 (1) was in the following terms:

"(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

- (a) outside the State, or
 (b) in the course of the import of the goods into, or export of the goods out of, the territory of India."

The short argument which was urged before the departmental authorities and the High Court and which has been now pressed before us by the learned counsel for the appellant is that owing to the express exclusion of Part C State from the definition of the word "State" in Article 284 the provisions of Article 286 could not possibly be applied as it places an interdict on the making of a law by a State of the nature mentioned in the Article. It is submitted that although Art. 284 says "unless the context otherwise requires", but there is nothing in Art. 286 from which any such requirement can be spelt out which would attract the applicability of Article 286.

5. It would be useful at this stage to first refer to Part VIII of the Constitution which deals with the States of Part C in the First Schedule. Article 239 provides "subject to the other provisions of this Part, a State specified in Part C of the First Schedule shall be administered by the President acting, to such extent as he thinks fit, through a Chief Commissioner or a Lieutenant Governor to be appointed by him or through the Government of a neighbouring State". Article 240 laid down that Parliament may by law create or continue for any State specified in Part C a body, whether nominated, elected or partly nominated and partly elected, to function as a legislature for the State; or a Council of Advisers or Ministers, or both with such constitution powers and functions, as may be specified. The Parliament under the powers conferred by the Constitution enacted the Part C States Laws Act, 1950, giving power to the Central Government to extend any enactment in force in Part A to the States in Part C "with such restrictions and modifications as it thinks fit. The validity of the provisions of that Act came up before this Court in *Re. the Delhi Laws Act, 1951* SCR 747 = (AIR 1951 SC 332). We need not, in this case, state the views which were expressed in that special reference. Parliament, however, after the opinions expressed by this Court passed the Government of Part C States Act, 1951 in exercise of its powers under Article 240 (1). By this Act Parliament made provision for the legislature, Council of Ministers or Advisers for Part C States. This Act also contained provisions relating to Consolidated Fund for a State which was included in Part C of the First Schedule.

6. Turning to Chapter XII of the Constitution before the amendments of 1956 it has already been noticed that Article 264 which relates to interpretation with reference to the provisions contained in this Part provides that unless the context otherwise required State would not include a State specified in Part C of the First Schedule. In some of the Articles, however, in spite of the aforesaid definition of a State given in Article 264 for the purposes of Part XII Part C States were expressly mentioned. For instance Article 268 which relates to duties levied by the Union but collected and appropriated by the States provides inter alia that in case of any States specified in Part C of the First Schedule these duties shall be collected by the Government of India. Article 269 deals with duties and taxes of the nature mentioned therein which shall be levied and collected by the Government of India but shall be assigned to the States. Such duties and taxes could not form part of the Consolidated Fund of India except in so far as those proceeds represent proceeds attributable to States specified in Part C. Article 270 deals with taxes levied and collected by the Union and distributed between the Union and the States. The prescribed percentage of the aforesaid taxes shall not form part of the Consolidated Fund of India except in the case of proceeds attributable to States specified in Part C.

7. Now there are several other Articles in Part XII which precede and follow Article 286 about which even the counsel for the appellant could not confidently say that the word "State" used in these Articles would not take in Part C States as well. Such Articles are 275, 276, 277, 280, 282, 287 and 291. Thus the meaning of the word "State" in Article 286 will have to be ascertained from the context. It will be quite legitimate to not only look at the context but also the purpose and the object for which Article 286 was enacted.

8. In the Bengal Immunity Company Ltd. v. The State of Bihar, (1955) 2 SCR 603=(AIR 1955 SC 661) the entire background and the true reasons for the enactment of Article 286 have been discussed at pages 636 and 637. It has been observed that the imposition of multiple taxes on one and the same transaction of sale or purchase was certainly calculated to hampur and dis-

courage free flow of trade within India regarded as one economic unit. By Article 286 the Constitution makers clamped on the legislative power several fetters. Broadly speaking, the fetters thus placed on the taxing power of the States are that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place, (a) outside the State or (b) in the course of import or export or (c) except in so far as Parliament otherwise provides, in the course of inter-State trade or commerce and lastly (d) that no law made by the legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

9. The High Court was fully justified in taking the view that if the framers of the Constitution thought it necessary to put restrictions on the legislative powers of the State for preventing impediment and discouragement to the free flow of trade within India regarded as one economic unit and for preventing commodities essential for the life of the community throughout India from being subjected to sales tax then there could be no ground whatsoever to differentiate Part C States from Part A or Part B State in the matter of restrictions put by Article 286 on the legislative power of the State. It must be remembered that it was contemplated and provided by the Constitution that Part C States could have their own legislatures and even an Act was passed, as previously mentioned in which detailed provisions were made regarding these matters. (The Government of Part C States Act, 1951). In this view of the matter a requirement can certainly be spelt out from the context of Article 286 that the word "State" employed therein should include Part C States. Several anomalies will result if it were to be held that Part C States were immune from the limitations and restrictions imposed by Article 286. The Explanation to Article 286 (1) would become ineffective. For instance, under the Explanation the State in which the goods have actually been delivered as a direct result of sale or purchase for purposes of consumption in that State would be competent to impose the sales tax. Now

if the former State of Vindhya Pradesh could also collect sales tax on sales where the delivery was outside the State and was covered by the Explanation then there would be multiple taxation on one transaction, one by the State of Vindhya Pradesh and the other by the State in which the goods were delivered for consumption. Clause (2) of Article 286 as it stood at the material time before the Constitutional amendments made in 1956 provided that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce except in so far as Parliament by law otherwise provided. Now, if Article 286 was not applicable to Part C States then the sales or purchases taking place in the course of inter-State trade and commerce could have been taxed by the erstwhile State of Vindhya Pradesh. It is difficult to understand how the Constitution makers could have ever countenanced such an anomalous situation which would have even brought in discrimination between Part C States and the other States. Whatever way the matter is looked at, it is difficult to escape from the conclusion that the context of Article 286 required that the word "State" as used therein should include Part C States.

10. We would accordingly affirm the view of the High Court and dismiss these appeals with costs. There will be one hearing fee.

GGM/D V.C.

Appeals dismissed.

AIR 1969 SUPREME COURT 552

(V 56 C 105)

(From Madras)*

R S BACHAWAT AND K. S.

HEGDE, JJ.

P. C. K. Muthia Chettiar and others, Appellants v. V. E. S. Shanmugham Chettiar (dead), and another, Respondents
Civil Appeal No. 705 of 1965, D/- 28-7-1968

(A) Constitution of India, Article 133 — New plea — Suit for accounts on basis of certain agreements — Concurrent findings of Courts below that agreement was

*(A. S. No. 756 of 1954, D/- 28-11-1958—Mad.)

vitiated by fraud — Fiduciary obligation to inform plaintiff of true state of affairs not discharged by defendant — No suggestion made in High Court that plaintiff had means of discovering the truth with ordinary diligence — On appeal under Article 133 held that it was too late for plaintiff to raise contention under Section 19 of Contract Act — Contract Act (1872), Section 19. (Para 2)

(B) Limitation Act (1908), Section 13, Article 95 — Scope and applicability — Suit for obtaining relief on ground of fraud — Article 95 attracted — Fraud committed on 7-1-1924 and discovered on 16-4-1924 — Defendant outside India for several months in 1924 and 1926 — Suit instituted on 14-9-1927 in Court at D in India — Defendant residing at place within jurisdiction of Court on that date — Held Court at D had jurisdiction to entertain and try suit, though cause of action for suit arose outside India — Suit was not barred by limitation — AIR 1928 Mad 1088 and AIR 1944 Mad 437 held rightly overruled by AIR 1955 Mad 96 (FB) — Civil P. C. (1909), Section 20.

In computing the period of limitation prescribed for the suit, "the time during which the defendant has been absent from India" has to be excluded under Section 13. The words of the section are clear and full effect must be given to its language. The section makes no exception for cases in which the cause of action arose in a foreign country or for cases in which the defendant was in a foreign country at the time of the accrual of the cause of action. In all such cases the time during which the defendant has been absent from India must be excluded in computing the period of limitation. (Para 5)

A was owner of 5 original shares in Rubber Estate in Malacca. A, B and certain others were partners in a firm in Malacca. A died in 1913 leaving behind him, his widow and son, C. Under compromise agreement D/- 18-7-1915 between C and B at Malacca the 2½ shares were transferred to B. Under agreement B agreed to account to C for 2½ shares belonging to him. Under another agreement dated 7-1-1924 between C and B, C transferred the remaining 2½ shares on receipt of 18000 dollars. On 14-9-1927 C instituted suit against B in Court of Subordinate Judge at place D in India for declaration and for accounts. Suit was for obtaining relief on ground of fraud committed on 7-1-1924 and discovered on

16-4-1924. B was outside India for several months in 1924 and 1926. On date of filing of suit B was residing at place P within jurisdiction of Court at D.

Held that Court at D had jurisdiction to entertain and try the suit and the Indian Limitation Act was applicable to the suit though the cause of action might have arisen outside India. Suit was governed by Article 95 of Limitation Act (1908). Under Section 13 thereof the period of B's absence from India must be excluded and the suit was not barred by limitation. (1887) ILR 14 Cal 457, Approved; AIR 1928 Mad 1088 and AIR 1944 Mad 437, held rightly Overruled by AIR 1955 Mad 96 (FB).

(Paras 3 to 5)

(C) Civil P. C. (1908), Section 35 — Costs in Supreme Court appeals — Suit for declaration and for accounts — Claim partly reduced — Parties directed to bear their own costs in Supreme Court.

(Para 11)

Cases Referred: Chronological Paras (1955) AIR 1955 Mad 96 (V 42) =

ILR (1955) Mad 116 (FB), Mathukanni v. Andappa 6

(1944) AIR 1944 Mad 437 (V 31) =

(1944) 1 Mad LJ 440, Subramania Chettiar v. Maruthamuthu 6

(1928) AIR 1928 Mad 1088 (V 15) = 28 Mad LW 645, Rathina v. Packiriswami 6

(1887) ILR 14 Cal 457, Atul Kriato Bose v. Lyon and Co. 6

M/s. M. S. K. Sastri and R. Thiagarajan Advocates, for Appellants; M/s. T. R. Srinivasan and R. Gopalakrishnan, Advocates, for Respondent No. 2.

The following Judgment of the Court was delivered by

BACHAWAT, J.: Subramanian Chettiar was the owner of 5 original shares subsequently represented by 1250 shares in the Chop-Leong Watt Hin Rubber Estate in Malacca. On December 9, 1912 Subramanian died leaving behind him his widow and his son plaintiff Shanmugham. In August 1913 the attorney of Subramanian's widow took out letters of administration to his estate. Subramanian, the defendant and certain others were partners in the P. M. S. Firm at Malacca. On July 16, 1915 while both Shanmugham and the defendant were at Malacca they entered into a compromise agreement which is evidenced by Exhibits A-177 and A-178. Under this compromise they agreed that out of the afore-

said original 5 shares in the Chop Leong Watt Hin Rubber Estate $2\frac{1}{2}$ shares would belong to the P. M. S. Firm then represented by the defendant as the managing partner and the remaining $2\frac{1}{2}$ shares would belong to Shanmugham. Under this compromise the defendant agreed and undertook to recover the 5 shares and to account to Shanmugham for the $2\frac{1}{2}$ shares belonging to him and the income and the dividends arising therefrom. On January 7, 1924 while Shanmugham and the defendant were at Malacca they entered into an agreement which is recorded in Exhibit B-2. Under this agreement Shanmugham transferred his remaining $2\frac{1}{2}$ shares in the Rubber Estate to the defendant on receipt of 18000 dollars as consideration. On September 14, 1927 Shanmugham instituted a suit against the defendant in the court of the Subordinate Judge, Devakottai, asking for a declaration that he was entitled to the original 5 shares in the Rubber Estate, that Exhibits A-177, A-178 and B-2 were void and for accounts and consequential reliefs. Shanmugham alleged that the transactions of July 16, 1915 and January 7, 1924 were vitiated by fraud, and fraudulent concealment. During the pendency of the suit Shanmugham was adjudicated an insolvent and thereupon the Official Receiver of Ramanathapuram was added as the 2nd plaintiff. After protracted proceedings which is not necessary to mention now, the Subordinate Judge granted the declarations claimed by Shanmugham and passed a preliminary decree for accounts. The Subordinate Judge accepted the plaintiff's contentions and held that both the transactions of July 16, 1915 and January 7, 1924 were vitiated by fraud and were liable to be set aside. The defendant filed an appeal in the High Court of Madras. During the pendency of the appeal the defendant died and his legal representatives were brought on record. The High Court held that the arrangement dated July 16, 1915 was valid and was not vitiated by fraud. With regard to the arrangement dated January 7, 1924 the High Court agreed with the Trial Court and held that the transaction was vitiated by fraud and that the defendant was liable to account for $2\frac{1}{2}$ shares in the Rubber Estate and dividends amounting to 35535 dollars and 50 cents with interest thereon. The High Court also held that the suit was not barred by limitation. The High Court assessed

the value of 2½ shares at \$1250 dollars and in modification of the decree passed by the Trial Court passed a final decree against the defendant for Rs. 2,35,555 and further interest. The present appeal has been preferred by the defendants after obtaining a certificate from the High Court.

2. Mr. M. S. K. Sastri attacked the finding that the arrangement dated January 7, 1924 was vitiated by fraud. He argued that the High Court failed to take into account the exceptions to Section 19 of the Indian Contract Act and that assuming that Shanmugham's consent was procured by fraud, nevertheless the agreement was not voidable as he had the means of discovering the truth with ordinary diligence. There is no substance in this contention. The two courts have concurrently found that the agreement was vitiated by fraud. The defendant concealed from Shanmugham that he had collected \$3535 dollars and 50 cents on account of dividend in respect of the shares. Had Shanmugham known that this huge amount had been realised by way of dividend he would not have parted with the shares with all their accrued benefits for the sum of 18000 dollars. The defendant was under a fiduciary obligation to Shanmugham to inform him of the true state of affairs. In the High Court it was not suggested that Shanmugham had the means of discovering the truth with ordinary diligence and it is now too late to raise this contention.

3. Mr. Shastri next contended that the suit was barred by limitation. The suit is for obtaining relief on the ground of fraud and is governed by Article 95 of the Indian Limitation Act, 1908. The starting point of limitation is the date when the fraud is known to the party wronged. The fraud was committed on January 7, 1924. The Subordinate Judge found that the fraud was discovered on or about April 16, 1924. We accept this finding. It may be noted that this finding was not challenged in the High Court. The defendant was outside India for several months in 1924 and 1926. The suit was instituted on September 14, 1927. It is common case before us that if the period of the defendant's absence from India is excluded under Section 13 of the Indian Limitation Act, 1908, the suit is not barred by limitation. Section 13 reads—

"In computing the period of limitation prescribed for any suit, the time during

which the defendant has been absent from India and from the territories beyond India under the administration of the Central Government shall be excluded."

4. It is to be noticed that the agreement dated January 7, 1924 was entered into between Shanmugham and the defendant at Malacca. The cause of action for the suit arose at Malacca and at the time of the accrual of the cause of action the defendant was at Malacca. Mr. Sastri argued that in these circumstances section 13 has no application. We are unable to accept this contention.

5. On the date of the filing of the suit the defendant was residing at Pothamangalam within the jurisdiction of the Court of the Subordinate Judge, Devakottai. That Court had jurisdiction to entertain and try the suit and the Indian Limitation Act was applicable to the suit though the cause of action may have arisen outside India. In computing the period of limitation prescribed for the suit, "the time during which the defendant has been absent from India" has to be excluded under Section 13. The words of the section are clear and full effect must be given to its language. The section makes no exception for cases in which the cause of action arose in a foreign country or for cases in which the defendant was in a foreign country at the time of the accrual of the cause of action. In all such cases the time during which the defendant has been absent from India must be excluded in computing the period of limitation.

6. In *Atul Kriato Bose v. Lyon and Co.*, (1887) ILR 14 Cal 457 the defendants were foreigners and they never came to India on or after the date of the accrual of the cause of action. The Calcutta High Court held that Section 13 applied and that the suit was not barred by limitation. The Court was not impressed with the argument that according to this construction a defendant who was in England when a cause of action against him accrued, and has remained there ever since might be liable after an indefinite time to be sued in a Calcutta Court. In *Mathukanni v. Andappa*, AIR 1955 Mad 96 the plaintiff and the defendant who were residents of Mannargudi in India had gone to Kaula Lampur to earn their livelihood, and while there the defendant executed a promissory note to the plaintiff on November 16, 1921. In

1925 the plaintiff brought a suit on the promissory note in the District Munsif's Court of Mannargudi. The cause of action in the suit arose outside India. A Full Bench of the Madras High Court held that the plaintiff was entitled to the benefit of Section 13 and in computing the period of limitation he was entitled to exclude the time during which the defendant was absent in Kaula Lampur. We agree with this decision. The Full Bench rightly overruled the earlier decisions in *Rathina v. Packiriswami*, AIR 1928 Mad 1088 and *Subramania Chettiar v. Maruthamuthu*, AIR 1944 Mad 437. We hold that the suit is not barred by limitation.

7. Mr. Shastri argued that the suit is bad for non-joinder of the other partners of the P. M. S. Firm. The point was not taken in the Courts below. It is not open to the appellant to take this point at this late stage.

8. The High Court valued 625 shares representing the original $2\frac{1}{2}$ shares in the Rubber Estate at 31250 dollars on the footing that the value of each share on January 7, 1924 was 50 dollars. There is force in Counsel's criticism that this valuation is erroneous. The Trial Court did not record any finding as to the value. The High Court said that in 1930 the value of the shares was 31250 dollars, and as there was a boom in the post-war period and a slump had set in since 1921, the value on January 7, 1924 would be 31250 dollars. The parties relied on the testimony of Tan Siew Giab. He proved Exhibit A-74, a list of transfers of shares in the Rubber Estate between June 29, 1920 and September 14, 1931. From the list it appears that the price per share on June 29, 1920 was between 23 and 20 dollars; on March 29, 1923, 20 dollars; on September 5, 1923, 10 dollars; on April 11, 1924, 20 dollars; on August 10, 1925, 10 dollars and on January 22, 1930 and February 28, 1930, 50 dollars. The price of the shares went up in 1930. But it is common case that the shares should be valued as on January 7, 1924. On the material on the record we assess the value of a share on that date to be 20 dollars. The value of 625 shares would therefore be 12500 dollars. Having regard to this finding the decree passed by the High Court requires modification.

9. The High Court held that the defendants were liable to pay (1) 35535

dollars and 50 cents on account of dividend, (2) interest thereon at 6 per cent per annum from the date of their receipt till November 28, 1958, (3) 10250 dollars after deducting from the value of the shares amounting to 31250 dollars the sum of 18000 dollars received by the plaintiff on January 7, 1924 and another sum of 3000 dollars given up by the plaintiff. Having regard to our finding the defendants are liable to be debited under the last head with 12500 dollars and are entitled to be credited with 18000 dollars and 3000 dollars. Thus under the last head the defendants are entitled to a net credit of 8500 dollars. The result is that the defendants are liable to pay 35535 dollars 50 cents minus 8500 dollars, that is to say, 27035 dollars 50 cents and interest thereon at 6 per cent per annum. From the material on the record it is not possible to find out the precise dates of receipt of the dividends. Counsel on both sides are agreed that we should allow interest on 27035 dollars and 50 cents at 6 per cent per annum from January 7, 1924 up to November 28, 1958 and further interest at 6 per cent per annum from November 28, 1958 until payment. The agreed rate of exchange is Rs. 156 per 100 dollars.

10. Counsel on both sides have worked out the figures and on that basis the defendants are liable to pay Rs. 42174 and 60 paise for principal and Rs. 88292 and 49 paise for interest up to November 28, 1958 aggregating to Rs. 130467 and interest on Rs. 42174 and 60 paise at 6 per cent per annum from November 28, 1958 until payment.

11. The appeal is allowed in part. The decree passed by the High Court is reduced to Rs. 130467 with interest at 6 per cent per annum on Rs. 42174 and 60 paise from November 28, 1958 until payment. Directions II, III, IV, V and VI incorporated in the High Court decree are affirmed. The parties will pay and bear their own costs in this Court. The second respondent will be at liberty to retain his costs out of the estate of the first respondent in his hands.

SSG/D.V.C.

Appeal partly allowed.

AIR 1969 SUPREME COURT 556
(V 56 C 106)

(From Allahabad)*

J C SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

M/s Baburam Prakash Chandra Maheshwari, Appellant v. Antaram Zila Parishad now Zila Parishad, Muzaffarnagar, Respondent.

Civil Appeal No. 605 of 1966, D/- 2-8-1968

Constitution of India, Art. 226 — Existence of alternative remedy is no bar to writ petition, where it is alleged that the Tribunal acted under provision of law which was ultra vires or where it is alleged that it acted in violation of principles of natural justice — S. A. No. 322 of 1964, D/- 27-3-1964 (All), Reversed.

When an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted. AIR 1950 SC 163 & AIR 1958 SC 86, Rel. on.

(Para 3)

There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Art. 226 for issuing appropriate writ for quashing them on the ground that they are incompetent, without his being obliged to

wait until those proceedings run their full course. AIR 1961 SC 1615 & AIR 1955 SC 661, Rel. on. (Para 3)

In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice. AIR 1958 SC 86, Rel. on. (Para 3)

Where the appellant had alleged in the writ petition that the Taxing Officer had no authority to impose the tax and there was no validly constituted Antaram Zila Parishad and it was further alleged that Ss. 114 and 124 of the U. P. District Boards Act No. X of 1922 violated Art. 14 of the Constitution as arbitrary power was granted to District Boards as well as the State Government to exempt any person or class of persons or any property or class of properties from the scope of the Act and there was also an allegation that the imposition of the tax violated the provisions of Art. 276 of the Constitution and that the Antaram Zila Parishad could not impose the tax beyond the maximum limit of Rs. 250/- per annum prescribed in that Article and it was further contended on behalf of the appellant that the procedure for assessment of the tax was not followed and there was violation of the principles of natural justice, in view of the allegations of the appellant that the taxing provisions are ultra vires and that there was violation of the principles of natural justice the High Court was in error in summarily dismissing the writ petition on the ground that the appellant had an alternative remedy of statutory appeal, and the discretion of the High Court had not been exercised in accordance with law S. A. No. 322 of 1964, D/- 27-3-1964 (All), Reversed. (Para 4)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 1615 (V 48)=

(1962) 2 SCR 81, Carl Stoll G.

m. b. II. v. State of Bihar

(1958) AIR 1958 SC 86 (V 45)=

1958 SCR 595, State of U. P. v.

Mohammad Nooh

(1955) AIR 1955 SC 661 (V 42)=

(1955) 2 SCR 603, Bengal Immunity Co. Ltd. v. State of Bihar

(1950) AIR 1950 SC 163 (V 37)=

1950 SCR 566, Rashid Ahmed v.

Municipal Board, Kairana

(1942) (1942) 1 KB 281=111 LJKB

224, Rex v. Wandsworth Justice

Ex parte Read

(1928) (1928) 1 KB 291=96 LJKB

347, King v. Postmaster-General

Ex parte Carmichael

(*Spl. Appeal No. 322 of 1964, D/- 27-3-1964—All.)

Mr. E. C. Agrawala and Mrs. E. Udayarathnam, Advocates, for Appellant; Mr. M. C. Chagla, Senior Advocate (Mr. P. C. Agrawala, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by:

RAMASWAMI, J.—The appellant is a partnership firm consisting of two brothers Lala Baburam and Shri Prakash Chandra, carrying on the business of manufacturing Khandsari sugar in the district of Muzaffarnagar. The partnership firm carries on its business through its two units (1) one located in the village Basora and run under the name and style of M/s. Baburam Ashok Kumar and (2) the other located in village Morna and run under the name and style of M/s. Baburam Prakash Chandra, both in the district of Muzaffarnagar. The case of the appellant was that the business of manufacturing Khandsari was seasonal and was carried on at both the places for less than 5 months in a year, i.e., from the month of November to the beginning of April. Under the U. P. District Boards Act No. X of 1922, the District Board of Muzaffarnagar was empowered to levy tax under Sections 108 and 114 in the rural area. Section 114 was to the following effect:

“The power of a board to impose a tax on circumstances and property shall be subject to the following conditions and restrictions namely—

(a) The tax may be imposed on any person residing or carrying on business in the rural area provided that such person has so resided or carried on business for a total period of at least six months in the year under assessment.

(b) The total amount of tax imposed on any person shall not exceed such maximum (if any) as may be prescribed by rule.

.....”
Under S. 123 of that Act the matters relating to the assessment and collection of taxes were to be governed by rules framed under Section 172 of that Act. On March 1, 1928, the Government of U. P. issued Notification No. 315/IX-413 notifying the rules for the assessment and collection of a tax on circumstances and property in the rural area of the Muzaffarnagar district. The rules provided, among other matters, that all the activities of an assessee within the district, whether carried on under the same or different name,

shall be considered in calculating the total amount to be assessed; and the tax shall be assessed by an Assessing Officer appointed by the District Board, and the list of assessment of the preceding year ending December 31, shall be completed on or before January 20, and shall be submitted to the Board which will return it by February 15 to the Assessing Officer for being revised and thereafter the Assessing Officer shall give notice of a date not less than one month when he will proceed to consider the objection. The assessee may file objections before the date fixed and thereafter the Assessing Officer shall allow the assessee an opportunity to be heard. Rule 16 read with Rule 2 fixed the maximum limit of the total amount of tax assessed on any person not to exceed Rs. 2,000/- in any year, having regard to all the activities of an assessee within the district whether carried on under the same or a different name. In the year 1950 the Constitution of India was promulgated and under cl. 2 of Article 276 the total amount payable in respect of any one person to the district Board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum. On August 22, 1958, the U. P. Antarim Zila Parishad Act of 1958 (U. P. Act No. XXII of 1958) passed by the U. P. Legislature received the assent of the Governor and was published in the U. P. Gazette dated August 23, 1958. Clause (3) of Section 1 of the U. P. Antarim Zila Parishad Act, 1958 runs as follows:

“It shall be deemed to have come into force on the 29th day of April, 1958, and shall expire on the 31st day of December, 1959.”

But the Amending Act (U. P. Act No. I of 1960) received the assent of the Governor on January 5, 1960 whereby the figure 1960 was substituted in place of 1959 in clause (3) of Section 1 of U. P. Act XXII of 1958. The case of the appellant is that the original Act No. XXII of 1958 had expired on December 31, 1959 and as such could not be revived on January 5, 1960 when the Amending Act No. I of 1960 received the assent of the Governor and that fresh legislation was necessary. On March 20, 1960, a copy of the Assessment Order assessing the appellant to the maximum amount of Rs. 2,000/- as circumstances and property tax for the assessment year 1959-60 was issued by the

Antarim Zila Parishad Muzaffarnagar. The assessment order was issued by Shri O. P. Varma purporting to act as a Taxing Officer of the Antarim Zila Parishad. Aggrieved by the assessment order, the appellant filed a Civil Miscellaneous Writ Petition No. 1780 of 1960 in the Allahabad High Court challenging the authority of the respondent Antarim Zila Parishad to impose the tax and praying for the grant of a writ to quash the said assessment order. The writ petition was summarily dismissed on July 21, 1960 by Jagdish Sahai, J., on a preliminary point that the appellant had a right to appeal to the prescribed authority under Section 128, of U. P. Act No. X of 1922. The appellant thereafter preferred a Special Appeal No. 452 of 1960 in the Allahabad High Court against the order of Jagdish Sahai, J. which was also dismissed on the ground that the appellant had an alternative remedy of appeal. During the pendency of the Special Appeal No. 452 of 1960, another new Act, namely the U. P. Kshatra Samitis and Zila Parishads Adhinyam of 1961 (i.e., the U. P. Act No. XXXII of 1961) was passed by the U. P. Legislature and on November 29, 1961 received the assent of the President of India. The case of the appellant is that on January 15, 1962, without giving any notice or inviting any objections, the Taxing Officer Shri O. P. Varma passed the assessment order for 1961-62 in respect of the circumstances and property tax regarding the Basera Unit. Being aggrieved by the two separate assessment orders of Rs. 2,000/- each in respect of the two units of Morana and Basera for the years 1961-62, the appellant filed again in the Allahabad High Court a writ petition No. 2371 of 1962 under Article 226 of the Constitution. The writ petition was summarily dismissed by S. N. Dwivedi, J., on February 13, 1964. The appellant took the matter in appeal in Special Appeal No. 322 of 1964 but the Special Appeal was dismissed by the Division Bench on March 27, 1964 on the ground that the appellant had not availed himself of the alternative remedy by way of appeal. The present appeal is brought to this Court by special leave from the judgment of the Division Bench of the Allahabad High Court dated March 27, 1964 in Special Appeal No. 322 of 1964.

2. The sole argument presented on behalf of the appellant is that the High Court was in error in holding that an

appeal under the U. P. District Boards Act No. X of 1922 was an adequate and efficacious remedy and that the appellant should have exhausted the statutory remedy before applying for a writ under Article 226 of the Constitution.

3. It is a well-established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, as observed by this Court in *Rashid Ahmed v. Municipal Board, Kairana*, 1950 SCR 566 = (AIR 1950 SC 163), "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari notwithstanding the fact that the statutory remedies have not been exhausted. In *State of Uttar Pradesh v. Mohammad Nooh*, 1958 SCR 595, 605 = (AIR 1958 SC 86, 93), S. R. Das, C. J., speaking for the Court, observed:

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. (Halsbury's Laws of England, 3rd Ed., Vol II, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior Courts subordinate to it and ordinarily the Superior Court will decline to interfere until the aggrieved party has exhausted his other statutory

remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In the *King v. Postmaster-General Ex parte Carmichael*, (1928 (1) KB 291) a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior Court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary jurisdiction. The case of *Rex v. Wandsworth Justices Ex parte Read*, 1942 (1) KB 281 is an authority in point. In that case a man had been convicted in a Court of summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction."

There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well-settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course. — (See the decisions of this Court in *Carl Still G. m. b. H. v. State of Bihar*, AIR 1961 SC 1615 and *Bengal Immunity Co. Ltd. v. State of Bihar*, (1955) 2 SCR 603 = (AIR 1955 SC 661). In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice. (See 1958 SCR 595, 605 = (AIR 1958 SC 86, 93)).

4. It is manifest in the present case that the appellant had alleged in the writ petition that the Taxing Officer had no authority to impose the tax and there was no validly constituted Antarim Zila Parishad after December 31, 1959. It was further alleged that Sections 114 & 124 of the U. P. District Boards Act

No. X of 1922 violated Article 14 of the Constitution as arbitrary power was granted to District Boards as well as the State Government to exempt any person or class of persons or any property or class of properties from the scope of the Act. There is also an allegation that the imposition of the tax violated the provisions of Article 276 of the Constitution and that the Antarim Zila Parishad could not impose the tax beyond the maximum limit of Rs. 250/- per annum prescribed in that Article. It was further contended on behalf of the appellant that the procedure for assessment of the tax was not followed and there was violation of the principles of natural justice. In view of the allegations of the appellant that the taxing provisions are ultra vires and that there was violation of the principles of natural justice, we think that the High Court was in error in summarily dismissing the writ petition on the ground that the appellant had an alternative remedy of statutory appeal. It was contended by Mr. Chagla on behalf of the respondent that in dismissing the writ petition the High Court was acting in its discretion. But it is manifest in the present case that the discretion of the High Court has not been exercised in accordance with law and the judgments of the Division Bench dated March 27, 1964 and of the learned Single Judge dated February 13, 1964 summarily dismissing the writ petition are defective in law.

5. For the reasons expressed we hold that this appeal must be allowed, the judgments of the Division Bench in Special Appeal No. 322 of 1964 dated March 27, 1964 and of the learned Single Judge dated February 13, 1964 should be set aside and Civil Miscellaneous Writ No. 2371 of 1962 should be restored to file and dealt with in accordance with law. There will be no order with regard to the costs of this appeal in this Court.

RGD

Appeal allowed.

AIR 1969 SUPREME COURT 560
(V 56 C 107)

(From Bombay)*

S. M. SIKRI, R S BACHAWAT AND
K. S. HEGDE, JJ

Dewaji, Appellant v. Ganpatlal, Res-
pondent.

Civil Appeal No. 1041 of 1965, D/-
6-8-1968

(A) Tenancy Laws — Berar Regula-
tion of Agricultural Leases Act (24 of
1951), Ss 16, 16A and 16B as amend-
ed in 1953 — Sections do not apply to
appeals pending when Amendment Act
of 1953 came into force — Civil P. C.
(1908), S 9 — Exclusion of jurisdiction
of Civil Court must be explicitly express-
ed or necessarily implied.

If the Legislature intends to oust the
jurisdiction of Civil Courts, it must say
so expressly or by necessary implication.
There are no words in Secs 16, 16A and
16B which can lead to the necessary in-
ference that these provisions were in-
tended to apply to appeals pending when
the 1953 Act came into force. It is true
that the word "whenever" is wide but
Sec 16A uses the words "suit or proceed-
ing" and these words do not ordinarily
indicate appellate proceedings. Further,
Sec 16B uses the word "entertain" and
not the words "entertain or try any suit"
as contained in Sec 15 (2) of the 1951
Act. If the intention was to affect pend-
ing proceedings, the word "try" along
with the word "entertain" would have
been used in Sec. 16B of the 1953 Act.
Therefore, the intention was not to ap-
ply the 1953 Act to pending appeals.

(Para 12)

(B) Letters Patent (Bom.) Cl. 15 —
Points on which appeal may be heard
— Points decided by interlocutory order
of Single Judge can be canvassed — Sec-
tion 105 (2) Civil P. C. does not apply
— (Civil P. C. (1908), S. 105 (2)).

It is not necessary under the Letters
Patent to obtain a separate leave to ap-
peal against an interlocutory order of
the Single Judge and in the appeal filed
against the judgment of the Single Judge
the Letters Patent Bench can decide all
the points decided by the Single Judge
in his interlocutory order Section 105 (2)
Civil P. C. does not apply to such a case.
AIR 1960 SC 941, Foll. (Para 13)

* (L. P. A. No 12 of 1961, D/- 9-8-1962 —
Bom at Nag.)

DM/EM/D815/68

Cases Referred: Chronological Paras
(1960) AIR 1960 SC 941 (V 47) =
1960-3 SCR 590, Satyadhyam
Ghosal v. Sm. Deorajin Devi 18
(1957) AIR 1957 Bom 239 (V 44) =
1957 Nag LJ 344 (FB), Paika v.
Rajeshwar 6

M/s S. V Natu and A. G. Ratnapar-
khi, Advocates, for Appellant, M/s S
N Kherdekar and M. R. K. Pillai, Advo-
cates, for Respondent.

The following judgment of the Court
was delivered by

SIKRI, J:— This appeal by certificate
granted under Article 133 (1) (a) and (b)
of the Constitution is directed against
the judgment of the High Court of Judi-
cature at Bombay Nagpur Bench in a
Letters Patent appeal allowing the ap-
peal and restoring the decree made in
favour of the plaintiff Ganpatlal — res-
pondent before us and hereinafter called
the respondent — by the Trial Court as
confirmed by the District Court.

2. The facts relevant for the determi-
nation of the points raised before us are
as follows: The respondent, Ganpatlal,
was the owner of Field Survey No 58,
measuring 25 acres 4 gunthas, in Yeot-
mal District. It appears that the res-
pondent used to lease the land to the
defendant, Dewaji — appellant before us
and hereinafter called the appellant —
on yearly lease. For the year 1950-51 he
gave the land to the appellant on the
condition that at the end of the year the
lease will stand determined and the ap-
pellant will hand over possession. On
May 7, 1951, the respondent served a
notice on the appellant requiring him to
vacate the land in suit. The appellant,
however, continued to remain in posses-
sion. Thereupon the respondent filed a
suit on September 17, 1951, praying for
possession, damages and mesne profits.
On November 15, 1951, the Berar Regu-
lation of Agricultural Leases Act, 1951
(Madhya Pradesh No. XXIV of 1951) —
hereinafter called the 1951 Act — came
into force, Section 16 of which provides
as follows:

"Except as otherwise provided in this
Act, no Civil Court shall entertain any
suit instituted, or application made, to
obtain a decision or order on any matter
which a Revenue Officer is by or under
this Act, empowered to determine, de-
cide or dispose of."

3. One of the pleas which the ap-
pellant took was that he had been record-

ed as a 'protected tenant' under the 1951 Act and that the Civil Courts had no jurisdiction to eject him in view of Section 8 of that Act. The Trial Court held that the appellant was not a protected tenant under Section 3 (3) of the 1951 Act and the Civil Court had jurisdiction.

4. The appellant then appealed to the District Judge and the Additional District Judge held that the Civil Court had jurisdiction. He observed that "there is nothing in this section (Section 16 of the 1951 Act) to suggest that the powers of the Civil Court were in any way curtailed in regard to the question whether a particular person was a tenant or not under Section 3 of the Act. Moreover, there is nothing in that Act to show that it was intended to apply to suits which were pending at the date when this Act came into force". By the time the appeal was heard by the Additional District Judge, Section 16 of the 1951 Act had been substituted by Sections 16, 16A and 16B by the Berar Regulation of Agricultural Leases (Amendment) Act 1953 — hereinafter called the 1953 Act. These sections run as follows:

"16(1) Whenever any question arises whether any transaction between a landholder and a person claiming to be his lessee is a lease within the meaning of this Act, such question shall be decided by the Revenue Officer.

(2) In deciding the question referred to in sub-section (1), the Revenue Officer shall, notwithstanding anything contained in Section 92 of the Indian Evidence Act, 1872, or in Section 49 of the Indian Registration Act, 1908, or in any other law for the time being in force, have power to inquire into and determine the real nature of the transaction and shall be at liberty notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or a statement or unregistered document with a view to such determination.

(3) Any decision of the Revenue Officer under this section shall be binding on the parties to the proceedings and persons claiming through them.

16-A(1) Whenever any question as is referred to in Section 16 arises before a Civil Court in any suit or proceeding, the Court shall, unless such question has already been determined by a Revenue

Officer, refer the question to the Revenue Officer for decision and shall stay the suit or proceeding so far as it relates to the decision of such question.

(2) The Civil Court shall accept the decision of the Revenue Officer on the question and decide the suit or proceeding before it accordingly.

16-B. Except as otherwise provided in this Act, no Civil Court shall entertain any suit instituted, or application made, to obtain a decision or order on any matter which a Revenue Officer is by or under this Act, empowered to determine, decide or dispose of."

5. Before the Additional District Judge the appellant relied on these sections and asserted that the determination of the question whether a person is a tenant or not was, under the 1953 Act, a matter entirely within the jurisdiction of the Revenue Courts and the jurisdiction of the Civil Courts had been ousted. The learned Additional District Judge repelled the argument and held that the 1953 Act did not affect pending proceedings. The learned Additional District Judge thereupon dismissed the appeal.

6. The appellant then appealed to the High Court. The appeal first came up for hearing before Vyas, J. By an order dated August 21, 1957, he held that in view of the amendments made by the 1953 Act, "it is not for the Civil Court to decide but for the Revenue Officer to determine whether in the year 1951-52 also the defendant was paying to his landlord every week by way of rent one-third share in the produce of the garden and was his lessee for that year also." He further observed that "if the answer to this question is in the affirmative, the defendant would be entitled to all the benefits of a protected tenancy, as observed by the learned Chief Justice in *Paika v. Rajeshwar*, 1957 Nag LJ 344= (AIR 1957 Bom 239) (FB). In the result he set aside the judgment and decree passed by the learned Additional District Judge and directed

"that the record and proceedings in this case be sent to the Revenue Officer, that is, the Sub-Divisional Officer, Yeotmal, and the said Revenue Officer is directed to decide whether the defendant's averment is right or otherwise, namely, that even after the expiry of the year 1950-51, that is, even after 31st March, 1951, the defendant used to pay

to his landlord, the plaintiff, every week by way of rent one-third share in the produce of the garden. The decision of the Revenue Officer shall be subject to the usual course of appeal and revision, and when the question which is referred to the Revenue Officer by this judgment is finally decided by the highest Revenue Authority, the finding shall be communicated to this Court. Until such time that this Court receives a finding upon the question mentioned above from the highest Revenue Authority, this appeal shall stand stayed. It shall be disposed of by this Court after the finding of the highest Revenue Authority is received by it."

7. The Revenue Courts then remitted the finding. The Commissioner, which was the last Revenue Court, gave a finding confirming the one as given by the Sub-Divisional Officer that the appellant was paying rent to the respondent for the year 1951-52.

8. The appeal was then heard by Badkas, J. It was argued before him that Vyas, J., should not have referred the issue to the Revenue Officer for decision under Section 16 of the 1951 Act, but Badkas, J., held that it would not be appropriate for him to sit in judgment over the decision given by Vyas, J., and that the reference made by Vyas, J., under Section 16 of the 1951 Act had to be accepted. Accepting the finding of the Revenue Courts, Badkas, J., held that the respondent was not entitled to eject the appellant. He further held that it was not necessary to decide whether the 1951 Act was retrospective or not as the 1951 Act came into force during the year in which the defendant held survey numbers in question as lessee. He accordingly allowed the appeal.

9. Having obtained leave, the respondent appealed under the Letters Patent. It was urged before the Letters Patent Bench on behalf of the appellant that the Bench could not deal with the question whether the 1953 Act applied to pending proceedings on the ground that this point had not been argued before the learned Single Judge. The Bench found no substance in this contention as the point had been raised before the learned Single Judges. The Bench further held that there was no bar to the question of applicability of the 1953 Act being allowed to be raised.

10. Dealing with the merits, the Bench held that "taking the scheme of

the Act into account and the fact that there is no section in the Act which makes the Act applicable to pending proceedings, it is at once clear that it was not intended to affect pending proceedings. Pending proceedings must continue unaffected by the provision of the Act and whatever questions arose in those proceedings must be decided by the Civil Courts."

11. The Bench then accepting the finding of the Civil Courts, held that there was no defence to the suit and the suit must succeed. The Bench also repelled the argument that it was not open to it to consider the entire merits of the Second Appeal as the leave had been given by Badkas, J., and not by Vyas, J. The Bench observed that there was no substance in the contention since the judgment of Vyas, J., was never open to the appeal it being an interlocutory judgment.

12. The learned Counsel for the appellant contends that Sections 16, 16A and 16B, as substituted by the 1953 Act, had clearly ousted the jurisdiction of the Civil Courts and Vyas, J., was right in sending the case to Revenue Courts for decision on the question whether the appellant was a tenant in the year 1951-52 or not. He stresses the word "whenever" appearing in Section 16 and says that this is a wide word and no limitation can be placed on it. In our view there is no substance in this contention. The first point to be noticed in this connection is that the 1953 Act came into force after the Trial Court had decreed the suit and an appeal was pending before the District Judge. It cannot be disputed that if the Legislature intends to oust the jurisdiction of Civil Courts, it must say so expressly or by necessary implication. We cannot find any words in Secs. 16, 16A and 16B which can lead to the necessary inference that these provisions were intended to apply to appeals pending when the 1953 Act came into force. It is true that the word "whenever" is wide but Section 16A uses the words "suit or proceeding" and these words do not ordinarily indicate appellate proceedings. Further, Section 16B uses the word "entertain" and not the words "entertain or try any suit" as contained in Section 15 (2) of the 1951 Act. If the intention was to affect pending proceedings, the word "try" along with the word "entertain" would have been used in Section 16B of

the 1953 Act. It seems to us that the intention was not to apply the 1953 Act to pending appeals. If Sections 16, 16A and 16B do not bar the jurisdiction of the Civil Courts in this case, the Letters Patent Bench was right in accepting the findings given by the Trial Court and the District Court in holding that the appellant was not a tenant for the year 1951-52.

13. The learned Counsel then contends that it was not open to the Letters Patent Bench to decide this question of the applicability of Sections 16, 16A and 16B because Vyas, J., had decided to the contrary and had not given leave to appeal against his order. It seems to us that the order of Vyas, J., was interlocutory and it was not necessary for the respondent to obtain separate leave to appeal against this order. It was open to the Letters Patent Bench to decide all points decided by Vyas, J., in the interlocutory order dated August 21, 1957. At any rate the same point was raised before Badkas, J. Further, as held by this Court in *Satyadhyam Ghosal v. Smt. Deorajin Devi*, 1960-3 SCR 590 = (AIR 1960 SC 941), "an interlocutory order which did not terminate the proceedings and which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken, could be challenged in an appeal from the final decree or order." Section 105 (2), C. P. C., does not apply in this case, and, therefore, the Letters Patent Bench was entitled to go into the validity of the order passed by Vyas, J.

14. The learned Counsel then urges that this was a new point and the Letters Patent Bench should not have allowed it to be taken. But we agree with the Bench that the point had been raised before the learned Single Judges. In view of this it is not necessary to decide whether a new point can be taken up in a Letters Patent appeal or not.

15. In the result the appeal fails and is dismissed with costs.

KSB

Appeal dismissed.

AIR 1969 SUPREME COURT 563
(V 56 C 108)

(From Andhra Pradesh)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Kamaraju Venkata Krishna Rao, Appellant v. Sub-Collector, Ongole and another, Respondents.

Civil Appeal No. 1103 of 1965, D/- 8-8-1968.

(A) Hindu Law — Charitable endowments — Tank can be an object of charity — Inam in favour of the "uracheruvu" (tank) — Tank must be considered a charitable institution within the meaning of Andhra Act 36 of 1956 — Andhra Inams (Abolition and Conversion into Ryotwari) Act, 1956, S. 2 (E).

Under Hindu Law a tank can be an object of charity and when a dedication is made in favour of a tank, the same is considered as a charitable institution. Therefore where there is an Inam in favour of the "uracheruvu" (tank), that tank must be considered as a charitable institution within the meaning of Section 2 (E) of the Andhra Act, 36 of 1956. Consequently after the abolition of the Inam, the Inam property gets itself converted into Royatwari property, of the "uracheruvu", to be managed by its Manager. Hence the property in question has to be registered in the name of the tank but it will continue to be managed by the Manager who was an Inamdar so long as he continues to be its Manager. AIR 1958 Mys 93 & (1890) ILR 14 Bom 1 & (1940) AC 138 & AIR 1940 PC 116, Rel. on. (Para 9)

(B) Words and Phrases — 'Institution' — Meaning — Meaning of the word institution that will cover every use of it depends on the context in which it is found — A tank can be a charitable institution when there is dedication in favour of that tank. (1940) AC 138, Rel. on; AIR 1940 PC 116, Ref. (Paras 5, 6)

Cases Referred: Chronological Paras
(1958) AIR 1958 Mys 93 (V 45)=

ILR (1957) Mys 291, V. Mari-
vappa v. B. K. Puttaramayya

8

(1940) AIR 1940 PC 116 (V 27)=

ILR (1940) Lah 493, Masjid
Shahid Ganj v. Shiromani Gurd-
wara Parbandhak Committee,
Amritsar

6

*(Writ Petn. No. 431 of 1961, D/- 9-8-1963, A. P.)

DM/EM/D625/63

(1940) 1940 AC 138=109 LJPC
 22, Minister of National Revenue
 v Trusts and Guarantee Co., Ltd. 5
 (1890) ILR 14 Bom 1, Jannabai
 v Khimji Vullubdas 7

Mr D Narasaraju, Senior Advocate
 (M/s A. Subba Rao and K. Jayaram,
 Advocates, with him), for Appellant, Mr.
 B Parthasarathy, Advocate, for Respondent
 No 1, Mr T Satyanarayana, Advocate,
 for Respondent No 2.

The following Judgment of the Court
 was delivered by

HEGDE, J:—A short, nonetheless
 interesting question of law arises for
 decision in this appeal by certificate,
 and that question is whether a tank can
 be considered as a charitable institution
 within the meaning of those words in
 Section 2 (E) of the Andhra Inams (Abolition
 & Conversion into Ryotwari Act)
 1956 (Act No 38 of 1956) (to be hereinafter
 referred to as the Act.)

2. The Inam with which we are concerned
 in this case stands abolished
 under the Act. The appellant wants the
 property comprised in that Inam to be
 registered in his name. His contention
 is that prior to its abolition he was the
 Inamdar of that Inam though he had
 the liability to repair the tank in his village
 from out of the income of that Inam.
 The Authorities under the Act
 have rejected his claim that he was the
 Inamdar of the Inam in question. They
 have come to the conclusion that
 the Inam was in favour of the
 tank and that he was in possession
 of the Inam property only as the Manager
 of the tank which according to them
 was a charitable institution. This conclusion
 has been upheld by the High Court.

3. It is not known as to who granted
 the Inam in question. The grant is lost
 in antiquity. The only evidence we
 have relating to this Inam are the entries
 in the Inam register. A copy of that
 register has been produced in this case.
 Therein the Inam is shown to
 have been granted to the tank "uracheruvu".
 Under column 8 it is mentioned
 that it was given for repairs of the pond
 called Uracheruvu situated close to the
 village. Under column 10 it is mentioned
 that it is to be in force so long as the
 repairs of the tank are performed. The
 ancestor of the appellant was shown to
 be the Manager of the charitable institution
 viz. the tank. Under the remarks

column it is mentioned: "The pond is of
 great use for the cattle and people of
 the village. The Inam can be confirmed
 permanently so long as the repairs are
 performed. The pond for which the
 Inam was originally granted was situated
 north to the village and is now out of
 use. At the request of the villagers the
 late Collector Mr. Fraser issued an order
 in 1819 that the proceeds of this Inam
 can be applied to the present existing
 Kunta which is south to the village and
 so of use."

4. From these entries it is clear that
 the Inam was granted in favour of the
 tank known as "uracheruvu". It has
 been so considered at least ever since
 1819. Therefore we are unable to uphold
 the contention of the appellant that
 it was a grant in favour of his family
 subject to the liability to repair the tank.
 It appears that the ancestors of the appellant
 and at present the appellant is looking
 after the management of the tank.

5. Mr. Narasaraju, learned Counsel
 for the appellant contended that even if
 we come to the conclusion that the Inam
 was granted for a charitable purpose,
 the object of the charity being a tank,
 the same cannot be considered as a charitable
 institution. According to him a tank
 cannot be considered as an institution.
 In support of that contention of
 his he relied on the dictionary meaning
 of the term 'institution'. According to
 the dictionary meaning, the term 'institution'
 means "a body or organization of
 an association brought into being for the
 purpose of achieving some object". Oxford
 Dictionary defines an 'institution' as
 "an establishment organisation or association,
 instituted for the promotion of
 some object especially one of public or
 general utility, religious, charitable, educational
 etc." Other dictionaries define the
 same word as 'organised society established
 either by law or the authority
 of individuals, for promoting any object,
 public or social.' In Minister of National
 Revenue v. Trusts and Guarantee Co.
 Ltd., 1940 AC 138, the Privy Council
 observed:

"It is by no means easy to give a definition
 of the word 'institution' that will
 cover every use of it. Its meaning must
 always depend upon the context in which
 it is found."

6. In Masjid Shahid Ganj v. Shiromani
 Gurdwara Parbandhak Committee,

Amritsar, AIR 1940 PC 116, the Privy Council considered a "Madrasah" as an institution though it doubted whether the same can be considered as a "juristic personality". This is what the Privy Council observed:

"A gift can be made to a madrasah in like manner as to a masjid. The right of suit by the mutwali or other manager or by any person entitled to a benefit (whether individually or as a member of the public or merely in common with certain other persons) seems hitherto to have been found sufficient for the purpose of maintaining Mahomedan endowments. At best the institution is but a caput mortuum, and some human agency is always required to take delivery of property and to apply it to the intended purposes. Their Lordships, with all respect to the High Court of Lahore, must not be taken as deciding that a "juristic personality" may be extended for any purpose to Muslim institutions generally or to mosques in particular. On this general question they reserve their opinion."

We may at this stage state that the Act has not defined either the expression "charitable institution" or even "institution". Therefore we have to find out the meaning of that term with reference to the context in which it is found. We must remember that the expression "charitable institution" is used in a statute which abolishes Inams. The Inam in question must undoubtedly have been granted by a Hindu. Most of the Inams abolished by the Act were those granted by Hindu Kings in the past. According to Hindu conceptions a tank has always been considered as an object of charity. In the Tagore Law Lectures delivered in 1892 by late Pandit Prannath Saraswati on "The Hindu Law of Endowments", he stated:

"From very ancient times the sacred writings of the Hindus divided works productive of religious merit into two divisions named ishta and purta a classification which has come down to our times. So much so that the entire objects of Hindu endowments will be found included within the enumeration of ishta and purta works. In the Rig Veda ishtapurttam (sacrifices and charities) are described as the means of going to heaven. In commenting on the same passage Sayana explained ishtapurta to denote "the gifts bestowed in *srauta* and *smarka* rites". In the *Taittiriya Aran-*

yaka, *ishtapurttam* occur in much the same sense and Sayana in commenting on the same explains *ishta* to denote "Vedic rites like *Darsa*, *Purnamasa* etc." and *purta* "to denote *Smarka* works like tanks, wells etc."

At page 26 he again quotes Vyasa in these words:

"Tanks, wells with flights of steps, temples, the bestowing of foods, and groves—these are called *purttam*."

At page 27, the learned lecturer enumerates the *purttam* works. Amongst them is included the construction of works for the storage of water, as wells, *baolis*, tanks, etc. The learned lecturer devotes his tenth lecture to "purta". In the course of that lecture he again states that the construction of reservoirs of water is classed by Hindu sages amongst the "*purttam*" and charitable works. In this connection he quotes from various treatises such as:

- (i) *Ashwalayana Grihya Parishishta*;
- (ii) *Vishnu Dharmottara*;
- (iii) *Skanda Purana*;
- (iv) *Nandi Purana*;
- (v) *Aditya Purana*;
- (vi) *Yama*;
- (vii) *Mahabharata*, etc. etc.

7. In *Jamnabai v. Khimji Vullubdass*, (1890) ILR 14 Bom 1 at p. 9, Sir Charles Sargent Kt., C. J., while interpreting a will observed thus:

"We come to the latter part of cl. 6 which directs the building of a well and "avada", (cistern for animals to drink water from), out of the surplus of his fund after providing for the outlay of the two *sadavartas* and repairing his property. Mr. Justice Jardine considered he could not presume a charitable object in a well and "avada". Such an object is so frequently the result of charitable intention in Oriental countries, and is so entirely in accordance with the notions of the people of this country that we think that, in the absence of anything to show that the testator intended the well and "avada" to be built for the benefit of the property — and there is nothing in the present will to show such intention — they should be presumed to have intended by the testator for the use of the public."

8. In *V. Mariyappa v. B. K. Puttaramayya*, ILR (1957) Mys 291=(AIR 1958 Mys 93), a Division Bench of the Mysore High Court observed thus:

"The maintenance of *Sadavartas*, tanks, seats of learning and homes for the dis-

abled or the destitute and similar institutions is recognised by and well known to Hindu Law, and when maintained as public institutions they must be taken to have a legal personality as a Matha or the deity in a temple has, and the persons in charge of the Management would occupy a position of trust."

That decision proceeds on the basis that a tank can be a charitable institution under Hindu Law. That decision was quoted with approval by late Bijan Kumar Mukherjee who later became the Chief Justice of this Court in his Tagore Law Lectures delivered in August, 1951. Therein he observed:

"It has been held that though Mutts and temples are the most common forms of Hindu religious institutions, dedication for religious or charitable purposes need not necessarily take one of these forms and that the maintenance of Sadabartas, tanks, seats of learning and homes for the disabled or the destitutes and similar institutions are recognised by and well known to Hindu Law and when maintained as public institutions, they must be taken to have a legal personality as a Matha or the deity in a temple has, and the persons in charge of the management would occupy a position of trust.

9. From the above discussion it is seen that under Hindu Law a tank can be an object of charity and when a dedication is made in favour of a tank, the same is considered as a charitable institution. It is not necessary for our present purpose to decide whether that institution can also be considered as a juristic person. Once we come to the conclusion that the Inam with which we are concerned in this case was an Inam in favour of the "uracheruvu" (tank) that tank must be considered as a charitable institution under the Act. Consequently after the abolition of the Inam, the Inam property gets itself converted into Royatwari property, of the "uracheruvu", to be managed by its Manager. Admittedly the appellant is its present Manager. Hence the property in question has to be registered in the name of the tank but it will continue to be managed by the appellant so long as he continues to be its Manager.

10. In the result subject to our observations as regards the management of the property, the appeal is dismissed. No costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 560
(V 56 C 109)

(From Bombay: AIR 1967 Bom 194)
S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Charity Commissioner, Bombay, Appellant v. Administrator of the Shringeri Math and its properties, Respondent.

Civil Appeal No. 1000 of 1965, D/- 13-8-1968.

Bombay Public Trusts Act (29 of 1950), Sections 2 (9), 2 (17), 18 — Situs of trust — How determined — Shankaracharya Math in Nasik — Property of Shringeri Math — Not a math or temple within the Act — Not liable to be registered.

In order to determine the situs of the trust, which consists of a Math and a subordinate so-called math or maths, it is the situs of the principal math which will determine the applicability of the Act. AIR 1968 SC 422 and Petn. No. 405 of 1955, D/- 15-12-1960 (SC), Rel. on.

(Para 15)

Where the finding of the High Court was that the Shankaracharya's Math at Nasik Panchvati was the property of the Shringeri math in Mysore State, that all the expenses of the Nasik math were made from the income of the Shringeri math, that in the Nasik Math no religious instructions are imparted and no spiritual service was rendered to any disciple and that no member of the public is allowed to enter the place of worship without permission although worship was carried out by the pujaris according to vedic usage.

Held that in view of these findings the Nasik Math could not be held to be a real math or temple within the definitions in the Bombay Act and that the math was not liable to be registered under that Act. AIR 1967 Bom 194, Affirmed.

(Para 15)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 422 (V 55) =

1968, Maha LJ 363, Ramswarup v. Motiram Khandu

14

(1960) Petn. No. 405 of 1955, D/- 15-12-1960 (SC), Maharaj Kumari Umeshwari Kuer v. State of Bihar

11

Mr. C. K. Daphtary, Attorney General for India (M/s. M. S. K. Sastri and S. P. Nayar, Advocates, with him), for Appellant; Mr. H. R. Gokhale, Senior Advocate, (Dr. Y. S. Chitale and Mr. K. Rajendra

DM/DM/E150/68

Chaudhuri, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.: This appeal by certificate granted by the High Court of Judicature at Bombay is directed against its judgment and decree dated December 30, 1962, whereby it set aside the order made by the Assistant Charity Commissioner, dated August 19, 1955, as confirmed by the Deputy Charity Commissioner and by the District Judge, Nasik. The High Court held that the Nasik Math is not liable to be registered under the Bombay Public Trusts Act, 1950.

2. The High Court found the following facts relating to the Nasik Math:

"The Principal Math is situated in the State of Mysore and as His Holiness is a Sanyasi he generally names the house properties with temples as 'Maths'. The properties at Nasik Panchvati, are known as properties of Shringeri Math. The Samadhis have been constructed to look like temple, there is Sabha Mandap in which an image of Adya Shankaracharya is installed. All the expenses have been incurred by His Holiness from the income of the Shringeri Math and some money was borrowed from Nasik creditors. Here religious instructions are not imparted and no spiritual service is rendered to any body of disciples. Sometimes people come there and if they are given admission they stay there for a short time. There being 'Samadhis' in these premises, there are some idols and occasional festivals but it is not a temple for purpose of public worship. No member of the public is allowed to enter the place of worship but it is carried out by the Pujaris according to Vedic usage. This property is being maintained by the Principal Math from the very beginning. The income consists of (1) rent earned by letting the property; (2) offerings made before the Samadhis; (3) grant from Nasik Treasury of Rs. 289 per year; and (4) yearly grant of Rs. 460-1-00 from village Pimpalgaon Funji in Ahmednagar District."

3. The High Court further observed:

"One of the Sanads regarding the income of Pimpalgaon village is on record and it shows that the grant of the income of the village is made to Shri Shankaracharya clearly mentioning it to be for the expenses of the 'Sansthan' but the tenor of the documents shows that

the offering is made to the Shankaracharya himself."

4. The relevant provisions of the Bombay Public Trusts Act, 1950 (Bombay Act XXXIX of 1950)—hereinafter referred to as the Act—are as follows:

5. The preamble of the Act reads:

"An Act to regulate and to make better provision for the administration of public religious and charitable trusts in the State of Bombay."

It would be noticed that the intention is only to deal with the trusts which are in the State of Bombay; it is not the idea to regulate or make better provision for the administration of trusts outside the State of Bombay; and one of the questions which we have to answer is whether Nasik Math can be said to be in the State of Bombay. The word "math" is defined in Section 2 (9) of the Act to mean "an institution for the promotion of Hindu religion presided over by a person whose duty it is to engage himself in imparting religious instructions or rendering spiritual services to a body of disciples or who exercises or claims to exercise headship over such a body and includes places of religious worship or instructions which are appurtenant to the institution." "Public trust" is defined in Section 2 (13) to mean "an express or constructive trust for either a public religious or charitable purpose or both and includes a temple, a math, a wakf, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860". The definition of "temple" may also be noted. "Temple" means "a place by whatever designation known and used as a place of public religious worship and dedicated to or for the benefit of or used as of right by the Hindu community or any section thereof, as a place of public religious worship. [s. 2 (17)]."

6. Section 18 of the Act provides for registration of public trusts and makes it the duty of the Trustees of a public trust to which the Act applies to make an application for the registration of the public trust. It is under this section that an application was made, under protest, by one Y. M. Krishnamurthy, Revenue Officer and Incharge Officer, Shri Shringeri Mutt and its properties.

7. The Assistant Charity Commissioner held an enquiry under Section 19 of the Act and came to the conclusion that a

trust existed and it is a public trust and is liable to be registered under the Act.

8. An appeal was taken to the Charity Commissioner. The Deputy Charity Commissioner exercising appellate powers confirmed the findings and order of the Assistant Charity Commissioner. An application was then made under Sec. 72 of the Act to the District Judge to set aside the decision and order of the Deputy Charity Commissioner, but the District Judge confirmed the order and dismissed the petition. He held that "this institution must be considered as Branch Mutt even though its origin may be the Samadhis or tombs of the Shankaracharya of the name Abhinava Sachchidanand Bharati." He further came to the conclusion that "the evidence on the record shows that this Institution at Nasik is a place of religious worship within the meaning of the definition in section 2 (9) of the Act." He observed:

"There is no dispute that there are idols of Shri Adya Shankaracharya and Shri Dattatraya in this institution and worship of those idols is carried on there. The festivals which are held and which are attended by the public who are invited on such occasions are the Jayantis of Shri Shankaracharya and the deity of Shri Dattatraya. In this behalf, the printed invitations (Exhibits 12/29, 12/30 and 12/31) may be perused. There is also day-to-day worship of these deities which is carried on by the Pujaris."

9 He further observed:

"Considering from this point of view, this place would be a place of religious worship and there is no dispute that at any rate it is appurtenant to the main institution or the Muth at Shringeri." He further held that "this institution or Foundation at Nasik is admittedly a Branch of the Muth at Shringeri which is founded by Adya Shankaracharya, and this Branch would partake of the nature of the main or Principal Institution at Shringeri." He accordingly held that it would be idle to contend that this institution at Nasik would not come within even what is called the 'inclusive portion' of the definition of 'Muth' enacted in Section 2 (9) of the Act.

10. The learned counsel for the appellant contends that the Nasik Math is an independent Math within Section 2 (9) of the Act and, therefore, covered by the provisions of the Act, at any rate, even if the Nasik Math is an adjunct of

or dependent upon the principal math at Shringeri, it is covered by the Act.

11. In *Maharajkumari Umeshwari Kuer v. State of Bihar*, Petn. No. 403 of 1935, D/- 15-12-1960 (SC) while considering the provisions of the Bihar Hindu Religious Trusts Act, 1950 (Bihar Act I of 1951), Gajendragadkar, J., as he then was speaking for the Court, observed.

"On behalf of the petitioner the learned Attorney-General has contended that as a result of our decisions in the group of cases to which we have already referred it is now established that before the Act can apply two conditions must be satisfied; first, that the religious trust or the institution itself must be in Bihar, and second, part of its property must be situated in the State of Bihar. Since the first of these two conditions is not satisfied in the present case the Act cannot apply. In our opinion this contention is well founded and must be upheld."

12. The facts in that case were that "a temple (was) situated at Vrindavan Dham in the District of Mathura in Uttar Pradesh. In this temple were installed the family idol of Shri Radha Gopalji as well as the idol of Radhendra Kishorji in 1872 and 1877 respectively by Maharani Inderjit Kuer of Tikari. The said Maharani created a waqf of certain properties known as Balkhar Mahal in the District of Gaya by a registered deed of endowment on July 25, 1872, for the purpose of meeting the expenses relating to food, offering prayers and worship in the said temple..... The Trust owns properties also in Bihar."

13. This Court repelled the contention that since the Trustees reside in Bihar and the Trust is substantially administered in Bihar the provisions of the Bihar Act would be applicable, and observed:

"It is the situs of the trust of the principal institution or temple with which the trust is integrally connected that determines the applicability of the Act. The properties in question which are situated partly in Uttar Pradesh and partly in Bihar belong to the temple and the deity is their owner. This deity is enshrined in the temple situated at Vrindavan Dham, and so it is common ground that the situs of the temple is outside Bihar. It is also admitted that part of the properties belonging to the trust are in Uttar Pradesh. Therefore the two tests laid down by this court inevitably lead to the conclusion that the present trust is

outside the purview of the Act. The fact that the trustees reside in Bihar or that the trust is partially administered in Bihar for charitable purposes can make no difference to this position."

14. In *Mahant Ramswarup v. Motiram Khandu*, 1968 Mah LJ 363 = (AIR 1968 SC 422) a case governed by the Bombay Public Trusts Act, Shelat, J., observed:

"There is no dispute that the trust is administered at Burhanpur and the bulk of its properties, except the three pieces of lands situate in the District of Dhulia, are all situate in the Madhya Pradesh State. The fact that a part of its properties is situate in Maharashtra State though the trust is within Madhya Pradesh State would not mean that the trust would be governed partly by the Madhya Pradesh Act and partly by the Bombay Act. Such a division of the Trust and its administration is not contemplated by either of the two Acts."

15. It seems to us that, in view of the above authorities, in order to determine the situs of the trust, which consists of a Math and a subordinate so-called math or maths, it is the situs of the principal math which will determine the applicability of the Act. We need not here decide the position of an independent real math though connected with another math. The High Court has found in this case that in the Nasik Math no religious instructions are imparted and no spiritual service is rendered to any body of disciples. Further no member of the public is allowed to enter the place of worship without permission although worship is carried out by the Pujaris according to vedic usage. In view of these findings the Nasik Math cannot be held to be a real math or temple within the definitions set out above. In our opinion, the High Court was right in holding that the Nasik Math is not liable to be registered under the Act.

16. The appeal accordingly fails and is dismissed with costs.

DRR

Appeal dismissed.

AIR 1969 SUPREME COURT 569

(V 56 C 110)

(From Madras)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Chockalinga Sethurayar and another,
Appellants v. Arumanayakam, Respondent.

Civil Appeal No. 1162 of 1965, D/-
28-8-1968.

(A) Hindu Law — Charitable endowment — Succession — Rule of — Charitable trust created by will — No direction as to line of succession — Ordinary rule of inheritance applies — Sister precedes distant agnate — (Hindu Law of Inheritance (Amendment) Act (1929), Section 2).

R, a well-to-do Hindu governed by Mitakshara Law executed a will in 1884 constituting a trust in respect of some of his properties for certain charitable purpose. He constituted his nephew D and his wife K as trustees after his death. The will also provided that after the lifetime of D and K the sons of D should be trustees and in their absence the 'vamsathar' of D should continue to conduct the said charities. D died in 1907, thereafter K continued to be the sole trustee till her death in 1932. After her D's son R was the trustee. R having died issueless in 1953, dispute arose as to succession to the trusteeship, one claimant being R's sister and the other being a grandson of R's paternal uncle. The latter claimed as 'vamsathar' of R under the will.

Held that on a true reading of the will of R it was seen that the testator had prescribed a line of succession for the devolution of the trusteeship only upto a point and not beyond it. As soon as D's son R took over the trusteeship the mode of succession prescribed in the will came to an end. Thereafter the succession is regulated by the ordinary rule of Mitakshara Law. (Para 6)

(2) That it was well settled that succession to trusteeship of properties similar to the one in question follows the ordinary rule of Hindu Law if there was no special custom to the contrary. There being no special custom in this case, the parties were governed by Mitakshara Law under which a sister was one of the heirs of a male person and was given a

*(Appeal No. 276 of 1955, D/- 3-11-1959 —Mad.)

higher place in the line of succession to the properties of her brother by the Hindu Law of Inheritance Amendment Act, 1929. R's sister was therefore entitled to succeed to the trusteeship previously held by her brother in preference to the other claimant. AIR 1917 PC 190 and (1904) ILR 27 Mad 192 and AIR 1951 SC 293, Ref. to.

(Paras 6 and 7)

(B) Hindu Law of Inheritance (Amendment) Act (1929), Section 1 (2) — Property — Whether hereditary trusteeship is 'property' — (Quaere).

(Para 8)

Cases Referred: Chronological Paras

(1951) AIR 1951 SC 293 (V 38) =

1951 SCR 1125, Sm Angurbala

Mullick v. Debabrata Mullick 6

(1917) AIR 1917 PC 190 (V 4) =

45 Ind App 1, Sethuramaswamiar

v. Meruswamiar 6

(1904) ILR 27 Mad 192, Ramanathan

Chetty v. Murugappa Chetty 6

Mr G. L. Sanghi, Advocate and M/s.

J B Dadachanji and Co., Advocates, for

Appellants, Mr R. Thiagarajan, Advocate,

for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: This appeal by certificate is directed against the decision of the High Court of Madras in A. S. No. 276 of 1955. The question that arises for decision herein is whether the appellants or the respondent should be held to be the trustees of the suit trust. The Trial Court upheld the claim of the appellants whereas the High Court in appeal came to the conclusion that the trusteeship has devolved on the respondent.

2. For the purpose of deciding the controversy before us it is not necessary to refer to the various facts that were placed before the Trial Court or the High Court. The facts material for our present purpose are these

3. One Rangayya Sethurayar who will hereinafter be referred to as Rangayya I was a well to do person. He died in the year 1886 leaving behind him his wife Karuthammal. He had no issues but he was bringing up his brother's son Dharmalinga Sethurayar as his foster son. He executed a will on June 25, 1884 (Exh. A-D) under which he constituted a trust in respect of some of his properties for the purpose of carrying on the water supply charity and Dvadasi Kattalai charity in the choultry built by him. Under the said will he constituted

Dharmalinga Sethurayar and his wife Karuthammal as the trustees of the trust in question after his death. The will also provides that after the lifetime of the aforementioned two persons the sons of Dharmalinga Sethurayar should be the trustees and in their absence the 'vamsathar' of Dharmalinga Sethurayar should continue to conduct the said charities. Dharmalinga Sethurayar died in 1907 but Karuthammal continued to live till 1932. After the death of Dharmalinga Sethurayar, Karuthammal continued as the sole trustee of the trust in question till her death. Thereafter Rangayya Sethurayar (to be hereinafter referred to as Rangayya II) took over the trusteeship and continued to manage the trust till his death on 9th May, 1953. The said Rangayya died issueless. The respondent claims to be the sister of said Rangayya and as such claims to be trustee of the suit trust. On the other hand the appellants who are the grandsons of the paternal uncle of Rangayya II are pressing their claim for the trusteeship on the ground that they belong to the 'Vamsa' of Rangayya II.

4. The respondent's claim that she is

the sister of Rangayya II is contested by the appellants as mentioned earlier. The Trial Court held that the respondent has failed to prove that she is the sister of Rangayya II but the High Court upheld her claim. We agree with the High Court in its finding that there is satisfactory evidence to show that the respondent is the sister of Rangayya II. That fact was specifically admitted by the first appellant in the counter affidavit filed by him in L. A. No. 171 of 1954. It may be noted that this admission was made after the dispute between the parties had commenced. At that stage the only plea advanced by the appellants was that though the respondent was the sister of Rangayya II, she was not entitled to succeed to the trusteeship under law. The High Court has rightly discarded the subsequent version put forward by the appellants to the effect that the admission in question was made under a wrong impression and the same was based on the information supplied by one Subbanna Nattar. The said Subbanna Nattar has not been examined as witness in the case. That apart the appellants and the respondent are near relations and hence the plea of the appellants that they did not know the exact relationship between the respondent and Rangayya II is unacceptable. Further if they did not

know the relationship they would not have admitted that she was the sister of Rangayya II. This admission is a very important piece of evidence. It cannot be brushed aside lightly as the learned Trial Judge has done. That admission is further supported by the witnesses examined on behalf of the respondent, whose evidence has been believed by the High Court. The contrary evidence given by D. W. 10 has not been believed by the High Court for very good reasons. There was convincing proof before the Trial Court to support the respondent's claim. The reasons given by the Trial Court for not accepting that evidence are far from convincing. In addition to the evidence adduced in the Trial Court, certain additional documentary evidence was adduced before the High Court. The deposition of Rangayya II in a criminal case was placed before the High Court wherein he had clearly admitted that the respondent was his sister. Mr. Sanghi learned Counsel for the appellants contended that the High Court was not justified in receiving additional evidence as no case was made out under Order 41, Rule 27, Code of Civil Procedure. We are unable to examine the correctness of that contention as the order impugned was neither printed nor made available to us. Even if we exclude that piece of evidence from consideration still the remaining evidence conclusively establishes that the respondent is the sister of Rangayya II.

5. This takes us to the next question whether she is entitled to succeed to the trusteeship. It was not disputed before us that the trusteeship in question is hereditary trusteeship and it relates to a private charity. The trustee is the legal owner of the trust properties though the entire income of the trust properties has to be utilized for charity. It was conceded before us that succession to trusteeship of properties similar to the one before us follows the ordinary rule of Hindu Law, if there is no special custom to the contrary. In the instant case no special custom was either pleaded or proved. Therefore all that we have to ascertain is the mode of succession to the same in accordance with the ordinary rule of Hindu Law. The parties are governed by Mitakshara Law under which a sister is one of the heirs of a male person. In view of Hindu Law of Inheritance Amendment Act 1929 (Act II of 1929), the sister is given a higher place in the

line of succession than what she had under the customary law in respect of properties of her brother not held by him in coparcenary and not disposed of by him by will. It is true that Act II of 1929 applies only to properties of males not held in coparcenary and not disposed of by will but in view of that Act as regards the individual properties of Rangayya II, the respondent is a nearer heir of his than the appellants.

6. Before examining the respondent's claim to succeed to the trusteeship we have to first dispose of another contention of the appellants. According to them under the will of Rangayya I whenever a trustee dies leaving behind him no sons the trusteeship should go to the 'vamsathar' of the last trustee; the respondent cannot be held to be a 'vamsathar' of Rangayya II as she had been married into a different family and consequently had become a 'vamsathar' of her husband's family; but they being the nephews of Rangayya II must be considered as his 'vamsathar' and consequently they are entitled to succeed to the trusteeship after the death of Rangayya II. There was considerable debate before us as to what is meant by that expression 'vamsathar'. We do not think that question is relevant for our present purpose. On a true reading of the will of Rangayya I it is seen that the testator had prescribed a line of succession for the devolution of the trusteeship only upto a point and not beyond it. According to the will after the death of the testator his foster son and his wife should continue to be the trustees and after their lifetime the sons of Dharmalinga Sethurayar, if any, should succeed to the trusteeship and in their absence the 'vamsathar' of Dharmalinga Sethurayar should take over the trusteeship. The direction contained in the will as to the line of succession exhausted itself as soon as Rangayya II became the trustee. He remained as the trustee till his death in 1953. Therefore there is no question of the 'vamsathar' of Dharmalinga Sethurayar succeeding to the trusteeship. As soon as Rangayya II took over the trusteeship, the mode of succession prescribed in the will came to an end. Rangayya II became a fresh stock of descent. Thereafter the succession is regulated by the ordinary rule of Mitakshara Law. As observed by the Privy Council in *Sethuramaswamiar v. Meruswamiar*, 45 Ind App 1 = (AIR 1917 PC 190):

"With regard to what are called private charities such as endowments for the support of the family idol, the law as laid down by various decisions in India and apparently accepted in one case by the Privy Council, *Ramanathan Chetty v. Murugappa Chetty*, (1904) ILR 27 Mad 192 (PC), is that if there is no contrary provision in original grant the right of management passes to the natural heirs of the original grantee."

Assuming without deciding that the expression 'property' used in Act II of 1929 does not include a trusteeship right still it is a well established proposition of law that succession to trusteeship similar to the one before us is governed by the ordinary rules of inheritance under the Hindu Law. Act II of 1929 has amended the general law of inheritance in certain respects and the same alteration must be recognised in regard to succession to trusteeship as well. This view finds support from the decision of this Court in *Sm Angurbala Mullick v. Debabrata Mullick*, 1951 SCR 1125 = (AIR 1951 SC 293). Therein this Court was concerned with the claim of a Hindu wife to the shebaitship of a temple which was originally held by her deceased husband. She advanced her claim on the basis of Section 3 (1) of the Hindu Women's Rights to Property Act (XVIII of 1937). That claim was rejected both by the Trial Court as well as by the High Court in appeal on the ground that the Hindu Women's Rights to Property Act was inapplicable to devolution of shebaitship rights. This Court overruled that conclusion. In so doing it observed thus:

"Assuming that the word 'property' in Act XVIII of 1937 is to be interpreted to mean property in its common and ordinarily accepted sense and is not to be extended to any special or peculiar type of property even then we think that the other contention of Mr. Tek Chand is perfectly sound. Succession to shebaitship, even though there is an ingredient of office in it follows succession to ordinary or secular property. It is the general law of succession that governs succession to shebaitship as well. While the general law has now been changed by reason of Act XVIII of 1937 there does not appear to be any cogent reason why the law as it stands at present should not be made applicable in the case of devolution of shebaitship."

7. The same reasoning applies with full force to the facts of the present case.

For the said reasons we hold that the respondent is entitled to succeed to the trusteeship previously held by her brother.

8. In view of our above conclusion, it is not necessary for us to consider whether a hereditary trusteeship is "property" within the meaning of Act II of 1929 and if so, succession to the same is governed by the provisions of that Act.

9. In the result this appeal fails and the same is dismissed with costs.
DRR Appeal dismissed.

AIR 1969 SUPREME COURT 572
(V 50 C 111)

(From Calcutta)*

**J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.**

Rajputana Trading Co., Ltd., Appellant
v. *Commissioner of Income-tax, West Bengal I, Respondent.*

Civil Appeal No. 1227 of 1967. D/- 5-9-1968

Income-tax Act (1922), S. 10(2-A) — Scope — When speculative loss or liability is treated as income or profit from business, profession or vocation, such income or profit can only be one arising from speculative business — *I. T. Ref. No. 215 of 1961, D/- 14-1-1965 (Cal), Reversed.*

If a portion of the loss or liability incurred by the assessee in a particular year is subsequently diminished by way of remission or otherwise, S. 10 (2A) creates a fiction and directs that the remission or the diminution shall be deemed to be profits and gains of business, profession or vocation and to have accrued or arisen during the relevant previous year. That fiction should be carried to its logical conclusion by necessary implication. When the loss or the liability for which deduction had previously been allowed to the assessee arose out of speculative transactions the origin of such loss or liability is known and ascertainable. If such loss or liability is to be treated as profit in the circumstances given in S. 10 (2A) it would be most illogical and irrational to treat the so-called profits as having a neutral source and not springing out of the same category of speculative business which led to the assessee incurring that loss or

**I. T. Ref. No. 215 of 1961, D/- 14-1-1965—Cal.)*

liability. If once a particular item of loss is categorised as speculative loss then in that case if such loss is to be deemed to be income or profit from the business, profession or vocation by virtue of the provisions of Sec. 10 (2A) it follows by necessary implication that such income or profit can only be income or profit arising from speculative business. Moreover, S. 10 (2A) envisages that the deemed income which is sought to be taxed should be considered to have arisen from the same business in which the loss that had been incurred was written back. It would be highly problematical to say that the deemed income arises from a non-descript business when the nature of the business which had given rise to the liability originally is known. I. T. Ref. No. 215 of 1961, D/- 14-1-65 (Cal), Reversed; AIR 1961 SC 1233, Ref. (Paras 5, 7)

Cases Referred: Chronological Paras (1961) AIR 1961 SC 1233 (V 48)=

1961-42 ITR 166, Donald Miranda v. Commr. of Income-tax, Bombay City, II

4, 5

Mr. M. C. Chagla, Senior Advocate (M/s. M. G. Poddar, H. K. Puri and B. N. Kripal, Advocates, with him), for Appellant; Mr. D. Narasraju, Senior Advocate (M/s. T. A. Ramachandran, R. N. Sachthey and B. D. Sharma, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.:— This is an appeal by certificate from a judgment of the Calcutta High Court answering the following question referred to it in the negative and against the assessee:—

“Whether on the facts and in the circumstances of the case, the sum of Rs. 78,749 which was deemed to be the profits and gains of business under S. 10 (2A) of the Income-tax Act, can be said to be arising from speculative business?”

2. The assessee carried on both speculative as well as non-speculative business. The system of account regularly employed being mercantile, any liability for payment of difference on account of speculative transactions is allowed as a deduction in computing the profit or loss in speculative business. At the commencement of the accounting year relevant for the assessment year 1955-56 i. e. July 1, 1953, there was a balance of such liabilities for speculation differences in the account of one Ramnath Narendra-nath amounting to Rs. 83,049. Out of this

liability the assessee had paid to the party a sum of Rs. 7,825 in cash. The balance of Rs. 75,224 along with a sum of Rs. 3,525 being similar liability due to other two creditors aggregating Rs. 78,749 was written back and taken credit of in the profit and loss account for the year ending June 30, 1954. The creditors had waived their right to receive the amount. The Income-tax Officer treated the amount of Rs. 78,749 as the assessee's income from business in terms of Section 10 (2A) of the Income-tax Act, 1922, hereinafter called the Act. The amount was not set off against the speculative loss either brought forward from the earlier years or suffered by the assessee during the accounting period on the ground that the liability written back and treated as business profit did not partake of the character of speculation profit.

3. The contention of the assessee was that the amount should be treated as profit from speculative business as the liability which was written back related to such business. In other words the assessee claimed that the amount of Rs. 78,749 should be available for set off against speculation loss. The Revenue authorities did not accede to this contention. Before the tribunal it was pressed on behalf of the assessee that the department could not stop by treating the liability written back as income from business but must also categorise and specifically describe what the nature of the business was and since the liability related to the particular business the income could only be construed as arising from that business. The tribunal negated this contention. According to it the effect of the provision of Section 10 (2A) of the Act is that it charges the amount to tax by its own force as a business income. “The income character of the receipt is designated by the fiction of law and it is to be brought under assessment as an income from business without any further categorisation. It cannot therefore be said that this income arose to the assessee from any speculation business. It is treated as business income only by virtue of the specific provision made in this regard”.

4. The High Court referred to the decision of this Court in Donald Miranda v. Commissioner of Income-tax, Bombay City II, 1961-42 ITR 166=(AIR 1961 SC 1233) but held that there was no warrant for saying that the remission of a speculative liability should be treated as spe-

culative income accruing to the assessee. The decision of this Court was distinguished on the ground that it related to refund of excess profit tax which stood on different footing inasmuch as it had to be paid because of an unusual rise in the income of the assessee over the standard profits and when refund of the tax paid was made it was logical to hold the same as income from business in respect of which the excess profits tax liability arose.

5 Section 10 (2A) of the Act was in these terms.

"Where for the purpose of computing profits or gains under this section, an allowance or deduction has been made in the assessment for any year in respect of any loss, expenditure or trading liability incurred by the assessee and subsequently during any previous year, the assessee has received whether in cash or in any other manner whatsoever any amount in respect of such loss or expenditure or has obtained some benefit in respect of such trading liability by way of remission or cessation thereof, the amount received by him or the value of the benefit accruing to him shall be deemed to be profits and gains of business, profession or vocation and to have accrued or arisen during that previous year."

It is apparent that one of the main purposes of the above provision which has been now re-enacted with some changes in Section 41 of the Income-tax Act 1961 was to catch cases of remission of debt by creditors in respect of earlier trading items which were allowed as deduction. As pointed out by the High Court, in the present case, if a portion of the loss or liability incurred by the assessee in a particular year is subsequently diminished by way of remission or otherwise, Section 10 (2A) creates a fiction and directs that the remission or the diminution shall be deemed to be profits and gains of business, profession or vocation and to have accrued or arisen during the relevant previous year. The contention of the assessee however, was that the fiction should be carried a step further and if the loss in respect of which the portion was remitted was a speculative loss the notional profits and gains of business which came into existence by the fiction of the section should be categorised as speculative income. Now it is difficult to understand how the fiction should not be carried to its logical conclusion by necessary implication. When the loss or

the liability for which deduction had previously been allowed to the assessee arose out of speculative transactions the origin of such loss or liability is known and ascertainable. If such loss or liability is to be treated as profit in the circumstances given in Section 10 (2A) it would be most illogical and irrational to treat the so-called profits as having a neutral source and not springing out of the same category of speculative business which led to the assessee incurring that loss or liability. The decision of this Court in Donald Miranda's case, 1961-42 ITR 166=(AIR 1961 SC 1233) may not be directly in point but there are certain observations in it which are quite apposite. It has been held therein that when any portion of the tax collected on excess profits is refunded under the provisions of the Indian Finance Act, 1942 or the Excess Profits Ordinance 1943, it necessarily has the same quality which it had before the amount which was charged with the payment of the tax had under the provisions of those Acts. This is what was observed at page 170:

"It would thus appear that the amount of excess profits tax was an allowable deduction for the purpose of computation of the business profits of an assessee under Section 12 (1) of the Excess Profits Tax Act and when it or a portion of it was refunded it had to be treated as income of the assessee. When it was deposited with the Central Government it was a portion of the profits of the business of the assessee and when it was returned to the assessee it must be restored to its character of being a part of the profits of a business. It cannot be said that its nature changes merely because it is refunded as a consequence of some provisions in the Finance Act or the Excess Profits Tax Ordinance. Its nature remains the same. The effect of the deposit under the Acts above mentioned was as if a slice of the business profits was taken and deposited with the Central Government Treasury and then when it was found that a larger amount had been deposited than was exigible a portion of it was returned. By being put in Government Treasury it does not cease to be what it was before, i.e., profits of a business.

6. Keeping in view the entire process by which remission of liability is to be deemed to be profits and gains of business etc. within the meaning of Sec. 10 (2A) it is difficult to understand how such

profits and gains can be completely divorced from the speculative business in respect of which allowance was made in the earlier year. That allowance or deduction was not liable to be reopened except for the reason that the creditors waived the payment of the debts to them by the assessee which attracted the fiction introduced by Section 10 (2A) of the Act. According to the Counsel for the assessee full effect must be given to that fiction and if full effect is given the conclusion is inevitable that the income in question is income from speculative business. Thus there is no question of resorting to any double fiction. The simplest and the most obvious way of looking at the matter is that once the amount of liability which is written back is to be treated as income from business it must be categorised and related to some business. In cases of the present kind there is a fairly direct and proximate relationship between the income as deemed to be arising under Section 10 (2A) and the speculative business which the assessee was carrying on. This income could not and would not have arisen but for the fact that in the speculative business the assessee had claimed deductions on account of liabilities for speculation differences.

7. There is a good deal of force in the point of view pressed on behalf of the appellant that under the provisions of Section 24 of the Act the profit or loss which is computed has to be categorised as either speculative profit or loss or non-speculative profit or loss. If once a particular item of loss is categorised as speculative loss then in that case if such loss is to be deemed to be income or profit from the business, profession or vocation by virtue of the provision of Section 10 (2A) it follows by necessary implication that such income or profit can only be income or profit arising from speculative business. Moreover Section 10 (2A) envisages that the deemed income which is sought to be taxed should be considered to have arisen from the same business in which the loss that had been incurred was written back. It would be highly problematical to say that the deemed income arises from a non-descript business when the nature of the business which had given rise to the liability originally is known.

8. The above submission of the appellant effectively meets the main reasoning which prevailed with the High Court that when Sec. 10 (2A) treats the

remission of liability as profits of the assessee's business, profession or vocation without giving to it any "local habitation or name", there is no reason why it should be treated as profits and gains of the same kind of business in which the liability was incurred.

9. In our opinion the question which was referred to the High Court should have been answered in the affirmative and in favour of the assessee. The appeal is accordingly allowed and the answer returned by the High Court is hereby discharged. In view of the nature of the point involved the parties are left to bear their own costs.

GGM/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 575 (V 56 C 112)

(From Delhi: 70 Pun LR (D) 332)

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Shakuntala Devi Jain, Appellant v.
Kuntal Kumari and others, Respondents.

Civil Appeal No. 970 of 1968, D/- 5-9-1968.

(A) Civil P. C. (1908), O. 41, R. 1, O. 2 (2), Ss. 47, 96 — Determination of any question within S. 47 is a decree — Appellant can file appeal under S. 96 — Appeal is incompetent unless memorandum thereof is accompanied by certified copy of judgment — AIR 1940 Pat 176, Overruled.

Because the determination of any question within Section 47 is a decree the appellant can file an appeal from the order under Sec. 96 of the Code. Under Order 41, R. 1 the appellate Court can dispense with the filing of the copy of the judgment but it has no power to dispense with the filing of the copy of the decree. A decree and a judgment are public documents and under Sec. 77 of the Evidence Act only a certified copy may be produced in proof of their contents. The memorandum of appeal is not validly presented, unless it is accompanied by certified copies of the decree and the judgment. (Para 3)

Ordinarily a decree means the formal expression of an adjudication in a suit. The decree follows the judgment and must be drawn up separately. In some Courts, the decision under Section 47 is required to be formally drawn up as a

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decree and in that case the memorandum of appeal must be accompanied by a copy of the decree as well as the judgment. But in some other Courts no separate decree is drawn up embodying the adjudication under Sec 47. In such a case, the decision under Sec. 47 is the decree and also the judgment, and the filing of a certified copy of the decision is sufficient compliance with Or. 41, R. 1. As the decision is the decree, the appeal is incompetent unless the memorandum of appeal is accompanied by a certified copy of the decision AIR 1940 Pat 176, Overruled, (1912) 15 Cal LJ 498, Approved (Paras 5, 6)

Where the practice in Courts at Delhi is not to draw up a formal expression of decision under S 47 as a decree, and in an appeal therefrom the High Court is not aware of the defect of non-compliance with O 41, R. 1 and no order is passed by it dispensing with the filing of certified copy, in such a case from the fact that the High Court admitted the appeal it need not be presumed to have dispensed with the filing of certified copy of judgment. AIR 1926 Nag 57, Ref.

(Para 4)

(B) Limitation Act (1963), Sec. 5 — Scope — Words “sufficient cause” — Meaning — On facts, application under S 5 was allowed and delay in filing appeal was condoned — (1968) 70 Pun LR (D) 332, Reversed — Civil P. C. (1908), O. 41, R. 1.

Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles, the words “sufficient cause” receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant. If the appellant makes out sufficient cause for the delay, the Court may in its discretion condone the delay in filing an appeal. (1890) ILR 13 Mad 269, Approved. (Para 7)

The objection under S 47 of A, one pardanashum lady, in execution of final decree in partition suit was dismissed on 20-1-1967. A filed appeal in High Court on 17-3-1967 without a certified copy of order. Appeal was admitted and an interim stay was granted. On 28-10-1967 objection as to competency of appeal was raised by respondents. On 8-11-1967 A applied for condonation of delay under S. 5 Limitation Act. On 6-11-1967, A ob-

tained certified copy and on same day filed it. High Court dismissed the appeal and the application. A filed appeal to Supreme Court after obtaining special leave. During the relevant period A made repeated attempts to procure a certified copy. The failure of the copying department to supply the copy in spite of those applications contributed largely to the unfortunate delay in filing it. A was under the bona fide impression that the certified copy was not ready, and that is why it was not supplied to her by the copying department. On the part of A, there was no want of bona fides or such inaction or negligence as would deprive her of the protection of Section 5 of the Limitation Act.

Held, that the application under S 5 Limitation Act was allowed and the delay in re-filing the appeal with certified copy of order was condoned. (1968) 70 Pun LR (D) 332, Reversed (Paras 10, 11)

Cases Referred: Chronological Paras

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| (1940) AIR 1940 Pat 176 (V 27) = | |
| 20 Pat LT 801, Bodh Narain | |
| Mahito v. Mahabir Prasad | 5 |
| (1926) AIR 1926 Nag 57 (V 13)=90 | |
| Ind Cas 135, G. I. P. Rly. Co. | |
| v. Radhakrishnan Jaikissen | 4 |
| (1912) 15 Cal LJ 498=14 Ind Cas | |
| 1006, Kamala Das v. Tarapada | |
| Mukherjee | 5 |
| (1890) ILR 13 Mad 269, Krishna | |
| v. Chathappan | 7 |

Mr. B. C. Misra, Senior Advocate, (Mr S S Shukla, Advocate, with him), for Appellant; Mr. Bishan Narain, Senior Advocate, (M/s Daya Krishen and Mohan Behari Lal, Advocates, with him), for Respondent No 2, Mr. Mohan Behari Lal, Advocate, for Respondents Nos. 3, 4 and 6.

The following Judgment of the Court was delivered by

BACHAWAT, J.—The respondent Sumat Prashad filed an application for execution of a final decree in a partition suit. The appellant filed objections under Section 47 of the Code of Civil Procedure. By an order dated January 20, 1967 the Subordinate Judge, Delhi, dismissed the objections. It is common case before us that under the relevant Civil Rules and Orders the Subordinate Judge, Delhi, was not required to draw up a formal expression of the decision under Section 47 as a decree. On March 17, 1967 the appellant filed an appeal against this order in the Delhi High Court. Along with the memorandum of appeal

she filed a plain copy of the order and an application praying that the appeal be entertained without a certified copy of the order. In the application she stated that she had applied for a certified copy of the order but the same was not ready and that she would file the certified copy as soon as it would be ready and available to her. She added that she wanted urgent interim relief and would be seriously prejudiced if she waited for a certified copy. She also filed an application for stay of execution. On the same date a Bench of the High Court admitted the appeal, granted an interim stay and directed issue of notice to the respondents. The attention of the Court was not drawn to the fact that a certified copy of the order had not been filed nor was the application for dispensing with the certified copy moved and an order obtained thereon. The appeal was registered as Execution First Appeal No. 86 of 1967. The appellant diligently prosecuted the appeal. On October 25, 1967 the respondents raised an objection that the appeal was incompetent as a certified copy of the order under appeal had not been filed. On November 3, she filed an application for condonation of the delay in filing the copy under Section 5 of the Limitation Act. On November 6, she obtained a certified copy and on the same day she filed it in Court. On December 22, 1967, the High Court held that as the memorandum of appeal was not accompanied by a certified copy of the order, the appeal was incompetent, and that there was no sufficient ground for condoning the delay in filing the copy. Accordingly the High Court dismissed the appeal and the application under Section 5 of the Limitation Act. The present appeal has been referred after obtaining special leave from this Court.

2. Two questions arise in this appeal. First, was the appeal from the order disposing the objections under Section 47 incompetent in view of the fact that the memorandum of appeal was not accompanied by certified copy of the order appealed from? Second, whether the delay in filing the appeal should be condoned under Section 5 of the Limitation Act?

3. Section 2 (2) of the Code of the Civil Procedure defines "decree". Unless there is anything repugnant in the subject or context "decree" means "the formal expression of an adjudication which so far as regards the Court expressing it,

conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Sec. 47 or Sec. 144...." It is because the determination of any question within Section 47 is a decree that the appellant could file an appeal from the order under Section 96 of the Code. Order 41, Rule 1 of the Code provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader "and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded". Under Order 41, Rule 1 the appellate Court can dispense with the filing of the copy of the judgment but it has no power to dispense with the filing of the copy of the decree. A decree and a judgment are public documents and under Sec. 77 of the Evidence Act only a certified copy may be produced in proof of their contents. The memorandum of appeal is not validly presented, unless it is accompanied by certified copies of the decree and the judgment.

4. The contention of Mr. Misra is that a decree is the formal expression of the adjudication and that where, as in this case, no formal decree is drawn up, the determination under Section 47 is a judgment and the Court having admitted the appeal must be presumed to have dispensed with the filing of the copy of the judgment. In this connection he drew our attention to Sections 2 (2), 33 and Order 20, Rules 1, 4, 6. We are unable to accept these contentions. We are not satisfied that the High Court dispensed with the filing of the copy of the order under Section 47. Admittedly, the High Court did not pass any express order to that effect. It may be that in a proper case such an order may be implied from the fact that the High Court admitted the appeal after its attention was drawn to the defect. (See *G. I. P. Railway Co. v. Radhakrishnan Jaikissen*, AIR 1926 Nag 57). But in the present case the High Court was not aware of the defect and did not intend to dispense with the filing of the copy.

5. Moreover an order under Sec. 47 is a decree, and the High Court had no power to dispense with the filing of a copy of the decree. Ordinarily a decree

means the formal expression of an adjudication in a suit. The decree follows the judgment and must be drawn up separately. But under Section 2 (2), the term "decree" is deemed to include the determination of any question within Sec. 47. This inclusive definition of decree applies to Order 41, Rule 1. In some Courts, the decision under Section 47 is required to be formally drawn up as a decree and in that case the memorandum of appeal must be accompanied by a copy of the decree as well as the judgment. But in some other Courts no separate decree is drawn up embodying the adjudication under Section 47. In such a case, the decision under Section 47 is the decree and also the judgment, and the filing of a certified copy of the decision is sufficient compliance with Order 41, Rule 1. As the decision is the decree, the appeal is incompetent unless the memorandum of appeal is accompanied by a certified copy of the decision. Our attention was drawn to the decision in *Bodh Narain Mahto v. Mahavir Prasad*, AIR 1940 Pat 178 where *Agarwala, J.* seems to have held that where no formal decree was prepared in the case of a decision under Section 47 the appellant was not required to file a copy of the order with the memorandum of appeal. We are unable to agree with this ruling. The correct practice was laid down in a *Kamala Das v. Tarapada Mukherjee*, (1912) 15 Cal LJ 493 where *Mookerjee, J.*, observed:—

"Now it frequently happens that in cases of execution proceedings, though there is a judgment, an order, that is, the formal expression of the decision is not drawn up. In such cases the concluding portion of the judgment which embodies the order may be treated as the order against which the appeal is preferred. In such a case it would be sufficient for the appellant to attach to his memorandum of appeal a copy of the judgment alone, and time should run from the date of the judgment. Where, however, as in the case before us, there is a judgment stating the grounds of the decision and a separate order is also drawn up embodying the formal expression of the decision, copies of both the documents must be attached to the memorandum, and the appellant is entitled to a deduction of the time taken up in obtaining copies thereof."

6. We hold that the memorandum of appeal from the order dated January 20, 1967 should have been accompanied by a certified copy of the order and in the ab-

sence of the requisite copy the appeal was defective and incompetent.

7. The next question is whether the delay in filing the certified copy or, to put it differently, the delay in re-filing the appeal with the certified copy should be condoned under Section 5 of the Limitation Act. If the appellant makes out sufficient cause for the delay the Court may in its discretion condone the delay. As laid down in *Krishna v. Chathappan*, (1890) ILR 13 Mad 269, 271 "Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood, the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant."

8. The record discloses that the appellant made repeated attempts to obtain a certified copy of the order. She is a pardanashin lady and her affairs were managed by her husband *Ajit Prasad* and sometimes by her son *Virendra*. On March 2, 1967 she applied for a certified copy of the order under appeal. The application distinctly stated that she wanted a copy of the order dated January 20, 1967, dismissing her objections. The application bore the serial number 17542. The copying department supplied to her a copy of another order passed by the Court on the same date dismissing *Sumat Prasad's* objections to the appellant's application for execution. The mistake is solely attributable to the negligence of the copying department. In her affidavit the appellant stated that the application for a copy dated February 17, 1967 was in respect of the order dismissing *Sumat Prasad's* objections. This statement is not correct, but it may well be that having got a certified copy of the order dismissing *Sumat Prasad's* objections she believed that she had applied for a copy of that order.

9. On March 2, 1967 the appellant's son *Virendra* made another application for a certified copy of the order. He got the certified copy on March 10. In paragraph 6 of the petition for condonation of delay the appellant stated that *Virendra* did not give her the copy and this statement was corroborated by *Virendra* in his supporting affidavit. In paragraph 9 she stated that *Virendra* had misplaced the copy.

and due to fear of reprimand he did not inform her or her husband. Virendra's affidavit is silent on this point. But the affidavits sufficiently establish that the appellant did not receive the certified copy from Virendra. Had she received the copy there is no reason why she would not have filed it along with the memorandum of appeal on March 17, 1967.

10. On March 20, 1967, the appellant filed another urgent application for a certified copy of the order dated January 20, 1967 and also copies of two other orders dated February 17, 1967 and May 13, 1966. On this application bearing serial number 19461 the copying department made a note on March 23, 1967, that the orders dated February 17, 1967 and May 13, 1966, were not found and the applicant should be asked to indicate the file whereon the orders were. It is surprising that the copying department should have asked the appellant to give this clarification. If the department found difficulty in finding the orders, it should have contacted the officer-in-charge of the records who would have secured the orders for them. The note did not indicate why a copy of the order dated January 20, 1967, was not being supplied. The next note on the application dated March 27, indicates that the application was returned to the appellant. From the next note dated April 11, it appears that the clerk-in-charge, copying department, directed that the application be filed. We may safely presume that before April 11, the application was re-submitted by the appellant to the copying department. There is nothing to show that the clarification asked for was not supplied by the appellant. The department took no further action on the application and made no effort to supply the certified copies to the appellant. No ground was given by the department for not supplying a certified copy of the order dated January 20, 1967. The time for filing the appeal expired on April 20, 1967. On October 25, 1967, the respondents took the objection for the first time that the appeal was incompetent. Before that date, the record of the Executing Court including the Original order appealed from had been received by the High Court. On October 27, 1967, the appellant made another application for a certified copy and on November 6, 1967 as soon as she received the copy she filed it in Court. The appellant made repeated attempts to

procure a certified copy. The failure of the copying department to supply the copy in spite of those applications contributed largely to the unfortunate delay in filing it. The appellant cannot be held responsible for the laches of the copying department. Once her son actually got the copy but she never received it. The appellant could have filed another copy before November 6, 1967, had it been supplied to her by the copying department. We are inclined to accept the statement that she was under the bona fide impression that the certified copy was not ready, and that is why it was not supplied to her by the copying department. It is not a case where it is possible to impute to the appellant want of bona fides or such inaction or negligence as would deprive her of the protection of Section 5 of the Limitation Act. We are therefore inclined to allow her application under Section 5 and to condone the delay in re-filing the appeal with a certified copy of the order.

11. In the result, we allow the appeal. The application filed by the appellant under Section 5 of the Limitation Act is allowed and the order of the High Court dismissing Execution First Appeal No. 86 of 1967 is set aside. The appeal is remanded to the High Court so that it may deal with and dispose of the appeal on the merits. There will be no order as to the costs of the appeal in this Court.
SSG/D.V.C. Appeal allowed.

AIR 1969 SUPREME COURT 579 (V56 C 113)

(From: Madhya Pradesh High Court)*
S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

The Municipal Corporation, Indore (In both the Appeals), Appellant v. K. N. Palsikar (In both the Appeals), Respondent.

Civil Appeals Nos. 1137 and 1138 of 1965, D/- 6-9-1968.

(A) Municipalities — M. B. Municipal Corporation Act (23 of 1956), S. 387 — Acquisition by Corporation — Compensation payable — Arbitrators have power to award 15 per cent solatium over and above compensation under Land Ac-

*(Civil Revn. Nos. 195 and 497 of 1962, D/- 12-10-1962 and 19-12-1962 respectively — Madh. Pra.)

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quisition Act, S. 23 (2), which applies to acquisition proceedings under the Act — (Land Acquisition Act (1894), S. 23 (2)) — AIR 1937 Bom 432, Approved.

(Para 18)

(B) Municipalities — M. B. Municipal Corporation Act (23 of 1956), S. 305 — Corporation cannot withdraw from acquisition proceedings.

There is no provision in the Act for enabling the Corporation to withdraw from the acquisition proceedings. In fact there is automatic vesting of the land in the Corporation under Sec. 305 once the requisite conditions are satisfied.

(Para 14)

(C) Municipalities — M. B. Municipal Corporation Act (23 of 1956), S. 392 — High Court cannot, in revision, determine amount of compensation — (Civil P. C. (1908), S. 115)

The High Court cannot in a revision under Section 392, go into questions of fact and determine the amount of compensation awarded by the District Court. Even if the powers under Section 392 of the Act are wider than that under S. 115, C P C, they do not extend to determining questions of fact.

(Para 19)

Cases Referred: Chronological Pars (1937) AIR 1937 Bom 432 (V 24)=

ILR (1937) Bom 632, The Borough Municipality, Ahmedabad v.

Jayendra Vajubhai Divatia

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M/s B. P. Jhanjharia and P. C. Bharti, Advocates and M/s. J. B. Dadachanji and Co., Advocates, for Appellant (In both the Appeals), M/s P. K. Saksena and A. G. Ratnaparkhi, Advocates, for Respondent (In both the Appeals).

The following Judgment of the Court was delivered by

SIKRI, J.— These appeals by special leave are directed against the judgment of the Madhya Pradesh High Court in two Civil Revisions, Civil Revision No. 195 of 1962 and Civil Revision No. 497 of 1962. These revisions came to be filed in the High Court in the following circumstances.

2. On January 21, 1961, the respondent K. N. Palsikar — hereinafter referred to as the applicant — filed an application under Sections 387 (4) and (5) of the Madhya Bharat Municipal Corporation Act, 1958 — hereinafter referred to as the Act — in the Court of District Judge, Indore. He alleged that the Municipal Corporation by its Memo No. 816 dated October 30, 1959, had informed him

that in accordance with the Road Widening Scheme a set back of total area of 1455 1 sq. ft. had been cut down from his land comprised in House No. 1 (New No. 38) on Road No. 1, Choti Gwaltoli No. 1, Indore, and that the Municipal Corporation proposed to give him compensation only at the rate of Rs. 2.50 per sq. ft. which was not acceptable to him. He further alleged that the arbitrators appointed by the parties had given an award which was also not acceptable to him. The arbitrators had given Rs. 50/- per sq. ft. while he demanded Rs. 145/- per sq. ft. The Municipal Corporation in its reply dated February 28, 1961, submitted that the compensation given by the arbitrators was very much in excess of the actual price of the land and prayed that the application be dismissed.

3. Various issues were framed by the Additional District Judge, Indore, but they were all directed to determining the fair amount of compensation including interest.

4. The Municipal Corporation also applied on January 19, 1961, under Sec. 387 (4) of the Act praying that the price of the land be settled as per Section 387 (4). In para 10 of this application it was alleged that the memo regarding set back was issued on October 30, 1959, and therefore the price is to be settled at the rates prevailing on that date.

5. In his reply to this application the applicant, Palsikar, accepted para 10 of the application.

6. The Additional District Judge on February 6, 1962, disposed of both the applications by one order and he fixed the compensation of land in question at the rate of Rs. 30 per sq. ft. with interest at 6 per cent per annum from the date of the delivery of the possession. He further ordered that the applicant shall be entitled to 15 per cent Solatium as decided by the award. He also valued the structure.

7. During the pendency of these applications the Municipal Corporation applied on August 1, 1961, to the Additional District Judge for withdrawing the claim of the Corporation over a portion of the land in question. On February 2, 1962, the Additional District Judge passed the following order.

"The N. A. applied that the Improvement Board is going to acquire portion of the land in question and hence the N. A. shall not be compelled to acquire this

land. At present there is nothing to show that the Improvement Trust is going to acquire the land. Moreover, I have to fix the compensation in the case. The N. A. may or may not acquire the land at its own risk. The application is rejected."

8. Against the common order of the Additional District Judge, three revisions, two by the Municipal Corporation and one by the applicant, were filed. Civil Revision No. 195 of 1962 was filed by the Municipal Corporation alleging that the compensation awarded by the learned Additional District Judge was excessive and praying that fair compensation be fixed.

9. The High Court held that the Additional District Judge had given opportunity to the parties to lead evidence and determined the amount of compensation after hearing the parties and in these circumstances it could not be said that he was guilty of committing irregularity in the exercise of his jurisdiction, even assuming that the amount determined as payable was either too high or too low. The High Court then dealt with the point raised by the learned counsel for the Municipal Corporation that the Additional District Judge had refused to permit the Corporation to withdraw the acquisition proceedings and had thus refused to exercise jurisdiction. The High Court held that in a proceeding under S. 387 (4) of the Act there was no provision to enable the Corporation to withdraw from any set back already given and no statutory provision had been pointed out entitling the Court to permit the Corporation to withdraw. In the result the High Court dismissed the revision petition.

10. In the meantime the applicant filed an application under Section 388, of the Act for execution of the order of the Additional District Judge dated February 6, 1962. The Corporation objected to the execution on the ground that the applicant had not given possession of the disputed land to the Corporation nor had he executed a sale deed with respect to it in its favour. The applicant controverted these objections and submitted that demand of possession prior to deposit of the decretal amount was illegal and contrary to S. 387(5) of the Act. He further submitted that under S. 305 of the Act the vesting of the property occurs immediately when the rebuilding starts and, therefore there is no

necessity of executing the sale deed. The Corporation again filed an application for permission to withdraw from the acquisition proceeding and in the alternative it was prayed that the money deposited in Court against this execution case may be given to the applicant only when he gives vacant possession of the land covered by the set back scheme.

11. The Additional District Judge by his order dated October 31, 1962, repelled these contentions and allowed the applicant to withdraw the money deposited by the Corporation. Against this order the Corporation filed Civil Revision No. 497 of 1962 to the High Court. The High Court by its judgment dated December 19, 1962, held that "the terms of S. 387(5) indicate that taking of possession of the property has to follow the payment of the amount of compensation determined by the Court. In view of the terms of this provision it is not correct to contend that the opponent (applicant) ought first to secure vacant possession of the property and then alone can claim to withdraw the compensation amount." The High Court noted in the order that the applicant was willing to give such possession as he himself could. This is the second judgment of the High Court against which the Court gave leave to appeal.

12. The learned counsel for the Corporation contends:

(1) that approval of the site plan will not divest the applicant of the ownership and therefore, it was possible for the Corporation to withdraw from the acquisition proceedings;

(2) when the projecting portion is the main building no compensation is payable unless the rebuilding starts and the portion is cleared;

(3) that the Act provides only for compensation and not for solatium; and

(4) that the amount of compensation is excessive.

13. The learned counsel for the applicant, Palsikar, made a statement before us that he was willing to deposit Rs. 6,000 in the District Court within four months in respect of the area which is in possession of the tenants and that he will be entitled to withdraw this amount once the possession is given to the Corporation and not before. In view of this undertaking it is not necessary to determine point No. 2. The point is not free from doubt and we hesitate to express our opinion when the point has

become academic in view of the undertaking given by the learned counsel for the applicant, Palsikar.

14. Regarding point No. 1, we agree with the High Court that there is no provision in the Act for enabling the Corporation to withdraw from the acquisition proceedings. In fact, it seems to us that there is automatic vesting of the land in the Corporation under Sec. 305 once the requisite conditions are satisfied. Section 305 reads as follows:

"305 Power to regulate line of buildings—(1) if any part of a building projects beyond the regular line of a public street, either as existing or as determined for the future or beyond the front of immediately adjoining buildings the Corporation may—

(a) if the projecting part is a verandah, step or some other structure external to the main building, then at any time, or

(b) If the projecting part is not such external structure as aforesaid, then whenever the greater portion of such building or whenever any material portion of such projecting part has been taken down or burned down or has fallen down, require by notice either that the part or some portion of the part projecting beyond the regular line or beyond the front of the immediate adjoining building, shall be removed, or that such building when being rebuilt shall be set back to or towards the said line or front, and the portion of land added to the street by such setting back or removal shall henceforth be deemed to be part of the public street and shall vest in the Corporation:

Provided that the Corporation shall make reasonable compensation to the owner for any damage or loss he may sustain in consequence of his building or any part thereof being set back.

(2) The Corporation may, on such terms as it thinks fit, allow any building to be set forward for the improvement of the line of the street."

15. In this case it is not necessary to determine whether land affected by a notice vests when the notice is given or when the part or some portion of the part projecting beyond the regular line or beyond the front of the immediately adjoining building is removed, or when the building when being rebuilt is set back, because it seems to have been common ground between the parties that the date for the determination of compensation in this

case is the date of the memo, i. e. October 30, 1959.

16. Coming to the third point, the relevant section which requires interpretation is S. 387(3) which reads:

"387. Arbitration in cases of compensation, etc.

(3) In event of the Panchayat not giving a decision within one month or such other longer period as may be agreed to by both the parties from the date of the selection of Sarpanch or of the appointment by the District Court of such members as may be necessary to constitute the Panchayat, the matter shall, on application by either party be determined by the District Court which shall, in cases in which the compensation is claimed in respect of land, follow, as far as may be the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court;

Provided that

(a) no application to the Collector for a reference shall be necessary, and

(b) the court shall have full power to give and apportion the costs of all the proceedings in manner it thinks fit."

17. The learned counsel for the applicant relies on the decision of the Bombay High Court in *The Borough Municipality of Ahmedabad v. Jayendra Vajubhai Divatia*, ILR (1937) Bom 632 = (AIR 1937 Bom 432). In that case Beaumont, C. J., interpreting Section 198 of the Bombay Municipal Boroughs Act (Bom. Act XVIII of 1925), which section is, in terms, similar to Section 387 of the Act, observed as follows:

"There is no express provision in the Bombay Municipal Boroughs Act allowing for such addition to the compensation, but under the Land Acquisition Act fifteen per cent is allowed in respect of the compulsory nature of the acquisition, and the question is whether that provision in the Land Acquisition Act can be treated as incorporated into section 198 of the Bombay Municipal Boroughs Act as being part of the procedure provided by the Land Acquisition Act. I agree that, *prima facie*, a provision of this sort, adding to the compensation to be payable for the value of the land, is not aptly described as procedure, but still one has to look at the Land Acquisition Act and note the phraseology adopted. One finds Part III headed 'Reference to Court and Procedure thereon....'

Then he referred to Sections 23, 24 and 25 of the Land Acquisition Act and concluded:

"It seems to me that sections 23, 24 and 25 of the Act constitute a code laying down the principles on which the District Court is to act in arriving at the compensation to be paid, and it is quite impossible to leave out of that code sub-section (2) of section 23, as Mr. Shah has invited me to do. His contention is that the fifteen per cent is an allowance of something in addition to the value of the land, which has to be paid for under the Municipal Act. But the truth is that the sections determine the basis on which the value of the land is to be ascertained on compulsory purchase and the allowance of the fifteen per cent must be set off against matters disallowed under Sec. 24. These provisions in the Land Acquisition Act are contained in a Chapter entitled "Reference to Court and procedure thereon" and I think that they must be treated as applicable to proceedings in the District Court under section 198 of the Bombay Municipal Boroughs Act."

18. The learned counsel for the Corporation was not able to cite any authority which has dissented from this view. We agree with the reasoning of the learned Chief Justice and hold that the Additional District Judge was right in awarding 15 per cent solatium.

19. Coming to the fourth point, the revision to the High Court was filed under Section 392 of the Act which provides that "notwithstanding anything to the contrary in any other law for the time being in force, the District Court shall exercise all the powers and jurisdiction expressly conferred on or vested in it by the provisions of this Act, and unless it is otherwise expressly provided by this Act, its decision shall be subject to revision by the High Court." The High Court could not, in a revision under section 392, go into questions of fact and determine the amount of compensation, and the High Court was right in declining to deal with this question. It is not necessary to determine whether the powers of revision under Section 392 are the same as under Section 115, C. P. C., because even if the powers under Section 392 of the Act are wider than that under Section 115, C. P. C., they do not extend to determining questions of fact. In view of this conclusion this point cannot be agitated before us.

20. In the result the appeals fail, but the applicant—Shri Palshikar—shall deposit the amount of Rs. 6,000 in the Court of the Additional District Judge within four months, as stated by his counsel, and he shall be entitled to withdraw this amount once vacant possession is given of the land in dispute to the Corporation. If so requested by the applicant, Shri Palshikar, the Corporation should join as co-plaintiff in a suit or proceeding to be filed by him against the tenants for securing possession. If it refuses to do so within 3 months from the date the applicant requires it to join as co-plaintiff the respondent may withdraw this Rs. 6,000 deposited by him. The Corporation shall also give such further assistance as may be required by the applicant in accordance with law.

21. The applicant shall be entitled to costs; one hearing fee.

RGD

Appeal dismissed.

AIR 1969 SUPREME COURT 583
(V 56 C 114)

(From Patna)*

M. HIDAYATULLAH, C. J. AND G. K. MITTER, J.

Dr. Lakhi Prasad Agarwal, Appellant
v. Nathmal Dokania, Respondent.

Civil Appeal No. 20 of 1968, D/- 6-9-1968.

(A) Representation of the People Act (1951), Sections 123 (2) and 83 (1) (c) — Corrupt practice by undue influence must be pleaded — Pleadings must set out full facts.

In order to sustain a plea of corrupt practice by "undue influence" which in the words of Section 123 (2) means any direct or indirect interference or attempt to interfere with the free exercise of any electoral right of a voter, there must be a pleading. In order that the pleading may be sufficient to make out a case of undue influence, it must set out full particulars of it under the provisions of Section 83 (1) (c) of the Act which may be compared with Order 6, Rule 4 of the Civil P. C. The said provision of the Act read with Section 123 (2) makes it obligatory on a party setting up a case of corrupt practice by exercise of undue

* (Ele. Petn. No. 19 of 1967, D/- 30-11-1967—Pat.)

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influence to give full particulars thereof
(Para 4)

(B) Representation of the People Act (1951), Section 123 (4) — Publication of statement of some fact which is false is essential.

In order to bring the case under Section 123 (4) there must be a publication by the candidate or his agent of any statement of some fact which is false, and which he believed to be false or did not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature or withdrawal of any candidate, being statement reasonably calculated to prejudice the prospects of that candidate's election. Where the publication does not cast any aspersion on the personal character or conduct of the candidate nor is there any false statement in relation to the candidature the election petition does not attract the operation of the aforementioned sub-sections of Section 123
(Para 5)

Mr Danial A Latifi, Senior Advocate, (Mr R A Gupta, Advocate with him), for Appellant, Mr. D Goburdhun, Advocate, for Respondent.

The following Judgment of the Court was delivered by

MITTER, J : This is an appeal by an unsuccessful candidate at an election held in February 1967 for the Bihar State Legislative Assembly from the Single Member Rajmahal Constituency No. 139. Originally there were eight candidates; we are concerned only with two of them, namely, the election petitioner and respondent, Nathmal Dokania, the returned candidate as a result of the election. The election petitioner lost before the High Court. The main ground on which he presses this appeal are based on paras 4(c) and 4(e) of the petition. The relevant issue framed by the learned trial judge with regard to paragraph 4(c) is issue No. 5 reading—

"Did the respondent or his election agent or his workers with his or his election agent's consent resort to corrupt practices in the election as alleged by the petitioner and has the result of the election been materially affected thereby?" In para 4 (c) it is pleaded that the respondent himself and his agents and workers including certain named persons with his consent "committed a corrupt practice of publication of statements of

facts throughout the constituency and mainly at Shahebganj, Teen Pahar and Rajmahal during the election campaign during the period 11th February 1967 to 15th February 1967 which induced and caused deception in the mind of the electors whereby the respondent procured a large number of votes which he would not otherwise have secured but for the corrupt practice aforesaid." Copies of the pamphlets form Annexure 2 series to the petition.

2. Mr Latifi appearing for the appellant submitted that Annexure 2 (A) does not further his client's cause. His grievance is based on Annexure 2. The translation of this Annexure of which the original was in Hindi shows that it was a call to the Muslim voters of Rajmahal to "hear the message and prepare the graveyard for the Congress." Reference was made therein to "the appeal of the day by Maulana Syed Usman Ghanu Saheb of Phulwari Sharif Khankah" "that nobody should be in illusion that Muslims have to vote for the Congress this time also". It was also suggested that on account of high-handedness of the Congress group Muslims should not support it. There was also a reference to the appeal of Pir Saheb of the Dargah of Phulwari Sharif that Muslims should not vote for any Congress candidate. The appeal ends with the sentence, "when you have lifelong connection with Sri Nathmal Dokania, the candidate of the Swatantra Party and when the Head of your religion, your Islam also opposes the Congress, then it becomes your duty to come out victorious by affixing stamps on the 'Star' symbol."

3. Mr. Latifi tried to argue that by the publication of the pamphlet an attempt was made to induce Muslim electors not to vote for a Congress candidate in opposition to the mandates of the two named religious heads. In other words, his contention was that undue influence within the meaning of Section 123 (2) of the Act was sought to be exercised on the Muslim voters in the name of the religious heads mentioned in the pamphlet under the threat of divine displeasure or spiritual censure. He also sought to argue that the reference to the mandate of Islam in the pamphlet amounted to the use of a religious symbol and as such the appeal by the pamphlet came within the mischief of Section 123 (3) of the Act.

4. Under Section 123 (2), a candidate may be guilty of corrupt practice if he

uses "undue influence" which in the words of the section means any direct or indirect interference or attempt to interfere with the free exercise of any electoral right of a voter. Mr. Latifi's submission was that the pamphlet came within the mischief of sub-clause (ii) of proviso (a) to section 123 (2). Unfortunately for Mr. Latifi although the pamphlet might have sustained a plea of undue influence about which we express no opinion, there is no pleading to that effect in the petition. In order that a pleading may be sufficient to make out a case of undue influence, it must set out full particulars of it under the provisions of S. 83 (1) (c) of the Act which may be compared with Order 6, Rule 4 of the Code of Civil Procedure. The said provision of the Act read with Section 123 (2) makes it obligatory on a party setting up a case of corrupt practice by exercise of undue influence as suggested, to give full particulars thereof by stating inter alia who attempted to induce electors to believe that voting for a particular person would render them objects of divine displeasure or spiritual censure and in what manner such attempts were made. The real charge in paragraph 4 (c) of the petition is that the pamphlet complained of misled the electors by false statements. Such a pleading falls far short of an allegation of undue influence by an attempt to make electors exercise their franchise in a particular manner. Para 4(c) does not even mention Muslim voters and does not contain any averment to the effect that they were sought to be influenced by the opinion of the religious heads.

5. Mr. Latifi's attempt to bring his case under Section 123 (3) is equally futile. Mr. Latifi sought to argue that Islam was a religious symbol of Muhammadans and the publication of the pamphlet containing a reference to the mandate of Islam was an attempt to prejudicially affect the election of the petitioner. This case too is not borne out by the pleadings. Failing in his attempt to bring the case under the two sub-sections mentioned already, he tried to bring his case under Section 123 (4) of the Act. In this too, in our view, he cannot succeed. To bring the case under this sub-section, there must be a publication by the candidate or his agent of any statement of some fact which is false, and which he believed to be false or did not believe to be true in relation to the personal character or conduct of any candidate, or in relation

to the candidature or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election. The pamphlet does not cast any aspersion on the personal character or conduct of the election petitioner. Nor is there any false statement in relation to the candidature of the petitioner. In fact there is no reference to him at all. Consequently, the election petition does not attract the operation of the aforementioned sub-sections of Section 123 of the Act. The learned trial Judge should not have entertained any argument under sub-ss. (3) and (3A) of Section 123 of the Act as in view of the pleadings issue No. 5 did not permit the raising of such contentions. In view of the pleadings we did not permit Mr. Latifi to pursue his arguments on this issue on the basis of Section 123 sub-sections (2) or (3) of the Act.

6. That leaves us only with the allegation in para 4 (e) of the petition which runs thus:

"The election of the respondent is void, because the Returning Officer who is also the Sub-Divisional Magistrate of the area, in collusion with the respondents harassed the petitioner in all possible ways so much so that a mere application for correction in the petitioner's name was allowed at the last juncture and the petitioner had been arrested the very next day of the said application, was put in jail for eight valuable days and thereby prevented from pursuing the election campaign."

The issue under which the above complaint was sought to be raised was the general one, namely, whether the election of the respondent is liable to be set aside? Mr. Latifi drew our attention to portions of the testimony of the returning officer where he denied that he was in collusion with Nathmal Dokania or that because of such collusion he got the petitioner arrested after he had filed applications for correction of the entries with respect to his name in the electoral roll. He also denied that he got the petitioner arrested with any mala fide intention so that he might not be able to contest the election. In his cross-examination, the returning officer referred to the proceedings started against the petitioner and said that the petitioner had been arrested once in January and for a second time in February 1967. The arrest in January 1967 was in connection with proceedings

under Section 107 of the Code of Criminal Procedure. The arrest in February 1967 was in connection with a case for some substantive offence. He added however that he was not in a position to say what was the offence alleged to have been committed by the petitioner by a mere reference to the certified copy of the order sheet. On this evidence, there was nothing before the court to justify a conclusion in favour of the petitioner on the general issue. Only some suggestions had been made to the returning Officer in his cross-examination that he had acted mala fide and that he had acted in collusion with the successful candidate. No details with regard to the complaints leading to or the grounds for the arrests were forthcoming. We find it difficult to believe that the petitioner did not know the grounds on which he was put under arrest. The arrest immediately before the election surely hampered the campaign of the election petitioner, but by itself the arrest does not lead to the conclusion that the returning officer was trying to bring pressure upon the election petitioner not to contest the election and much less that the arrest was made in collusion with the successful candidate.

7. These being the only two points which were urged before us in the appeal, the appeal must fail and it is hereby dismissed with costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 536
(V 56 C 115)

(From Gujarat)*

M. HIDAYATULLAH, C. J. AND G. K. MITTER, J.

Jashbhai Chumbhai Patel, Appellant v. Anverbeg A. Murza, Respondent.

Civil Appeal No. 799 of 1968, D/- 18-9-1968.

(A) Representation of the People Act (1951), Sections 123 (5), 100 — Scope — Proof of ingredients — Burden lies on election petitioner — Absence of proof of free conveyance of voters in particular vehicle — Election of returned candidate cannot be declared void.

* (Ele. Petn. No 5 of 1967, D/- 18-10-1967—Guj)

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Section 123 (5) defines one of the corrupt practices and it consists of the hiring and procuring whether on payment or otherwise of any vehicle. This hiring and procuring must be by a candidate or his agent or by any other person with the consent of the candidate or his election agent and the hiring according to the section must be for the free conveyance of any elector other than the candidate himself or members of his family, or his agent to and from any polling station. The section, therefore, requires three things, (1) hiring or procuring of a vehicle, (2) by a candidate or his agent etc. and (3) for the free conveyance of an elector. The Section also speaks of the use but it speaks of the use of such vehicle which connects the two parts, namely, hiring or procuring of vehicle and the use. The requirement of the law, therefore, is that in addition to proving the hiring or procuring and the carriage of electors to and from any polling station, it should also be proved that the electors used the vehicle free of cost to themselves. The burden is on election petitioner to prove this fact. (Para 10)

Where, in an election petition challenging the election of returned candidate belonging to Congress Party, there was proof that the particular vehicles were procured either by Congress Party or from private parties and that the particular vehicle was used for conveyance of the three lady voters but there was no proof that there was free conveyance of the ladies in that vehicle, the ingredients of the section having not been established the election of returned candidate could not be declared void on ground of Section 123 (5). (Para 11)

(B) Representation of the People Act (1951), Sections 116A, 100 — Election Petition — Pleas — Contention about wrong refusal of demand of general recount — Absence of plea in this regard — Mention of general recount only in relief clause of petition — Held, under the circumstances, that there was no room for further count — Representation of the People (Conduct of Election and Election Petition) Rules (1951), Rules 58, 64. (Para 12)

(C) Civil P. C. (1908), Section 35 — Costs in Supreme Court Appeals — Representation of the People Act (1951), Sections 116-A, 100 — Dismissal of Election petition as well as appeal therefrom — Prevarications of returned candidate not attempted to be explained by him

counsel — Petitioner not allowed any costs either in Supreme Court or in High Court — (Representation of the People Act (1951), Sections 116-A, 100).

(Para 12)

Mr. Bishan Narain, Senior Advocate, (Mr. B. Datta, Advocate for M/s. J. B. Dadachanji and Co., with him), for Appellant; Mr. S. V. Gupte, Senior Advocate (M/s. M. I. Patel and R. P. Kapur, Advocates and Mr. M. N. Shroff, Advocate for Mr. I. N. Shroff, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal from the judgment dated 17/18 October, 1967 of the High Court of Gujarat in an election petition filed by the present appellant. The election petition was dismissed by the Judgment under appeal.

2. The matter concerns the Petlad constituency in Kaira District from which election was to be held to the State Legislative Assembly Gujarat at the 4th General Election. The appellant was a candidate for the Swatantra Party and the respondent a candidate for the Congress Party. The poll was held on February 21, 1967 and the result of the election was declared on February 24, 1967. The appellant secured 23,795 votes and the respondent 23,981 votes. 1806 votes were declared invalid. The respondent was therefore declared elected to the seat.

3. The election petition set out a number of grounds on which the election of the returned candidate was challenged as void under the Representation of People Act. We are concerned in this appeal with only one such ground. There is also a prayer in the appeal that a general recount was wrongly disallowed by the learned Judge who decided the election petition and that it should be ordered here. We shall come to the second ground in due course.

4. As regards the first ground, the contention was that a car No. GJH 108 was hired or procured by the returned candidate and on the day of poll, it was used for free conveyance of three ladies to the polling booth. In the election petition the election petitioner had stated that the returned candidate had made extensive use of hired and procured vehicles for the purpose of free conveyance of voters to and from the various polling stations. Although another instance was cited in the

election petition, no evidence was led to support that or any other instance of the user of this or other vehicle. The whole of the case therefore rested on the use of vehicle No. 108 and also its use on one occasion only, namely, when three lady voters were said to have been brought to the polling booth in it. According to the election petitioner, he was in the Sayagi Hospital compound wherein two polling booths Nos. 8 and 9 were situated. He was then accompanied by Suryakant Manilal Shah and Somabhai Chhotabhai Kachhia. At about 12-30 p. m., a taxi bearing No. GTG 9021 came to the gate of the hospital compound, and a lady got out of it. The election petitioner alleges that he immediately asked Suryakant Manilal Shah to request the Presiding Officer of one of the booths to come out. Presiding Officer B. M. Bhat came to the gate and saw the lady who had got out of the taxi. The lady had in her hand a voter's identity card with the congress symbol and her No. was Serial No. 535 of Electoral Unit 26/100 belonging to Ward No. 1 of Petlad. This part of the allegation in the election petition was not used as evidence of free conveyance of voters. This incident was recited as furnishing the immediate background of what followed. The allegation in regard to car No. 108 starts from this point. The allegation is that while the election petitioner was complaining to the Presiding Officer Bhatt about the other car, car No. 108 came to the gate of the compound and the petitioner along with his companion and Bhatt were standing there. Three ladies got out of this car bearing identity cards from the Congress Party and their numbers were 426, 424 and 386 of electoral unit 28/100. Bhatt then told the election petitioner that these voters would go to the other booth and that he was not concerned with that booth. The election petitioner says that he followed the three voters to the next booth and called out the Presiding Officer K. D. Trivedi and pointed out the three voters to him stating that they were brought by car No. 108. He asked him to verify this from Bhatt. The complaint of the election petitioner was then recorded by Trivedi and it appears from the evidence that he also questioned Bhatt who endorsed the statement of the election petitioner that he had seen them get out of the car.

5. In support of this case witnesses were examined. The net result of the

examination of these witnesses established the fact that the ladies came by this car and that a complaint followed. However no attempt was made to establish that these ladies had come in the car free. We need not traverse the entire evidence to establish the above conclusions which in our opinion, are quite clearly demonstrable from the evidence. There is evidence to show that the car did come, that the three ladies did get out of the same and went to polling booth No 9 and also that they were holding identity cards issued by the Congress Party. Presumably therefore they were brought in this car for voting on behalf of the Congress.

6. Attempt was then made to establish connection between the returned candidate and this car. On this part of the case testimony of the returned candidate was extremely unsatisfactory. He first said that three cars were placed at his disposal by the Congress party between January 15 and January 31, 1967. In another place he said that he had been given only two cars. Later he said that two of the cars were withdrawn from him and that after the withdrawal of the cars he had no other car from the Congress Party. He denied the use of the cars contrary to the evidence of the purchase of petrol and also denied any connection between himself and one person by name H I Pathan, who had written requisition for petrol. It was however proved by cross-examination that this H I Pathan is probably one of his nephews, a fact which he denied also. It appears that before this car was used, the returned candidate opened a new account in the name of Mahendra Electric Company c/o. Anwarbeg and petrol was bought for this car along with other cars right upto 21st February in the account of this Mahendra Electric Company and that was the returned candidate himself. Since the requisitions for petrol were issued by H I. Pathan, the returned candidate was at great pains to deny any connection with him and even went to the length of denying the real names of his own nephews. However, this only proved that he had procured the car No. 103 from the Congress Party or somebody else for his own use during the election propaganda and at the time of the poll. It also proved that he had purchased petrol not only previously but also on the day of poll because entries in respect of this car exist-

ed in the accounts of the petrol dealer's firm on 18, 19, 20 and 21 February. The evidence also proved that the three ladies did travel by this car on the date of poll and got out of it at the gate of the hospital compound where the polling booth was situated.

7. The question is whether all this evidence even taken in favour of the election petitioner goes to satisfy the requirement of the law under Section 123 (5) of the Representation of the People Act. That section contains many ingredients and to them we shall come presently; one such ingredient is that the car must be used for the free conveyance of the voters to the poll. The learned Judge who heard the case gave a finding that the car was so used, that is to say, the three ladies were carried free to the booths in this car. There is no evidence to establish this. The owner of the car, the driver and the electors namely the three ladies were not examined and there is nothing to show whether they had travelled free or had paid for the privilege.

8. Mr. Sishan Narain argues in the alternative, firstly, that an inference arises in the present case that the ladies must have been taken free and he refers to the findings given by the High Court on this part of the case. Next, he argues that this is not the requirement of Section 123 (5) and he interprets the section so as to save his case from the operation of that section.

9. As regards the finding of the High Court that the ladies must have travelled free, we can only say that it is a mere surmise because there is no evidence whatever on this part of the case. Mr Bishan Narain stated that the best evidence could come from the returned candidate and that his client was not required to prove a negative. In our opinion, the burden was upon the election petitioner to establish this fact, if it was a requirement of law. We do not think that it was an utter impossibility because the owner of the car, the driver or one of the ladies could have been questioned about it and something would have then come in evidence. Since no such attempt was made there is nothing on which we can say whether the ladies were brought free or on payment and regard being had to the strictness of the law on the subject of corrupt practice we must hold in favour of the returned candidate that the

requirements of the section have not been met.

10. This brings us to the examination of section 123 (5) with a view to finding out what are its requirements. We have already indicated that in our opinion the election petitioner must prove in addition to the other ingredients of the section that the vehicle was used for free conveyance of voters which ingredient we have stated was not attempted to be established in the case. Section 123 (5) of the Representation of People Act reads as follows:

"The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person with the consent of a candidate of his election agent, or the use of such vehicle or vessel for the free conveyance of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under section 25 or a place fixed under sub-section (1) of Section 29 for the poll:

Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause if the vehicle or vessel so hired is a vehicle or vessel not propelled by mechanical power:

Provided further that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause.

Explanation: In this clause, the expression "vehicle" means any vehicle used or capable of being used for the purpose of road transport whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise."

This section defines one of the corrupt practices and it consists of the hiring and procuring whether on payment or otherwise of any vehicle. This hiring and procuring must be by a candidate or his agent or by any other person with the consent of the candidate or his election agent and the hiring according to the section must be for the free conveyance of any elector other than the candidate

himself or members of his family or his agent to and from any polling station. It will, therefore, appear that the section requires three things, (1) hiring or procuring of a vehicle; (2) by a candidate or his agent etc. and (3) for the free conveyance of an elector. It will be noticed that the section also speaks of the use but it speaks of the use of such vehicle which connects the two parts, namely, hiring or procuring of vehicle and the use. The requirement of the law therefore is that in addition to proving the hiring or procuring and the carriage of electors to and from any polling station, it should also be proved that the electors used the vehicle free of cost to themselves. The contention of Mr. Bishan Narain that the requirement of free conveyance is not necessary is therefore not borne out by the words of the section. The two provisos also prove the same thing. The first proviso provides that it would not be a corrupt practice for any elector to hire a vehicle for himself or even a group of electors to join in hiring a vehicle and the second proviso lays down that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost is not a corrupt practice. In other words the electors, if they have to perform the journey by hired vehicle must pay for its hire themselves. They cannot be taken in a hired vehicle free of costs to themselves. In the same way if a procured vehicle is used, it must not be used for free conveyance of voters. The journey of the elector must be paid for by him. If a candidate hires or procures a vehicle for free conveyance of the electors that also is perhaps a corrupt practice but that aspect need not be considered here. The language seems capable of that interpretation though we express no final opinion.

11. In the present case there is proof that the vehicles were procured; whether they were supplied by the Congress Party or were procured from private parties makes no difference. There is also proof that the vehicle numbered 103 was, in fact, used for the conveyance of three lady voters. What is not proved is that there was free conveyance of the ladies in that vehicle. Mr. Bishan Narain contends that this is very difficult of proof but as we stated earlier it is not impossible of proof because the owner of the car or the driver or the ladies could have been examined to show that the

ladies had travelled free in the vehicle. This is not proved and therefore the ingredients of the section have not been established. In our opinion therefore there is no room for interference although, our reasons are slightly different from those of the High Court.

12. It was next contended that a general recount was demanded in the case and has been wrongly refused. We have scrutinized the pleadings on this point carefully and we find that no plea on which it could be rested was made although in the relief clause there is mention of a general recount. The pleas concerned the votes cast by impersonators and rejected votes. These have been considered already and therefore there is no room for further count. On the whole therefore we are of opinion that the judgment under appeal cannot be interfered with. The appeal fails and will be dismissed. In view however, of the prevarications of the returned candidate which were not attempted to be explained by his learned Counsel we are of opinion that we should not allow him any costs either here or in the High Court and we order accordingly.

SSG/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 590

(V 56 C 116)

(From Madhya Pradesh:

AIR 1964 Madh Pra 312)

J. M. SHELAT AND C. A.

VAIDIALINGAM, JJ.

Payment of Wages Inspector, Ujjain, Appellant v. Surajmal Mehta, Director, The Bamagar Electric Supply and Industrial Co. Ltd., and another, Respondents.

Civil Appeal No. 1577 of 1966, D/- 8-12-1968.

Payment of Wages Act (1936, as amended by Act 63 of 1957), Ss. 2 (vi) (d), 15 (2) — Wages — Whether include compensation payable under S. 25 FF, Industrial Disputes Act — Authority under payment of Wages Act in application under S. 15 (2) cannot entertain claim for compensation under S. 25 FF, when defence raised involves complicated question of law — Proper authority is Labour Court — Scope of jurisdiction of Authority under Payment of Wages Act indicated — (Industrial Disputes Act (1947), Ss 25 FF and 25 FFF). 1967-1 Lab LJ 232 (Punj) Overruled.

DM/EM/G226/68

Workmen whose services are terminated in consequence of a transfer of an undertaking, whether by agreement or by operation of law, have a statutory right under Section 25 FF, Industrial Disputes Act to compensation unless such right is defeated under the proviso to that section. The same is the position in the case of closure under Section 25 FFF. Such compensation would be "wages" as defined by S. 2 (iv) (d) of the Payment of Wages Act as amended by Act 63 of 1957 as it is a "sum which by reason of the termination of employment of the person employed, is payable under any law" which provides for the payment of such sum whether with or without deductions but does not provide for the time within which the payment is to be made". Since Sections 25FF and 25FFF do not contain any conditions precedent, as in the case of retrenchment under Section 25F, and transfer and closure can validly take place without notice or payment of a month's wages in lieu thereof or payment of compensation, Section 25F can be said not to have provided any time within which such compensation is to be paid. The words "in accordance with the provisions of Section 25F" in Ss 25FF and 25FFF are used only as a measure of compensation and are not used for laying down any time within which the employer must pay the compensation. It would, therefore, appear that compensation payable under Sections 25FF and 25FFF read with Section 25F would be 'wages' within the meaning of Section 2 (vi) (d) of the Act. AIR 1957 SC 121 & AIR 1960 SC 923 & AIR 1963 SC 1489, Ref.

(Para 4)

But when in an application under Sec. 15 (2) of the Payment of Wages Act claiming compensation under Sec. 25FF, of the Industrial Disputes Act the defence taken by the ex-employer was that he was not the person responsible for payment of compensation and that the right of the workmen was defeated by reason of the proviso to Sec. 25FF being applicable inasmuch as these workmen were continued in the employment by the new employer, that therefore there had been no interruption in their employment, that the terms and conditions of service given to them by the new employer were in no way less favourable than those they had when the old employer was the employer and that the new employer was responsible for payment of compensation if any retrench-

ment took place in future, in view of the limited jurisdiction of the Authority under Sec. 15 (2) of the Payment of Wages Act, it was not intended to deal with such questions, which in some cases might well raise complicated problems of both fact and law. AIR 1963 SC 487, Ref. (Para 5)

Where the right of a workman was disputed by his employer, the Labour Court can go into the question as to whether he had a right to receive such a benefit. Sub-section (3) of Section 33C under which the Labour Court can appoint a commissioner to take evidence for computing the benefit postulates that it has the jurisdiction to decide whether the workman claiming benefit was entitled to it where such right was disputed by the employer. AIR 1964 SC 743, Ref. (Para 6)

A workman whose claim, monetary or otherwise, is disputed by his employer can lodge such a claim before a specified Labour Court under Section 33C and obtain an inexpensive and expeditious remedy. For such a claim the legislature did not intend to provide alternative remedies both under the Industrial Disputes Act and the Payment of Wages Act. AIR 1964 SC 743, Ref. (Para 6)

It is explicit from the terms of Sec. 15 (2) that the Authority appointed under sub-section (1) has jurisdiction to entertain applications only in two classes of cases, namely, of deductions and fines not authorised under Sections 7 to 13 and of delay in payment of wages beyond the wage periods fixed under Section 4 and the time of payment laid down in Sec. 5. The only applications which the Authority can entertain are those where deductions unauthorised under the Act are made from wages or there has been delay in payment beyond the wage period and the time of payment of wages fixed or prescribed under Sections 4 and 5 of the Act. Section 15 (2) postulates that the wages payable by the person responsible for payment under Section 3 are certain and such that they cannot be disputed. (Para 8)

It is true that the Authority has the jurisdiction to try matters which are incidental to the claim in question. It is also true that while deciding whether a particular matter is incidental to the claim or not care should be taken neither to unduly expand nor curtail the jurisdiction of the Authority. But it has at the same time to be kept in mind that the juris-

diction under Section 15 is a special jurisdiction. The Authority is conferred with the power to award compensation over and above the liability for penalty of fine which an employer is liable to incur under Sec. 20. AIR 1955 SC 412 & AIR 1961 SC 970, Ref. (Para 10)

On the footing that compensation payable under Secs. 25FF and 25FFF of the Industrial Disputes Act being wages within the meaning of Sec. 2 (vi) (d) of the Payment of Wages Act a claim for it on the ground that its payment was delayed by an employer cannot be entertained under Section 15 (2) of the Act, because the claim is not a simple case of deductions having been unauthorisedly made or payment having been delayed beyond the wage periods and the time of payment fixed under Secs. 4 and 5 of the Act and in view of the defence taken the Authority would inevitably have to enter into questions arising under the proviso to Sec. 25FF viz., whether there was any interruption in the employment of the workmen, whether the conditions of service under the new employer were any the less favourable than those under the old employer and whether the new employer, had become liable to pay compensation to the workmen if there was retrenchment in the future. Such an inquiry would necessarily be a prolonged inquiry involving questions of fact and of law. Besides, the failure to pay compensation on the ground of such a plea cannot be said to be either a deduction which is unauthorised under the Act, nor can it fall under the class of delayed wages as envisaged by Sections 4 and 5 of the Act. When the definition of wages was expanded to include cases of sums payable under a contract, instrument or a law it could not have been intended that such a claim for compensation which is denied on grounds which inevitably would have to be inquired into and which might entail prolonged inquiry into questions of fact as well as law was one which should be summarily determined by the Authority under Sec. 15. Nor could the Authority have been intended to try as matters incidental to such a claim questions arising under the proviso to Sec. 25FF. It would be the Labour Court in such cases which would be the proper forum which can determine such questions under Sec. 33C (2) of the Industrial Disputes Act which also possesses power to appoint a commissioner to take evidence where question

of facts require detailed evidence. 1967-1 Lab LJ 232 (Punj), Overruled, AIR 1964 Madh Pra 312, Affirmed. (Para 11)

Cases Referred. Chronological Paras
(1967) 1967-1 Lab LJ 232=67 Pun
LR 1124, Uttam Chand v. Kartar
Singh

(1964) AIR 1964 SC 743 (V 51)=
1964 (3) SCR 140, Central Bank
of India Ltd v. Rajagopalan

(1964) AIR 1964 SC 752 (V 51)=
1964 (3) SCR 709, Bombay Gas
Co, Ltd v Gopal Bhava

(1963) AIR 1963 SC 487 (V 50)=
1962 Supp (2) SCR 977, Punjab
National Bank Ltd v K. L. Khar-
banda

(1963) AIR 1963 SC 1489 (V 50)=
1963 Supp (1) SCR 730, Anaka-
palle Co-operative Agricultural
and Industrial Society Ltd. v.
Workmen

(1961) AIR 1961 SC 970 (V 48)=
1961-3 SCR 220, Shri Ambica
Mills Co, Ltd v S B. Bhatt

(1960) AIR 1960 SC 923 (V 47)=
1960-3 SCR 528, M/s Hatisingh
Mfg Co, Ltd., Ahmedabad v.
Union of India

(1957) AIR 1957 SC 121 (V 44)=
1957 SCR 121, Hariprasad v.
A. D. Divelkar

(1955) AIR 1955 SC 412 (V 42)=
1955-1 SCR 1353, D'Costa v. B.
C. Patel

Mr I. N. Shroff, Advocate, for Ap-
pellant.

The following Judgment of the Court
was delivered by—

SHELAT, J :— This appeal, by certi-
ficate, is directed against the judgment
and order of the High Court of Madhya
Pradesh and raises the question of the
scope of jurisdiction of the Authority
under the Payment of Wages Act, 4 of
1936 (hereinafter referred to as the Act).

2. On the licence of the Barnagar
Electric Supply and Industry Company,
of which respondent 1 was at all mate-
rial times the managing director, having
been revoked by the Madhya Pradesh
Government and the company's undertak-
ing having been taken over by the
Madhya Pradesh Electricity Board, res-
pondent 1 served notices on the com-
pany's employees that their services
would no longer be required as from
October 1, 1962. Thereupon the appel-
lant on behalf of 20 employees of the
company filed an application under Sec-
tion 15 (2) of the Act to recover from res-

pondent 1 wages for the notice month
and retrenchment compensation amount-
ing to Rs 12,853 60 P. payable to the
employees under Section 25FF of the
Industrial Disputes Act, 1947. On res-
pondent 1 contesting the claim as also
the jurisdiction of the Authority, the Au-
thority raised certain preliminary issues,
namely. (1) whether the said applica-
tion was maintainable in view of the re-
vocation of the company's licence, (2)
whether the Authority had jurisdiction to
determine the liability of respondent 1
for retrenchment compensation before
the amount thereof was ascertained under
Section 33C (2) of the Industrial Disputes
Act and (3) whether in view of the ser-
vices of the workmen not having been
interrupted by the said transfer and the
terms and conditions of service applicable
to them after the said transfer being not
in any way less favourable than before and
the said Board as the new employer be-
ing liable after the transfer for compen-
sation in the event of retrenchment, the
employees were entitled to claim any
compensation. By his order dated May 21,
1963, the Authority held against res-
pondent 1 on the question of jurisdiction.
Respondent 1 thereupon filed a writ peti-
tion in the High Court and a Division
Bench of the High Court held that sec-
tion 15 of the Act did not apply and that
the proper forum for such an application
was a Labour Court under Sec. 33C (2)
of the Industrial Disputes Act. This ap-
peal challenges the correctness of this
order.

8. Mr. Shroff for the appellant con-
tended that after the amendment of the
definition of 'wages' in the Act by Act 68
of 1957 and the amended definition having
now included "any sum which by reason
of the termination of employment of
the person employed is payable under
any law, contract or instrument which
provides for payment of such sum whe-
ther with or without deductions but does
not provide for the time within which the
payment is to be made" as wages, there
could be no doubt that the legislature has
conferred jurisdiction on the Authority
under the Act to determine compen-
sation payable under Section 25FF of the
Industrial Disputes Act in an application
under Section 15 (2) of the Act and
that therefore the High Court was in
error in quashing the order passed by
the Authority. Mr Chagla appearing
for Respondents 1 and 2 in the next
appeal, on the other hand, contended (1)

that the Authority under the Act was a special Authority with limited jurisdiction, that it has to deal only with the subject matters specified in the Act and its jurisdiction must therefore be strictly construed, and (2) that the Act and the Industrial Disputes Act deal with different subjects, provide different tribunals with different jurisdictions and therefore it is not possible to hold that Parliament which enacted both the Acts could possibly have contemplated that a claim arising under the Industrial Disputes Act should be determined by a tribunal set up under a different Act.

4. On these contentions the first question which arises for determination is whether compensation payable under Section 25FF of the Industrial Disputes Act can fall under the amended definition in Section 2 (vi) (d) of the Act and can be called 'wages'. The High Court thought that it was not but Mr. Shroff relied on certain decisions of this Court to contest that part of the conclusion of the High Court. The Industrial Disputes Act, which as enacted in 1947 was a piece of legislation which mainly provided machinery for investigation and settlement of industrial disputes, has since then undergone frequent modifications. In 1953, by Act 43 of that year Chapter VA consisting of Sections 25A to 25J was incorporated providing therein compensation for lay-off and retrenchment. It also provided a definition of retrenchment in Sec. 2 (oo). Chapter VA, as it then stood, did not expressly provide for compensation for termination of service on account of transfer of an undertaking by an agreement or as a result of operation of law or the closure of the undertaking. Consequently, in *Hariprasad v. A. D. Divelkar*, 1957 SCR 121=(AIR 1957 SC 121) this Court held that retrenchment as defined in Section 2 (oo) and the word 'retrenched' in Section 25F meant discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action and did not include termination of services of all workmen on a bona fide closure of an undertaking or on a change of ownership or management thereof. This decision was followed first by an ordinance and then by Act 18 of 1957 incorporating in the Act the present Sections 25FF and 25FFF. It will be noticed that both these sections use the words "as if the workman had been retrenched". The intention of the legisla-

ture was, therefore, clear that it did not wish to place transfer and closure on the same footing as retrenchment under Section 25F. This is apparent also from the fact that it left the definition of retrenchment in Section 2 (oo) untouched in spite of the decision in *Hariprasad's case*, 1957 SCR 121=(AIR 1957 SC 121) (supra). The three sections, Section 25F, 25FF and 25FFF also show that while under Section 25F no retrenchment can be made until conditions therein set out are carried out, the other two sections do not lay down any such conditions. All the three sections, however, involve termination of service whether it results in consequence of retrenchment or transfer or closure, and notice and compensation in both Sections 25FF and 25FFF have been provided for "in accordance with the provisions of Section 25F". (See *M/s. Hatisingh Mfg. Co. Ltd. v. Union of India*, (1960) 3 SCR 528=(AIR 1960 SC 923) and *Anakapalle Co-operative Agricultural and Industrial Society Ltd. v. Workmen*, 1963 Supp (1) SCR 730=(AIR 1963 SC 1489)). That being the position a workman whose service is terminated in consequence of a transfer of an undertaking, whether by agreement or by operation of law, has a statutory right under Section 25FF to compensation unless such right is defeated under the proviso to that section. The same is the position in the case of closure under Sec. 25FFF. Such compensation would be wages as defined by Section 2 (vi) (d) of the Act as it is a "sum which by reason of the termination of employment of the person employed, is payable under any law which provides for the payment of such sum whether with or without deductions but does not provide for the time within which the payment is to be made." Since Sections 25-FF and 25-FFF do not contain any conditions precedent, as in the case of retrenchment under S. 25-F, and transfer and closure can validly take place without notice or payment of a month's wages in lieu thereof or payment of compensation, Sec. 25FF can be said not to have provided any time within which such compensation is to be paid. It is well established that the words "in accordance with the provisions of Section 25F" in Sections 25FF and 25FFF are used only as a measure of compensation and are not used for laying down any time within which the employer must pay the compensation. It would therefore, appear that compensation payable

under Sections 25FF and 25FFF read with Section 25F would be 'wages' within the meaning of Section 2 (vi) (d) of the Act.

5. It must, however, be remembered that though such compensation falls within the definition of wages, cases may arise where it would not be a simple question of recovery of wages. In the present case, for instance, the defence taken by respondent 1 was that he was not the person responsible for payment of compensation and that the right of the workmen was defeated by reason of the proviso to Section 25FF being, according to him, applicable inasmuch as these workmen were continued in the employment by the said Board, the new employer, that therefore there had been no interruption in their employment, that the terms and conditions of service given to them by the new employer were in no way less favourable than those they had when the company was the employer, and that the new employer was responsible for payment of compensation if any retrenchment took place in future. The question, therefore, is whether in view of the limited jurisdiction of the Authority under Section 15 (2) of the Act, it was intended to deal with such questions, which in some cases might well raise complicated problems of both fact and law.

6. While considering the scope of jurisdiction of the Authority under Section 15 of the Act it is relevant to bear in mind the fact that the right to compensation is conferred by the Industrial Disputes Act which itself provides a special tribunal for trying cases of individual workmen to whom compensation payable under Chapter VA has not been paid. Section 33C of that Act provides both a forum and the procedure for computing both monetary as well as non-monetary benefits in terms of money and further provides machinery for recovery of such claims. In *Punjab National Bank Ltd. v. K. L. Kharbanda*, 1962 Supp (2) SCR 977=(AIR 1963 SC 487) this Court held that while sub-section (1) of Section 33C applied to cases where any money was due to a workman from an employer under a settlement, award or under the provisions of Chapter VA and the amount was already computed or calculated or at any rate there could be no dispute about its calculation or computation, sub-section (2) applied to benefits including monetary benefits conferred on a workman under an award, settle-

ment etc., but which had not been calculated or computed and there was a dispute as to their calculation or computation. The Court rejected the contention that sub-section (2) applied only to a non-monetary benefit which had to be converted in terms of money. The Court also observed that Section 33C was a provision in the nature of execution and where the amount to be executed was worked out or where it might be worked out without any dispute sub-section (1) would apply but where such amount due to the workman was not stated or worked out and there was a dispute as to its calculation, sub-section (2) would apply and the workman would be entitled to apply thereunder to have the amount computed provided he was entitled to a benefit, whether monetary or non-monetary, which was capable of being paid in terms of money. In the *Central Bank of India Ltd. v. Rajagopalan*, 1964 (3) SCR 140=(AIR 1964 SC 743) this Court held that where the right of a workman was disputed by his employer the Labour Court could go into the question as to whether he had a right to receive such a benefit. Sub-section (3) of Section 33C under which the Labour Court can appoint a commissioner to take evidence for computing the benefit postulates that it has the jurisdiction to decide whether the workman claiming benefit was entitled to it where such right was disputed by the employer. In *Bombay Gas Co. Ltd. v. Gopal Bhatia*, 1964-3 SCR 709=(AIR 1964 SC 752) this Court held that the Labour Court could in an application under Section 33C (2) go even into the question whether the award under which the workman had made a claim was a nullity. Being in the nature of an executing Court it could interpret the award and also, consider the plea that the award sought to be enforced was a nullity. It is thus clear that a workman whose claim, monetary or otherwise, is disputed by his employer can lodge such a claim before a specified Labour Court under Section 33C and obtain an inexpensive and expeditious remedy. The question then is whether for such a claim the legislature intended to provide alternative remedies both under the Industrial Disputes Act and the Payment of Wages Act. For deciding this question it is necessary to refer to some of the provisions of and the scheme of the Payment of Wages Act.

7. The Act was passed to regulate the payment of wages to certain classes of persons employed in any factory or by a railway administration or by a person fulfilling a contract with a railway administration or in any industrial establishment to which a State Government by notification has extended the Act. Section 3 lays down as to who shall be responsible for payment of wages. Section 4 provides for the fixation of wage periods and Section 5 lays down the time within which payment of wages has to be made. Section 7 provides that wages shall be paid without any deductions except those authorised by the Act and Sec. 8 provides that no fine shall be imposed on any employed person save in respect of such acts or omissions on his part as the employer with the previous approval of the State Government or the prescribed authority may have specified by notice. Sections 9 to 13 lay down the deductions which an employer is authorised to make and the conditions under which such deductions can be made. Section 13A provides for the maintenance of certain registers and records by the employer and Sections 14 and 14A provide for appointment of inspectors under the Act, their powers and the facilities to be afforded by the employer to such inspectors. Section 15 (1) provides for the appointment of a person to be the Authority under the Act to hear and decide for any specified area claims arising out of (a) deduction from wages, or (b) delay in payment of wages of persons employed or paid in that area including all matters incidental to such claims. Sub-section (2) provides that:

"Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself, or any legal practitioner or any official of a registered trade union.....or any inspector under this Act, or any other person acting with the permission of the authority.....may apply to such authority for a direction under sub-section 3."

The first proviso to sub-section (2) lays down a period of limitation of 12 months from the date of deduction or the due date of payment and the second proviso empowers the Authority to admit applications beyond the period of limitation on sufficient cause being shown. Sub-section (3) empowers the Authority to direct refund to the employed person of the amount deducted, or the payment of the

delayed wages and also empowers it to award compensation specified therein without prejudice to any other penalty to which the employer guilty of unauthorised deduction or delay in payment is liable under the Act. Under sub-section (5) of Section 15 the amount awarded by the authority can be recovered as if it were a fine imposed by a magistrate. Section 20 provides for penalty for offences under certain provisions of Sections 5, 7, 8, 9, 10 and 11 to 13 extending upto Rs. 500.

8. It is explicit from the terms of Section 15 (2) that the Authority appointed under sub-section (1) has jurisdiction to entertain applications only in two classes of cases, namely, of deductions and fines not authorised under Sections 7 to 13 and of delay in payment of wages beyond the wage periods fixed under Section 4 and the time of payment laid down in Section 5. This is clear from the opening words of sub-section (2) of Section 15, namely, "where contrary to the provisions of this Act" any deduction has been made or any payment of wages has been delayed. These being the governing words in the sub-section the only applications which the Authority can entertain are those where deductions unauthorised under the Act are made from wages or there has been delay in payment beyond the wage period and the time of payment of wages fixed or prescribed under Sections 4 and 5 of the Act. Section 15 (2) postulates that the wages payable by the person responsible for payment under Section 3 are certain and such that they cannot be disputed.

9. In *D'Costa v. B. C. Patel*, 1955-1 SCR 1353=(AIR 1955 SC 412) this Court held after considering the scheme of the Act that the jurisdiction of the Authority under Section 15 was confined to deductions and delay in payment of the actual wages to which the workman was entitled and that the Authority under the Act had no jurisdiction to enter into a question of potential wages, i. e., where the workman pleads that he ought to have been up-graded as persons junior to him were up-graded and that he ought to have been paid wages on a scale paid to those so up-graded. This Court held that the Authority had jurisdiction to interpret the terms of a contract of employment to find out the actual wages payable to the workmen where deduction from or delay in payment of such wages is alleged, but not to

enter into the question whether the workman should have been up-graded from being a daily rated worker to a monthly rated workman. In *Shri Ambica Mills Co Ltd. v. S. B. Bhatt*, 1961-3 SCR 220=(AIR 1961 SC 970) this Court again examined the scheme of the Act and held that the only claims which could be entertained by the Authority were claims arising out of deductions or delay made in the payment of wages. The Court, however, observed that in dealing with claims arising out of deductions or delay made in payment of wages the Authority inevitably would have to consider questions incidental to these matters, but in determining the scope of these incidental matters care must be taken to see that under the guise of deciding incidental matters the limited jurisdiction was not unreasonably or unduly expanded. Equally, care must also be taken to see that the scope of these incidental matters was not unduly curtailed so as to affect or impair the limited jurisdiction conferred on the Authority. The Court declined to lay down any hard and fast rule which would afford a determining test to demarcate the field of incidental facts which could be legitimately considered by the Authority and those which could not be so considered.

10 It is true, as stated above, that the Authority has the jurisdiction to try matters which are incidental to the claim in question. Indeed Section 15 (1) itself provides that the Authority has the power to determine all matters incidental to the claim arising from deductions from or delay in payment of wages. It is also true that while deciding whether a particular matter is incidental to claim or not care should be taken neither to unduly expand nor curtail the jurisdiction of the Authority. But it has at the same time to be kept in mind that the jurisdiction under Section 15 is a special jurisdiction. The Authority is conferred with the power to award compensation over and above the liability for penalty of fine which an employer is liable to incur under Section 20.

11. The question, therefore, is whether on the footing that compensation payable under Sections 25FF and 25FFF of the Industrial Disputes Act being wages within the meaning of Section 2 (vi) (d) of the Act, a claim for it on the ground that its payment was delayed by an employer could be entertained under

Section 15 (2) of the Act. In our view it could not be so entertained. In the first place, the claim made in the instant case is not a simple case of deductions having been unauthorisedly made or payment having been delayed beyond the wage periods and the time of payment fixed under Sections 4 and 5 of the Act. In the second place, in view of the defence taken by Respondent 1, the Authority would inevitably have to enter into questions arising under the proviso to Section 25FF, viz., whether there was any interruption in the employment of the workmen, whether the conditions of service under the Board were any the less favourable than those under the company and whether the Board, as the new employer, had become liable to pay compensation to the workmen if there was retrenchment in the future. Such an inquiry would necessarily be a prolonged inquiry involving questions of fact and of law. Besides, the failure to pay compensation on the ground of such a plea cannot be said to be either a deduction which is unauthorised under the Act, nor can it fall under the class of delayed wages as envisaged by Ss. 4 and 5 of the Act. It may be that there may conceivably be cases of claims of compensation which are either admitted or which cannot be disputed which by reason of its falling under the definition of wages the Authority may have jurisdiction to try and determine. But we do not think that a claim for compensation under section 25FF which is denied by the employer on the ground that it was defeated by the proviso to that section, of which all the conditions were fulfilled, is one such claim which can fall within the ambit of section 15 (2). When the definition of wages was expanded to include cases of sums payable under a contract, instrument or a law it could not have been intended that such a claim for compensation which is denied on grounds which inevitably would have to be inquired into and which might entail prolonged inquiry into questions of fact as well as law was one which should be summarily determined by the Authority under Section 15. Nor could the Authority have been intended to try as matters incidental to such a claim questions arising under the proviso to section 25FF. In our view it would be the Labour Court in such cases which would be the proper forum which can determine such

questions under section 33C(2) of the Industrial Disputes Act which also possesses power to appoint a commissioner to take evidence where questions of facts require detailed evidence. Mr. Shroff, however, drew our attention to the decision in Uttam Chand v. Kartar Singh, 1967-1 Lab LJ 232 (Punjab) a decision of a learned Single Judge of the High Court of Punjab, taking a view contrary to the one which we are inclined to take. But that decision contains no reasons and is, therefore, hardly of any assistance.

12. In the result we agree with the High Court that the Authority had no jurisdiction under Section 15 (2) of the Act to try these applications. The appeal consequently must fail and is dismissed. But we make no order as to costs.

RGD

Appeal dismissed.

AIR 1969 SUPREME COURT 597 (V 56 C 117)

(From Punjab and Haryana: AIR 1968 Punjab 331)

M. HIDAYATULLAH, C. J. AND
G. K. MITTER, J.

Parsram and another, Appellants v. Shivchand and others, Respondents.

Civil Appeal No. 1869 of 1967, D/- 28-11-1968.

Constitution of India, Article 341 — In the absence of a public notification issued by the President a person properly described as mochi in Punjab does not fall within the caste of Chamars as included in Constitution (Scheduled Castes) Order 1950 and Constitution (Scheduled Castes) (Union Territories) Order 1951 (as amended in 1966) — Court cannot scrutinise the Gazeteers and glossaries for this purpose. AIR 1965 SC 1269 and AIR 1965 SC 1557, Rel. on. (Para 7)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1269 (V 52) =
1965-1 SCR 316, Basavalingappa v. D. Munichinappa 5
(1965) AIR 1965 SC 1557 (V 52) =
1965-2 SCR 877, Bhैया Lal v. Harikrishen Singh 6

M/s. K. P. Bhandari and Hardev Singh, Advocates, for Appellants; M/s. C. L. Lakhanpal and D. D. Sharma, Advocates, for Respondent No. 1.

DM/EM/G330/68

The following Judgment of the Court was delivered by

MITTER, J.: In the election petition out of which the present appeal arises the main question canvassed was, whether the nomination paper of respondent No. 8 (appellant No. 2 before this Court) was wrongly rejected. It is admitted that if the rejection was wrong, the election cannot stand.

2. The petitioner challenged the election to the Lambi Assembly Constituency (reserved seat) in the district of Ferozepore. There were eight candidates, the first respondent being the returned candidate. The petition was filed by one of the unsuccessful candidates impleading the other seven candidates, and Kishan Lal whose nomination paper was rejected. According to the petitioner, Kishan Lal was a Hindu and being a Chamar by caste he belonged to a scheduled caste within the meaning of paragraph 2 read with Part X of the Constitution (Scheduled Castes) Order 1950 issued under Article 341 of the Constitution: he had filed a declaration under Section 33 (2) of the Representation of the People Act, stating his caste to be Chamar covered by item 9 in Part X (Punjab) of the Schedule to the Order. The said item reads as follows:

“Chamar, Jatia Chamar, Reghar, Raigar, Ramdasi or Ravidasi.”

It was stated in the petition that the returning officer had at first accepted the nomination paper of Kishan Lal on 21st January 1967, but subsequently, on an objection having been raised by the first respondent on the ground that Kishan Lal was not a member of a Scheduled Caste, the proceedings were adjourned till the next day when after admitting evidence, the same was rejected on the plea that Kishan Lal was a mochi by caste. The petitioner's case was that Chamar and Mochi were not two separate castes and the word ‘mochi’ was applied to a chamar who actually started working in leather. On the pleadings the learned trial Judge framed four issues:

1. Is respondent No. 8 Kishan Lal a Hindu Chamar by caste which is a scheduled caste within the meaning of Part X of the Schedule to the Constitution (Scheduled Castes) Order, 1950?

2. Was the nomination paper of respondent No. 8 Kishan Lal accepted by the Returning Officer and if so, whether the Returning Officer had the power of reviewing his order?

3. Has the nomination paper of respondent No. 8 Kishan Lal been wrongly rejected? If so, is the election of the returned candidate void?

4. Is Chamar or Mochi one and the same caste and a scheduled caste within the meaning of Part X of the Schedule to the Constitution (Scheduled Castes) Order, 1950?

The point canvassed before him with a good deal of force was that the returning officer had sought to review his own order passed on 21st January 1967 accepting the nomination paper and this, he was not competent to do. The learned Judge did not accept that a finalised order had been reviewed. An examination of the document tends to support the appellant's argument about the nomination paper having been accepted at first but rejected subsequently. The manner of recording the order is suggestive of the above. It appears that the Returning Officer at first wrote the word 'accepted' and gave the date as 21st January 1967 to the left of his signature: the endorsement rejecting the nomination paper is by way of a postscript abbreviated as "P. S." the last two lines curving over the signature. Unfortunately, however, for the petitioner, the returning officer, although he appeared in court to produce some documents, was not orally examined and we are therefore without his testimony on the subject. Kishan Lal who came to give evidence in this case in support of the petition stated in his examination-in-chief that:

"At the time of the scrutiny of the nomination papers for elections in 1967 the Returning Officer at first announced orders on my nomination papers accepting the same. Then an objection was raised by respondent No. 1 Shiv Chand. Thereafter the Returning Officer adjourned the matter to the next date on which after examining evidence led by the parties he rejected the nomination papers." Prima facie this goes to support the case of the petitioner, but in cross-examination Kishan Lal stated:

"At the time when the nomination papers were being scrutinised by the Returning Officer, an objection was raised when he was writing the order."

This nullifies the effect of the statement in the examination-in-chief and suggests that this objection was raised before the order had been signed or announced.

This is strengthened by the evidence of Shiv Chand R. W. 7. He said:

"The Returning Officer had not announced that he had accepted the nomination papers of Kishan Lal but had written the word 'accepted'. This I know because I was sitting next to him."

On this evidence, it is not possible to hold that the returning officer had announced his decision accepting the nomination paper, but had reviewed his own order afterwards on objection being raised and let in evidence on the next day and rejected the nomination paper.

3. Before the learned trial Judge, a good deal of evidence was adduced and arguments advanced as to whether the words 'chamar' and 'mochi' were synonymous and even if Kishan Lal was held to be a mochi, there was no reason to exclude him from the fold of the caste of chamars in which case his nomination paper was wrongly rejected. For this we have to refer to Article 341 of the Constitution under Clause 1 of which the President may, with respect to any State or Union Territory, and where it is a State, after consulting the Governor of the State, by public notification specify the castes, races or tribes or parts or groups within castes, races or tribes which shall for the purposes of the Constitution, be deemed to be Scheduled Castes in relation to that State or Union Territory as the case may be. This article empowered the President to specify not only the entire castes but tribes or parts or groups within castes, races or tribes which were to be treated as Scheduled Castes in relation to a particular caste. So far as chamars and mochis are concerned, it will be noted from a reference to the Constitution (Scheduled Castes) Order, 1950 that the President was not of opinion that they were to be considered to belong to the same caste in all the different States. For instance, in the States of Andhra Pradesh, Bihar, Gujarat, Kerala, Madhya Pradesh, Madras, Maharashtra, Mysore, Orissa, Rajasthan and West Bengal chamars and mochis were put on the same footing.

4. Before the Reorganisation of the Punjab Act of 1966 item 9 of Part X of the Order specifying the Scheduled Castes in the State read—

"Chamar, Jatia Chamar, Raghar, Ralgar, Ramdasi or Ravidasi." After the reorganisation of territories and creation of new States by the said Act

the Scheduled Castes Order was amended providing for the specification of Scheduled Castes for the new States and territories. The Constitution (Scheduled Castes) (Union Territories) Order of 1951 was also amended in 1966. As a result of the above changes, the final position with regard to the Scheduled Castes was as follows. Item No. 9 remained unaltered as regards the new States of Haryana and the Punjab. Chamars and Mochis were put in the same class as regards the Union territory of Delhi and Himachal Pradesh, while the position in the Union territory of Chandigarh remained the same as in the old State of Punjab. This shows that even when the subject of specification of Scheduled Castes engaged the attention of the President in 1966 he did not take the view that mochis should be classed together with chamars in so far as the State of Haryana, Punjab and the Union territory of Chandigarh were concerned. It is also clear that the question of inclusion of mochis in the scheduled castes was considered by him. Apart from this, there are two decisions of this Court which conclude the point.

5. In *Basavalingappa v. D. Munichinnappa*, 1965-1 SCR 316 = (AIR 1965 SC 1269) an election petition was filed challenging the election of the first respondent *inter alia* on the ground that he was not a member of any of the scheduled castes mentioned in the Constitution (Scheduled Castes) Order, 1950. Respondent No. 1 claimed that he belonged to the scheduled caste listed as 'Bhovi' in the Order. The appellant, on the other hand contended that respondent No. 1 was a Voddar by caste and that Voddar was not a scheduled caste specified in the order and consequently, he could not stand for election from a scheduled caste constituency. It was held by this Court that it was not open to anyone to seek for any modification in the order by producing evidence to show (for example) that though caste A alone was mentioned in the Order, caste B was also a part of Caste A, and as such to be deemed to be included in caste A. This Court also pointed out that "wherever one caste has another name it has been mentioned in brackets after it in the Order. Therefore, generally speaking, it would not be open to any person to lead evidence to establish that caste B is part of caste A notified in the Order." In the peculiar circumstances of this case, evidence was

allowed to be led to identify the caste specified in the Order because the Order referred to a Scheduled Caste known as Bhovi in the Mysore State as it was before 1956 and therefore it had to be accepted that there was some caste which the President intended to include after consultation with the Rajpramukh in the Order, when the Order mentioned the caste Bhovi as a scheduled caste. But when it was not disputed specifically that there was no caste known as Bhovi in the Mysore State before 1956, the only course open to courts was to find which caste was meant by Bhovi by taking evidence.

6. A point very similar to the one before us came up for consideration in this Court in *Bhaiya Lal v. Harikrishen Singh*, 1965-2 SCR 877 = (AIR 1965 SC 1557). There, the appellant's election was challenged on the ground that he belonged to the Dohar caste and was not a chamar. Dealing with this point, it was stated by this Court:

"...the plea that the Dohar caste is a sub-caste of the Chamar caste cannot be entertained in the present proceedings in virtue of the Constitution (Scheduled Castes) Order, 1950."

Reference was then made to Article 341 of the Constitution, Cls. 1 and 2 and it was said:

"In order to determine whether or not a particular caste is a scheduled caste within the meaning of Article 341, one has to look at the public notification issued by the President in that behalf. In the present case, the notification refers to Chamar, Jatav or Mochi and so in dealing with the question in dispute between the parties, the enquiry which the Election Tribunal can hold is whether or not the appellant is a Chamar, Jatav or Mochi. The plea that though the appellant is not a Chamar as such, he can claim the same status by reason of the fact that he belongs to the Dohar caste which is a sub-caste of the Chamar caste, cannot be accepted. It appears to us that an inquiry of this kind would not be permissible having regard to the provisions contained in Article 341."

These judgments are binding on us and we do not therefore think that it would be of any use to look into the gazeteers and the glossaries on the Punjab castes and tribes to which reference was made at the Bar to find out whether mochi and chamar in some parts of the State at least meant the same caste although there

might be some difference in the professions followed by their members, the main difference being that Chamars skin dead animals which mochis do not. However that may be, the question not being open to agitation by evidence and being one the determination of which lies within the exclusive power of the President, it is not for us to examine it and come to a conclusion that if a person was in fact a mochi, he could still claim to belong to the scheduled caste of chamars and be allowed to contest an election on that basis. Quite a lot of evidence was adduced orally and also by documents before the learned trial Judge to show that Krishan Lal was a chamar and not a mochi. The learned Judge examined the evidence thoroughly and we do not propose to do the same again. In his view Krishan Lal was a mochi and not a chamar and we do not see any reason why we should come to any different conclusion.

7. Once we hold that it is not open to this Court to scrutinise whether a person who is properly described as a mochi also falls within the caste of chamars and can describe himself as such, the question of the impropriety of the rejection of his nomination paper based on such distinction disappears. In this case, Krishan Lal was found to be mochi and not a chamar and therefore his nomination paper was rightly rejected. He tried to prove by evidence that he was a chamar but he did not succeed thereon. The appeal therefore fails, and is dismissed with costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 600 (V 56 C 118)

(From Calcutta High Court)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJSoli Pestonji Majoo, Appellant v Ganga
Dhar Khemka, Respondent.

Civil Appeal No 24 of 1968, D/- 6-12-1968

(A) Transfer of Property Act (1882),
S 67 — Civil Procedure Code (1908),
O. 34, Rr 1 and 4, First Schedule App.
'D' Form 5-A — Puisse mortgagee party(*Appeal No. 82 of 1959, D/- 17-1-1962—
Cal)

DM/EM/G350/68

in prior mortgagee's suit — Claim of prior mortgagee satisfied by payments made by mortgagor before sale — Puisse mortgagee is entitled to institute separate suit in respect of his mortgage — Effect of incorporation of relevant sections of T. P. Act in O. 34, Civil P. C. — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Operation of Acts).

A puisne mortgagee in respect of whose mortgage decree has already been made in a prior mortgagee's suit to which he is made a party, is entitled to institute a separate suit in respect of his mortgage and ask for a decree in Form 5-A of App. "D" in First Schedule of Civil P. C. when the claim of the prior mortgagee made in the prior mortgagee's suit has been satisfied by payments made by the mortgagor and as a result thereof no sale takes place in the suit. The puisne mortgagee is merely made a party to the suit in order that he may have an opportunity of redeeming if he wishes and in order that he may receive his mortgage money, or part of it, out of the surplus sale-proceeds after satisfaction of the prior mortgage, but the decree is not really a decree in his favour, and he can not insist upon a sale nor get a personal decree in his favour if the prior mortgagee is satisfied by the mortgagor before the sale. AIR 1919 Mad 100 (2) & (1947) 51 Cal WN 798. Approved. Case Law Disc. (Paras 3, 4)

The practice of treating the suit as one for the benefit of the puisne mortgagee was based on the English practice from the case of Platt v. Mendel, (1884) 27 Ch D 246. But under the Transfer of Property Act, the proper procedure is different and the effect of incorporation of the relevant sections in the Transfer of Property Act under O. 34 of the new Code of Civil Procedure was to put an end to any independent practice on the original side of the Calcutta High Court based on the old procedure. Distinction between English practice and Indian practice noticed. Case Law Disc. (Para 4)

(B) Civil P. C. (1908), S. 34, O. 34, Rr. 2, 4, 11 — Scope and applicability — Suit by puisne mortgagee — Grant of interest — Principles — Appeal No. 82 of 1959, D/- 17-1-1962 (Cal), Reversed — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Special and general provisions.)

Order 34, Rr. 2 and 4 which applies to a mortgage suit, enjoins the Court to order

an account to be taken of what is due to the plaintiff at the date of such decree for principal and "interest on the mortgage". The special provision in O. 34 has therefore to be applied in preference to the general provision in S. 34. Till the period for redemption expires the matter is considered to remain in the domain of contract and interest has to be paid at the rate and with the rests specified in the contract of mortgage but after the period for redemption has expired the matter passes from the domain of contract to that of judgment. The right of the mortgagee will henceforth depend not on the contents of his bond but on the directions of the decree. Order 34, R. 11 gives a certain amount of discretion to the Court so far as interest pendente lite and subsequent interest is concerned and it is no longer absolutely obligatory on the Courts to decree interest at the contractual rates upto the date of redemption in all circumstances even if there is no question of the rate being penal, excessive or substantially unfair. AIR 1927 P. C. 1 and AIR 1940 F. C. 20, Foll. (Para 5)

Held under the circumstances of the case that the puisne mortgagee should be granted interest on the principal sum due at the contractual rate till the date of the suit and simple interest at 6 per cent p. a. on the principal sum adjudged from the date of the suit till the date of the preliminary decree and also at the same rate till the date of realisation: Appeal No. 82 of 1959 D/- 17-1-1962 (Cal.), Reversed.

(Para 5)

(C) Civil P. C. (1908), S. 35, O. 34, R. 10 — Puisne mortgagee also a party in suit by prior mortgagee — Separate suit by puisne mortgagee — Part of claim in respect of interest not decreed — Plaintiff awarded costs proportionate to his success as between attorney and client — Puisne mortgagee held not entitled to costs incurred by him in previous suit in which he was made a party.

(Para 6)

Cases Referred: Chronological Paras

- (1947) 51 Cal WN 798, Shir Kumar Prosad v. Trustees for Improvement of Calcutta 3
- (1940) AIR 1940 FC 20 (V 27)=72 Cal LJ 165, Jaigobind Singh v. Lachmi Narain Ram 5
- (1927) AIR 1927 PC 1 (V 14)=54 Ind App 1, Jagannath Prasad Singh Chaudhury v. Surajmal Jalal 5

- (1919) AIR 1919 Mad 100 (2) (V 6)=ILR 42 Mad 90, Vedavyasa Ayyar v. Madura Hindu Sabha Nidhi Co., Ltd. 3
- (1910) ILR 37 Cal 907, Sarat Chandra Roy Chowdhury v. M. M. Nahapiet 4
- (1897) ILR 24 Cal 190=1 Cal WN 156, Kissory Mohun Roy v. Kali Churn Ghosh 4
- (1897) 1 Cal WN 106, Kissory Mohun Roy v. Kalu Churn Ghosh 4
- (1895) ILR 22 Cal 100, Kissory Mohun Roy v. Kally Churn Ghosh 4
- (1884) 27 Ch D 246=51 LT 424, Platt v. Mendel 4

M/s. Rameshwar Nath and Mahinder Narain, Advocates, of M/s. Rajinder Narain and Co., for Appellant; Mr. J. P. Mitter, Senior Advocate (M/s. Sardar Bahadur, Vishnu Bahadur and Miss Younginder Khushalani, Advocates with him), for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.:— The appellant is the executor of the estate of Pestonji Sorabji Majoo deceased, hereinafter referred to as the 'mortgagor'. During his lifetime the mortgagor was the owner of one-third share in premises No. 50, Chit-taranjan Avenue, Calcutta. On November 21, 1938, the mortgagor executed a deed of mortgage in respect of his one-third share in favour of Shew Balak Pandey for Rs. 7,500/-. On December 3, 1945 he executed another deed of mortgage in respect of his one-third share in favour of one Sudhinder Nath Mitter for Rs. 8,350/-. On May 6, 1947, he executed the third deed of mortgage in respect of his one-third share of the premises in favour of the respondent Gangadhar Khemka for Rs. 12,000/- carrying interest at the rate of 12 per cent per annum with monthly rests. On January 13, 1948 Shew Balak Pandey filed a suit on his mortgage, being Suit No. 135 of 1948, impleading the puisne mortgagees as parties to the suit. On December 12, 1949, a preliminary mortgage decree in Form 9 of Appendix 'D' in the First Schedule to the Code of Civil Procedure was passed in the said suit. Since the mortgagor did not pay, a final decree was passed on December 4, 1952 in the suit. The decree directed that the mortgaged property should be sold. It contained a further direction for the disbursement of the sale proceeds and it was stated that if any balance was left

after payment of the amounts due to Pandey and Mitter, "that shall be applied in payment of the amount payable to the defendant Ganga Dhar Khemka under the aforesaid preliminary decree and in payment of any amount which may be adjudged due to the said defendant Ganga Dhar Khemka for such costs of the suit." On July 4, 1954, the mortgagor, without having the property put to sale paid off the decretal dues of Pandey. On August 5, 1955, the respondent filed the suit out of which this appeal arises, being Suit No. 2218 of 1955 jointly against the appellant and his mother Mrs Majoo for a mortgage decree in Form 5-A. The appellant and Mrs Majoo filed a joint written statement. The suit ultimately came for hearing before Law, J., on June 2, 1958. Several issues were raised in the suit and Law, J., decreed the suit and passed a preliminary decree in Form 5-A of Appendix 'D' in the First Schedule to the Code of Civil Procedure and declared that a sum of Rs 41,172/6/- was due to the respondent on June 2, 1958. The appellant and Mrs Majoo took the matter in appeal before the Division Bench consisting of Bachawat and Das Gupta, JJ, who partially allowed the appeal and varied the decree by reducing the amount declared due in the decree dated July 10, 1958 from Rs. 41,172/6/- to Rs. 38, 207/-.

2. This appeal is brought, by special leave, from the judgment of the Division Bench of the Calcutta High Court dated January 17, 1962.

3. The first question presented for determination in this appeal is whether a puisne mortgagee in respect of whose mortgage a decree has already been made in a prior mortgagee's suit to which he is made a party, is entitled to institute a separate suit in respect of his mortgage and ask for a decree in Form 5-A when the claim of the prior mortgagee made in the prior mortgagee's suit has been satisfied by payments made by the mortgagor-defendant and as a result thereof no sale takes place in the suit. It was argued on behalf of the appellant that the respondent was not entitled to file the suit because of the preliminary decree passed in Suit No 135 of 1948 in which he as a puisne mortgagee was made a party-defendant and the only course open to him as such puisne mortgagee was to apply for a final decree for sale and thereby realise his dues from the surplus sale proceeds of the mortgaged

property. It was submitted that the appellant (respondent?) was not entitled in the circumstances to bring a fresh suit on his mortgage. We are unable to accept this argument. Clause (5) of the decree in Form 9 clearly states that "if the defendant No. 2 (puisne mortgagee) pays into Court to the credit of the suit the amount adjudged due to the plaintiff (prior mortgagee) but the defendant No. 1 (mortgagor) makes default in the payment of the said amount, then the defendant No 2 (puisne mortgagee) shall be at liberty to apply to the Court to keep the plaintiffs (prior mortgagee's) mortgage alive for his benefit and to apply for a final decree." In other words, if the puisne mortgagee redeems the prior mortgage then he can step into the shoes of the prior mortgagee and apply for final decree. The puisne mortgagee cannot apply for the sale unless he pays off the prior mortgage. It is manifest that the puisne mortgagee is added as a defendant in a suit of this description only with the purpose of redeeming the prior mortgage, if he wished and proving his mortgage and having the accounts taken. Such account of the puisne mortgagee is taken because if there are any surplus sale proceeds after meeting the prior mortgagee-plaintiff's claim, he can participate in such surplus sale proceeds as may be available for the satisfaction of the claim of the puisne mortgagee. Essentially therefore the rights of puisne mortgagee-defendant in a prior mortgagee's suit are, first, the right to redeem the prior mortgage, and, secondly, the right to participate in the surplus sale proceeds. This view is borne out by the decision of the Madras High Court in Vedavyasa Ayyar v. The Madura Hindu Sabha Nidhi Co. Ltd., ILR 42 Mad 90 = (AIR 1919 Mad 100 (2)) in which it was held that the rights of the subsequent mortgagees are contingent on the property being brought to sale for non-payment of the sum due to the plaintiff-mortgagee and a decree drawn up in Form 7 of Appendix D of the Code of Civil Procedure cannot be read as a decree directing the mortgagor to redeem each of the puisne encumbrances within the time limited for redeeming the first mortgagee. It was accordingly held that the puisne mortgagee was not entitled to execute the decree for the amount due to him when no sale was held for the realisation of the amount due to the prior mortgagee and the re-

medy of the puisne mortgagee was a suit for sale and Section 47, Civil Procedure Code was no bar to the suit. The same view has been taken in *Shiv Kumar Prosad v. The Trustees for the Improvement of Calcutta*, (1947) 51 Cal WN 798 in which Chakravarti, J. observed at page 802 as follows:

"It is true that he (puisne mortgagee) gets a free adjudication of his rights but the only practical relief which the decree gives him is that he is declared entitled to obtain satisfaction of his dues out of the surplus sale proceeds if any be left after satisfying the plaintiff's dues (see Form No. 9). The puisne mortgagee cannot apply for a final decree unless he himself pays off the prior mortgagee and the right to apply for a sale arises only if the plaintiff's dues are not paid but not if the puisne mortgagee's due are not."

The learned Judge proceeded to observe:

"When he is impleaded as a defendant in a prior mortgagee's suit he is brought before the Court whether he wishes to come or not and his rights are adjudicated on by the Court under the compulsion of Order 34, Rule 4 (5)."

4. Some uncertainty in this branch of law has been caused by the English practice as mentioned in *Platt v. Mende*, (1884) 27 Ch D 246 and *Daniel's Chancery Practice*. But having regard to the provisions of the Transfer of Property Act and the present Civil Procedure Code the Indian practice is quite different. The distinction has been pointed out by Pugh, J. in *Sarat Chandra Roy Chowdhry v. M. M. Nahapiet*, (1910) ILR 37 Cal 907. It was observed by the learned Judge that prior to the Code of Civil Procedure, 1908 there was a recognised practice on the original side of the Calcutta High Court to treat the preliminary mortgage decree as being in favour not only of the first mortgagee, but also in favour of the second mortgagee.—(See the decision of Sale, J. in *Kissory Mohun Roy v. Kaly Churn Ghose*, (1895) ILR 22 Cal 100 and *Kissory Mohun Roy v. Kaly Churn Ghose*, (1897) ILR 24 Cal 190. But in a later case, in the matter of *Kissory Mohun Roy v. Kali Charan Ghose*, (1897) 1 Cal WN 106, Sale, J. allowed a second mortgagee, who was a defendant, under the liberty retained to him by the preliminary decree, to come in and obtain an order for sale of the property outside Calcutta, which

was subject only to the second mortgage, not to the first. This practice of treating the suit as one for the benefit of the second mortgagee was based on the English practice as it appears from the case of (1884) 27 Ch D 246 supra. But under the Transfer of Property Act, the proper procedure is different and the effect of incorporation of the relevant sections in the Transfer of Property Act under O. 34 of the new Code of Civil Procedure was to put an end to any independent practice on the original side of the Calcutta High Court based on the old procedure. The legal position therefore is that the second mortgagee is merely made a party to the suit in order that he might have an opportunity of redeeming if he wished, and in order that he might receive his mortgage money, or part of it, out of the surplus sale-proceeds after satisfaction of the first mortgage, but the decree was not really a decree in his favour, and he could not insist upon a sale nor get a personal decree in his favour if the first mortgagee was satisfied by the mortgagor before the sale. We accordingly reject the argument of the appellants on this aspect of the case.

5. We pass on to consider the second contention raised on behalf of the appellants, namely that even if the respondent is entitled to institute a second mortgage suit the High Court ought not to have granted interest to the respondent at the rate of 12 per cent p. a. with monthly rests even after the date of the suit and the maximum interest which should have been allowed was not more than 6 per cent p. a. simple on the principal sum adjudged. In our opinion this argument is well founded and there was no justification for the High Court to allow interest at the contractual rate from the date of the suit on the amount adjudged. Prior to 1929 the legal position was that under Section 34 of the Civil Procedure Code in granting a decree for payment of money the Court had full discretion to order interest at such rate as it deemed reasonable to be paid on the principal sum adjudged from the date of the suit onwards. But Order 34, Rules 2 and 4 which applied to a mortgage suit, enjoined the Court to order an account to be taken of what was due to the plaintiff at the date of such decree for principal and "interest on the mortgage". The special provision in O. 34 had therefore to be applied in preference to the general provision in Section 34. Till the

period for redemption expired therefore the matter was considered to remain in the domain of contract and interest had to be paid at the rate and with the rests specified in the contract of mortgage but after the period for redemption had expired the matter passed from the domain of contract to that of judgment. The right of the mortgage would henceforth depend not on the contents of his bond but on the directions of the decree—(See the decision in Jagannath Prosad Singh Chowdhury v Surajmal Jalal, AIR 1927 PC 1). By Act 21 of 1929, O. 34 of Civil Procedure Code was amended and a new R. 11 was inserted which deals specially with interest and which states:

11. In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage at the rate payable on the principal or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money at the rate agreed between the parties, or, failing such rate (at the same rate as is payable on the principal, or failing both such rates, at nine per cent per annum), and

(b) subsequent interest up to the date of realisation or actual payment at such rate as the Court deems reasonable—

(i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause, and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under Rule 10.

This rule was further amended by the Code of Civil Procedure Amendment Act, 1956 but we are not concerned with this

further amendment in the present case. It is apparent that the new rule 11 as inserted by the Amending Act 21 of 1929 provides that the Court "may" order payment of interest to the mortgagee upto the date fixed for payment at the rate payable on the principal. It was held by the Federal Court in Jaigobind Singh v. Lachmi Naran Ram, AIR 1940 FC 20 that the language of the rule gives a certain amount of discretion to the Court so far as interest pendente lite and subsequent interest is concerned and it was no longer absolutely obligatory on the Courts to decree interest at the contractual rates upto the date of redemption in all circumstances even if there is no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. In view of the principle laid down by the Federal Court in this decision we are of opinion that in the circumstances of the present case the respondent should be granted interest on the principal sum due at the contractual rate till the date of the suit and simple interest at 6 per cent p a. on the principal sum adjudged from the date of the suit till the date of the preliminary decree and also at the same rate till the date of realisation.

6. We accordingly allow this appeal to the extent indicated above and modify the decree of the Calcutta High Court. The plaintiff-respondent will be awarded costs proportionate to his success in the present suit as between attorney and client. He is not entitled to the costs he has incurred in the previous suit i. e., suit No. 135 of 1948 in which he was made a party. The order of the High Court with regard to costs is also modified to this extent. There will be no order as to costs of this appeal.

SSG/D.V.C.

Appeal partly allowed.

AIR 1969 SUPREME COURT 604
(V 56 C 119)

(From Supreme Court. AIR 1969 SC)

447
M HIDAYATULLAH, C. J., J. C SHAH,
V. RAMASWAMI, G. K. MITTER
AND A. N. GROVER, JJ.

Vishwanatha Reddy, Petitioner v.
Konappa Rudrappa Nadgouda and
another, Respondents.

Review Petn. No. 54 of 1968, D/ 13-9-1968

CM/CM/E849/68

Representation of the People Act (1951 as amended by Act 47 of 1966), Ss. 84, 101, 9A and 53 — Only two contesting candidates — Returned candidate found to be under statutory disqualification at date of filing nomination paper — Votes cast in his favour may be regarded as thrown away, irrespective of whether voters who voted for him were aware of the disqualification — No fresh poll is necessary — The other contesting candidate can be declared elected. AIR 1960 SC 131, Overruled.

When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification and no fresh poll is necessary. This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate. Section 53 renders a poll necessary only if there are more candidates contesting the election than the number of seats contested. If the number of candidates validly nominated is equal to the number of seats to be filled, no poll is necessary. Where by an erroneous order of the Returning Officer poll is held which, but for that order, was not necessary, the Court would be justified in declaring those contesting candidates elected, who, but for the order, would have been declared elected. AIR 1960 SC 131, Overruled; AIR 1969 SC 447, Affirmed.

(Paras 12, 14)

When in an election petition which complies with Sec. 84 of the Act it is found at the hearing that some votes were obtained by the returned candidate by corrupt practices, the Court is bound to declare the petitioner or another candidate elected if, but for the votes obtained by the returned candidate by corrupt practice, such candidate would have obtained a majority of votes. In cases falling under clause (b) of Sec. 101 the Act requires merely proof of corrupt practice, and obtaining votes by corrupt

practice; it does not require proof that the voters whose votes are secured by corrupt practice had notice of the corrupt practice. If for the application of the rule contained in clause (b) notice to the voters is not a condition precedent, there is no reason why it should be insisted upon in all cases under clause (a). The votes obtained by corrupt practice by the returned candidate, proved to be guilty of corrupt practice, are expressly excluded in the computation of total votes for ascertaining whether a majority of votes had been obtained by the defeated candidate, and no fresh poll is necessary. The same rule should apply when at an election there are only two candidates and the returned candidate is found to be under a statutory disqualification existing at the date of the filing of the nomination paper. (Para 13)

The general rule of election law, which prevailed in the British Courts for a long time, that the votes cast in favour of a person who is found disqualified for election may be regarded as thrown away only if the voters had notice before the poll of the disqualification of the candidate cannot be extended to the trial of disputes under Indian election law, for it is not consistent with the Indian Statute Law and in any case the conditions prevailing in India do not justify the application of that rule. If the rule is applied the provisions of S. 84 read with S. 101(a) would practically be nugatory. (1874) LR 9 CP 626 & (1904) 1 KB 74 & (1889) 23 QBD 79 & (1961) 3 All ER 354, Ref. to. (Paras 11, 12)

Cases Referred: Chronological Paras

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| (1961) 1961-3 All ER 354=24 MLR 757, In re, Bristol South East Parliamentary Election | 10 |
| (1960) AIR 1960 SC 131 (V 47)= (1960) 1 SCR 902, Keshav Laxman Borker v. Dr. Devrao Laxman Anande | 2, 6, 14 |
| (1904) (1904) 1 KB 74=73 LJKB 47, Hobbs v. Moray | 8 |
| (1889) 23 QBD 79=58 LJQB 316, Beresford Hope v. Lady Sandhurst | 9 |
| (1874) LR 9 CP 626=43 LJCP 355, Drinkwater v. Deakin | 7 |

M/s. B. S. Patil, M. K. Ramamurthi, Vineet Kumar and Mrs. Shyamal Pappu, Advocates, for Petitioner; Mr. S. V. Gupte, Senior Advocate (M/s. S. S. Javali and B. Datta, Advocates, with him), for Respondent No. 1.

The following judgment of the Court was delivered by

SHAH, J.— Vishwanatha Reddy was declared elected to the Mysore Legislative Assembly from the Yadgri constituency at the poll held in February 1967. Nadgouda who was a contesting candidate filed a petition before the High Court of Mysore for an order setting aside the election of Reddy on the ground that Reddy was disqualified from standing as a candidate for election and for an order declaring that he—Nadgouda—be declared elected. The High Court rejected the petition. In appeal, this Court held that at the date of nomination Reddy was disqualified from standing as a candidate and passed an order on July 19, 1968 that—

“...the appeal is therefore allowed, the election of the first respondent is declared void. In this view of the matter the votes cast in favour of the first respondent be treated as thrown away. As there was no other contesting candidate we declare the appellant (election petitioner) elected to the seat from the Yadgri constituency.”

2. Reddy then applied for review of judgment and claimed, relying upon the decision of this Court in Keshav Laxman Borkar v. Dr. Devrao Laxman Anande (1960) 1 SCR 902 = (AIR 1960 SC 131) that in the circumstances of the case no order declaring Nadgouda (sic) could be made by this Court. This Court granted review of judgment by order dated August 27, 1968, and the appeal is now before us for consideration of the question whether it is open to this Court on the finding recorded about the disqualification of Reddy to declare Nadgouda as duly elected to the Mysore Legislative Assembly.

3. Out of seven candidates who filed their nomination papers for election, five candidates withdrew their candidature, and Nadgouda and Reddy were the only two candidates remaining in the field. Nomination of Reddy was challenged before the Returning Officer on the plea that Reddy was disqualified by virtue of Section 9A of the Representation of the People Act from standing as a candidate for election to the Mysore State Legislative Assembly, but that objection was overruled and his nomination was accepted. Reddy secured at the poll 4,000 more votes than Nadgouda and was declared elected.

4. This Court has declared the election of Reddy void on the ground of disqualification under Section 9A of the Representation of the People Act, and the question is no longer in issue at this stage. The only question which remains to be determined is whether in the events which have transpired, Nadgouda could under the law be declared elected.

5. Section 53 of the Representation of the People Act provides that if the number of contesting candidates is more than the number of seats to be filled, a poll shall be taken, and if the number of such candidates is equal to the number of seats to be filled, the returning officer shall forthwith declare all such candidates to be duly elected to fill those seats. “Disqualified” means “disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State” Section 7 (b). Section 9A of the Act provides:

“A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken, by that Government.

Explanation—

Reddy was on the finding recorded by this Court incompetent to be chosen as a member of the Legislative Assembly. Objection was raised before the Returning Officer that Reddy was disqualified, but no general notice was given to the electorate about the disqualification. On the view that Reddy was not disqualified, the Returning Officer accepted his nomination and at the poll Reddy was declared duly elected.

6. Section 84 of the Representation of the People Act provides that—

“A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.”

Nadgouda by his election petition did make a claim that the election of Reddy be declared void and that he—Nadgouda—be declared duly elected. Section 100 sets out the grounds on which an election may be declared void, and S 101 sets out the grounds on which a candidate other than the returned candidate may be declared to have been elected. That section provides:

"If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion—

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,

"the High Court shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate as the case may be, to have been duly elected."

The expression "valid votes" used in Section 101 has not been defined in the Act. But this Court has held in *Keshav Laxman Borkar's case*, (1960) 1 SCR 902 = (AIR 1960 SC 131) that a candidate whose nomination paper is accepted after scrutiny, is a validly nominated candidate "at least for the purpose of receiving votes at the election", and that the candidate must be treated as a person for whom votes could be given. The Court on that view held that where there are only two candidates for a seat and the election of the candidate declared elected is set aside on the ground that he was disqualified the defeated candidate cannot be declared elected, and there must be a fresh election. In the opinion of the Court the votes cast in favour of the disqualified candidate cannot be said to be thrown away unless there is a "special pleading" that certain voters had cast their votes with the knowledge or notice that the candidate for whom they had voted was not eligible for election, and they had deliberately thrown away their votes in favour of the disqualified person: in the absence of such a plea it cannot be said that the votes cast in favour of a person who was by law disqualified from being nominated, but who was in fact nominated, were thrown away. In the Court's view a defeated candidate out of the two who contested the election may be declared elected under Section 84 read with Section 101 of the Act, if he proves that the voters had notice of the disqualification of the successful candidate. Correctness of this view is challenged before us.

7. The rule enunciated by this Court was apparently adopted from certain cases decided by the Courts in the United Kingdom. In *Drinkwater v. Deakin*, (1884) LR 9 CP 626 it was held that bribing by a candidate at an election, though it renders his election void if he be found guilty of it on petition, does not incapacitate at that election in the sense that the votes given for him by voters with knowledge of it will be thrown away, and that no disqualification arises in that sense of the term until after the candidate has been found guilty of bribery on petition, and consequently, the petitioner was not entitled to the seat.

8. In *Hobbs v. Moray*, (1904) 1 KB 74 at a municipal election a person who had an outstanding contract with a municipality was nominated as a candidate and was declared duly elected. The defeated candidate then claimed the seat on the plea that the successful candidate was disqualified. It was held that the nomination of the successful candidate was invalid, and as the defeated candidate did not allege any notice to the electorate of the disqualification of the successful candidate, the votes given for him could not be treated as thrown away, and the defeated candidate was not entitled to claim the seat.

9. In *Beresford Hope v. Lady Sandhurst*, (1889) 23 QBD 79 it was held by the Court of Appeal that an election of a woman candidate to a county council under the Local Government Act, 1888, being void, the defeated candidate could be declared elected, because it was common knowledge that women are incapacitated from being elected members of a county council and the votes given to the woman candidate were thrown away.

10. In a recent judgment of the Court of Appeal in *Re. Bristol South East Parliamentary Election*, 1961-3 All ER 354, at the parliamentary election Wedgwood Benn was declared duly elected member of the Parliament. Prior to that date St. Clair a contesting candidate had sent out notices to all persons entitled to vote stating that by reason of his status as a peer of the United Kingdom Wedgwood Benn was disqualified from being elected a member of Parliament and that all votes given for him would be thrown away and be null and void. Similar notices were published in the newspapers circulating in the constituency and were posted at the entrance to polling stations. The Court of Queen's Bench held in that case

that the facts which in law created the incapacity of Wedgwood Benn to be elected a member of Parliament were known to the electors before they cast their votes, and the Court was bound to declare that the votes cast for the successful candidate had been thrown away. The petitioner (defeated candidate) was accordingly declared duly elected.

11. The cases decided by the Courts in the United Kingdom appear to have proceeded upon some general rule of election law that the votes cast in favour of a person who is found disqualified for election may be regarded as thrown away only if the voters had notice before the poll of the disqualification of the candidate.

12. But in our judgment the rule which has prevailed in the British Courts for a long time has no application in our country. Section 53 of the Representation of the People Act renders a poll necessary only if there are more candidates contesting the election than the number of seats contested. If the number of candidates validly nominated is equal to the number of seats to be filled, no poll is necessary. Where by an erroneous order of the Returning Officer poll is held which, but for that order, was not necessary, the Court would be justified in declaring those contesting candidates elected, who, but for the order, would have been declared elected. The rule enunciated by the Courts in the United Kingdom has only the merit of antiquity. But the rule cannot be extended to the trial of disputes under our election law, for it is not consistent with our statute law, and in any case the conditions prevailing in our country do not justify the application of that rule. If the rule is applied in our country, the provisions of Section 84 read with Sec. 101 (a) would practically be nugatory. Apart from the immense cost of intimating each voter in the vast electorate in the constituencies the rule that a defeated candidate may be declared elected only if he pleads and proves that the voters had notice of the disqualification would render the exception in the context of prevailing illiteracy and ignorance of large sections of the electorate in our country, a dead letter. A very large percentage of the electorate in our country is, unfortunately illiterate and sections thereof not infrequently speak a language different from the language of the Majority. It would be well-nigh impossible to give informa-

tion of the disqualification of a candidate in a medium which the illiterate electors understand. We are again unable to see any logic in the assumption that votes cast in favour of a person who is regarded by the returning officer as validly nominated but who is in truth disqualified, could still be treated as valid votes, for the purposes of determining whether a fresh election should be held. When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification. This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate.

13. The view that we are taking is consistent with the implication of Cl (b) of Section 101. When in an election petition which complies with Section 84 of the Act it is found at the hearing that some votes were obtained by the returned candidate by corrupt practices, the Court is bound to declare the petitioner or another candidate elected if, but for the votes obtained by the returned candidate by corrupt practice, such candidate would have obtained a majority of votes. In cases falling under Clause (b) of Section 101 the Act requires merely proof of corrupt practice, and obtaining votes by corrupt practice: it does not require proof that the voters whose votes are secured by corrupt practice had notice of the corrupt practice. If for the application of the rule contained in Clause (b) notice to the voters is not a condition precedent, we see no reason why it should be insisted upon in all cases under Clause (a). The votes obtained by corrupt practice by the returned candidate, proved to be guilty of corrupt practice, are expressly excluded in the computation of total votes for ascertaining whether a majority of votes had been obtained by the defeated candidate and no fresh poll is necessary. The same rule should, in our judgment, apply when

(1925) 267 US 132 = 69 L Ed
 543 = 45 SCT 280 = 39 ALR
 790, Carroll v. United States 7, 20
 (1925) 269 US 20 = 70 L Ed
 145 = 46 SCT 4 = 51 ALR 409,
 Agnello v. United States 16
 (1914) 232 US 383 = 58 L Ed
 652 = 34 SCT 341 = LRA 1915
 B 834, Weeks v. United States 11
 (1891) 141 US 250 = 35 L Ed
 734 = 11 SCT 1000, Union Pac.
 R. Co. v. Botsford 7
 (1878) 97 US 642 = 24 L Ed
 1035, Stacey v. Emery 28
 43 F 2d 911, United States v. Poller 30

Louis Stokes argued the cause for Petitioner; Reuben M. Payne argued the cause, for Respondent.

OPINION OF THE COURT

Mr. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

2. Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary. (1) Following the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton, (2) by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he

1. Ohio Rev. Code S. 2923.01 (1953) provides in part that "No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person." An exception is made for properly authorized law enforcement officers.

2. Terry and Chilton were arrested, indicted, tried, and convicted together. They were represented by the same attorney, and they made a joint motion to suppress the guns. After the motion was denied, evidence was taken in the case against Chilton. This evidence consisted of the testimony of the arresting officer and of Chilton. It was then stipulated that this testimony would be applied to the case against Terry, and no further evidence was introduced in that case. The trial judge considered the two cases together, rendered the decisions at the same time and sentenced the two men at the same time. They prosecuted their state Court appeals together through the same attorney, and they petitioned this Court for certiorari together. Following the grant of the writ upon this joint petition, Chilton died. Thus, only Terry's conviction is here for review.

was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day". He added: "Now, in this case when I looked over they didn't look right to me at the time".

3. His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men. "I get more purpose to watch them when I seen their movements", he testified. He saw one of the men leave the other one and walk south-west on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

4. By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up", and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun". Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the

street corner. Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, retrieved a .38 caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record he never placed his hands beneath Katz's outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

5. On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial Court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons. However, the Court denied the defendant's motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the Court held, the officer had the right to pat down the outer clothing of these men, whom he had reasonable cause to believe might be armed. The Court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons

and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible".

6. After the Court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The Court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed *State v. Terry*, (1966) 5 Ohio App 2d 122 = 214 NE 2d 114. The Supreme Court of Ohio dismissed petitioner's appeal on the ground that no "substantial constitutional question" was involved. We granted certiorari, (1967) 387 US 929 = 18 L Ed 2d 989 to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp v. Ohio*, (1961) 367 US 643 = 6 L Ed 2d 1081. We affirm the conviction.

I.

7. The Fourth Amendment provides that

"the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated This inestimable right of personal security belongs as much to the citizen on the streets of our great cities as to the homeowner closeted in his study to dispose of his secret affairs. For as this Court has always recognized,

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference, unless by clear and unquestionable authority of law". *Union Pac. R. Co. v. Botsford*, (1891) 141 US 250-251 = 35 L Ed 734, 737.

We have recently held that "the Fourth Amendment protects people, not places", *Katz v. United States*, (1967) 389 US 347, 351 = 19 L Ed 2d 576, 582 = 88 S Ct 597 and wherever an individual may harbor a reasonable "expectation of privacy", *id.*, at 361, 19 L Ed 2d at 588 (Mr Justice Harlan concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures". *Illinois v. United States*, (1960) 364 US 206, 222=4 L Ed 2d 1669, 1690. Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. *Beck v. Ohio*, (1964) 379 US 89 = 13 L Ed 2d 142, *Rios v. United States*, (1960) 364 US 253, 4 L Ed 2d 1688; *Henry v. United*

States, (1959) 361 US 98 = 4 L Ed 2d 134; United States v. Di Re, (1948) 332 US 581 = 92 L Ed 210; Carroll v. United States, (1925) 267 US 132 = 69 L Ed 543. The question is whether in all the circumstances of this on-the-street encounter his right to personal security was violated by an unreasonable search and seizure.

8. We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to “stop and frisk”—as it is sometimes euphemistically termed—suspicious persons.

9. On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a “stop” and an “arrest” (or a “seizure” of a person), and between a “frisk” and a “search.”(3) Thus, it is argued, the police should be allowed to “stop” a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to “frisk” him for weapons. If the “stop” and the “frisk” give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal “arrest”, and a full incident “search” of the person. This scheme is justified in part upon the notion that a “stop” and a “frisk” amount to a mere “minor” inconvenience and petty indignity,(4) which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer’s suspicion.(5)

3. Both the trial Court and the Ohio Court of Appeals in this case relied upon such a distinction. State v. Terry, 5 Ohio App 2d 122, 125-130, 214 NE 2d 114, 117-120 (1966). See also, e.g., People v. Rivera, 14 NY 2d 441, 201 NE 2d 32, 252 NYS 2d 458 (1964), cert denied, 379 US 978, 13 L Ed 2d 568, 85 S Ct 679 (1965); Aspen, Arrest and Arrest Alternatives: Recent Trends, 1966 U Ill LF 241, 249-254; Warner, The Uniform Arrest Act, 28 Va L Rev 315 (1942); Note, Stop and Frisk in California, 18 Hastings LJ 623, 629-632 (1967).

4. People v. Rivera, supra. n. 3, at 447, 201 NE 2d, at 36, 252 NYS 2d, at 464.

5. The theory is well laid out in the Rivera opinion:

10. On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment.(6) It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary co-operation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution. Acquiescence by the Courts in the compulsion inherent in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in “the often competitive enterprise of ferretting out crime”. Johnson v. United States, (1948) 333 US 10, 14 = 92 L Ed 436, 440. This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation’s cities.(7)

11. In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in

“.....[T]he evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed.

“And as the right to stop and inquire is to be justified for a cause less conclusive than that which would sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police customarily act”. People v. Rivera, 14 NY 2d 441, 445, 447, 201 NE 2d 32, 34, 35, 252 NYS 2d 458, 461, 463 (1964), cert denied, 379 US 978, 13 L Ed 2d 568, 85 S Ct 679 (1965).

6. See, e.g., Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?, 51 J Crim LC & PS 402 (1960).

7. See n 11, infra.

which policemen and citizens confront each other on the street. The State has characterized the issue here as "the right of a police officer . . . to make an on-the-street stop, interrogate and pat down for weapons (known in the street vernacular as 'stop and frisk')"(8) But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. See *Weeks v. United States*, (1914) 232 US 383, 391-393 = 58 L Ed 652, 655, 656. Thus its major thrust is a deterrent one, see *Lankletter v. Walker*, (1965) 381 US 618, 629-635 = 14 L Ed 2d 601, 608-612, and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words". (1961) 367 US 643, 655 = 6 L Ed 2d 1091, 1090. The rule also serves another vital function—"the imperative of judicial integrity" (1960) 364 US 206, 222 = 4 L Ed 2d 1669, 1680. Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

12. The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them being in a friendly enough manner, only to take a different turn upon the injection of

some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime(9) Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police,(10) it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

13. Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes frequently complain, (11) will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking

9. See *Tiffany, McIntyre & Rotenberg, Detection of Crime—Stopping and Questioning, Search and Seizure, Encouragement and Entrapment* 18-56 (1967). This sort of police conduct may, for example, be designed simply to help an intoxicated person find his way home, with no intention of arresting him unless he becomes obstreperous. Or the police may be seeking to mediate a domestic quarrel which threatens to erupt into violence. They may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.

10. See *Tiffany, McIntyre & Rotenberg, supra*, n 9, at 100-101; Note, 47 Nw U L Rev 493, 497-499 (1952).

11. The President's Commission on Law Enforcement and Administration of Justice found that "in many communities, field interrogations are a major source of friction between the police and minority groups." President's Commission on Law Enforcement and Administration of Justice. Task Force Report: The Police 183 (1967) It was reported that the friction caused by "misuse of field interrogations" increases "as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." *Id.*, at 184. While the frequency with which

application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overhearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.

14. Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest. Given the narrowness of this question we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

II.

15. Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search". There is

"frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, see Tiffany, McIntyre and Rotenberg, *supra*, n 9, at 47-48 it cannot help but be a severely exacerbating factor in police community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets." *Id.*, at 47-48.

some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution.⁽¹²⁾ We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecute for crime—"arrests" in traditional terminology. It must be recognised that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search". Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity."⁽¹³⁾ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.⁽¹⁴⁾

12. In this case, for example, the Ohio Court of Appeals stated that "we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the Fourth Amendment and probable cause is essential." *State v. Terry*, 5 Ohio App 2d 122, —, 214 NE2d 114, — (1966). See also, e. g., *Ellis v. United States*, 264 F 2d 372, 374 (CA DC Cir 1959); Note, 65 Col L Rev 848, 860 and n 81 (1965).

13. Consider the following apt description:

"[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet. *Priar and Martin, Searching and Disarming Criminals*, 45 J Crim L. C. and P. S. 481 (1954).

14. See n 11, *supra* and accompanying text.

We have noted that the abusive practices which play a major though by no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an

16. The danger in the logic which proceeds upon distinctions between a "stop" and an "arrest", or "seizure" of the person, and between a "frisk" and a "search" is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation (15). This Court

assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.

15. These dangers are illustrated in part by the course of adjudication in the Court of Appeals of New York. Although its first decision in this area, *People v. Rivera*, 14 NY2d 441, 201 NE2d 32, 252 NYS2d 458 (1964), cert denied, 379 US 978, 13 L Ed 2d 568, 85 S Ct 679 (1965), rested squarely on the notion that a "frisk" was not a "search", see nn. 8-5, supra, it was compelled to recognize in *People v. Taggart*, 20 NY2d 335, 342, — NE2d —, — NYS2d —, — (1967), that what it had actually authorized in *Rivera* and subsequent decisions, see, e.g., *People v. Pugach*, 15 NY2d 65, 204 NE2d 176, 255 NYS2d 833 (1964), cert denied 380 US 936, 13 L Ed 2d 823, 85 S Ct 946 (1965), was a "search" upon less than probable cause. However, in acknowledging that no valid distinction could be maintained on the basis of its cases, the Court of Appeals continued to distinguish between the two in theory. It still defined "search" as it had in *Rivera* — as an essentially unlimited examination of the person for any and all seizable items — and merely noted that the cases had upheld police intrusions which went far beyond the original limited conception of a "frisk". Thus, principally because it failed to consider limitations upon the scope of searches in individual cases as a potential mode of regulation, the Court of Appeals in three short years arrived at the position that the Constitution must, in the name of necessity, be held to permit unrestrained rummaging about a person and his effects upon mere suspicion. It did apparently limit its holding to "cases involving serious personal injury or grave irreparable property damage," thus excluding those involving "the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like." *People v. Taggart*, supra, at 340, — NE2d, at —, — NYS2d, at —.

In our view the sounder course is to recognize that the Fourth amendment governs all intrusions by agents of the public upon personal security and to make the

has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment "by virtue of its intolerable intensity and scope." *Kremen v. United States*, (1957) 353 US 346, 1 L Ed 2d 876, Go-Bart Importing Co. v. United States, (1931) 282 US 344, 356-358, 75 L Ed 374, 381-383; see (1948) 332 US 581, 586-587, 92 L Ed 210, 216. The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. *Warden v. Hayden*, (1967) 387 US 294, 810, 18 L Ed 2d 782, 794. (Mr. Justice Fortas, concurring); see e.g., *Preston v. United States* (1964) 376 US 364, 367-368, 11 L Ed 2d 777, 780, 781; *Agnello v. United States*, (1925) 289 US 20, 30-31, 70 L Ed 145, 148.

17. The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under

the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

18. In this case there can be no question then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did. (16) And in determining whether

scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. Cf. *Brinegar v. United States*, 338 US 160, 183, 93 L Ed 1879, 1894, 69 S Ct 1302 (1949) (Mr. Justice Jackson, dissenting). (Compare *Camara v. Municipal Court*, 387 US 523, 537, 18 L Ed 2d 930, 940, 87 S Ct 1727 (1967). This seems preferable to an approach which attributes too much significance to an overly technical definition of "search", and which turns in part upon a judgment hierarchy of legislative enactments in the criminal sphere. Focusing the inquiry squarely on the dangers and demands of the particular situation also seems more likely to produce rules which are intelligible to the police and the public alike than requiring the officer in the heat of an unfolding encounter on the street to make a judgment as to which laws are "of limited public consequence."

16. We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention"

the seizure and search were "unreasonable" our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

III.

19. If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, see, e. g., (1967) 389 US 347, 19 L Ed 2d 576, (1964) 379 US 89, 98, 13 L Ed 2d 142, 147; *Chapman v. United States*, (1961) 365 US 610, 5 L Ed 2d 828, or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances, see, e. g., (1967) 387 US 294, 18 L Ed 2d 782 (hot pursuit); cf. (1964) 376 US 364, 367-368, 11 L Ed 2d 777, 780, 781. But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth amendment's general proscription against unreasonable searches and seizures. (17)

20. Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the inva-

and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

17. See generally, *Leagre*. The Fourth Amendment and the Law of Arrest, 54 J. Crim. L. C. and P. S. 393, 398-403 (1963).

sion which the search [or seizure] entails." *Camara v. Municipal Court*, (1967) 387 US 523, 534, 536-537, 18 L Ed 2d 930, 938-940. And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. (18) The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. (19) And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Cf. (1925)

18. This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence. See *Beck v. Ohio*, 379 US 89, 96-97, 13 L Ed 2d 142, 147, 148, 85 S Ct 223 (1964); *Ker v. California*, 374 US 23, 34-37, 10 L Ed 2d 726, 738-740, 83 S Ct 1623 (1963); *Wong Sun v. United States*, 371 US 471, 479-484, 9 L Ed 2d 441, 450-452, 83 S Ct 407 (1963); *Rios v. United States*, 364 US 253, 261-262, 4 L Ed 2d 1688, 1693, 1694, 80 S Ct 1431 (1960); *Henry v. United States*, 361 US 98, 100-102, 4 L Ed 134, 137, 138, 80 S Ct 168 (1959); *Draper v. United States*, 358 US 307, 312-314, 3 L Ed 2d 327, 331, 332, 79 S Ct 329 (1959); *Brinegar v. United States*, 338 US 160, 175-178, 93 L Ed 1879, 1890, 1891, 69 S Ct 1302 (1949); *Johnson v. United States*, 333 US 10, 15-17, 92 L Ed 436, 441, 442, 68 S Ct 367 (1948); *United States v. Di Re*, 332 US 581, 593-595, 92 L Ed 210, 219, 220, 68 S Ct 222 (1948); *Husty v. United States*, 282 US 694, 700-701, 75 L Ed 629, 632, 51 S Ct 240, 74 ALR 1407 (1931); *Dumbra v. United States*, 268 US 435, 441, 69 L Ed 1032, 1036, 45 S Ct 546 (1925); *Carroll v. United States*, 267 US 132, 159-162, 64 L Ed 543, 554, 555, 45 S Ct 280, 39 ALR 790 (1925) *Stacey v. Emery*, 97 US 642, 645, 24 L Ed 1035, 1036 (1878).

19. See, e. g., *Katz v. United States* 389 US 347, 354-357, 19 L Ed 2d 576, 583, 585, 88 S Ct 507 (1967); *Berger v. New York*, 388 US 41, 54-60, 18 L Ed 2d 1040, 1049, 1053, 87 S Ct 1873 (1967); *Johnson v. United States*, 333 US 10, 13-15, 92 L Ed 436, 440, 441, 68 S Ct 367 (1948); cf. *Wong Sun v. United States*, 371 US 471, 479-480, 9 L Ed 2d 441, 450, 83 S Ct 407 (1963). See also *Aguiar v. Texas*,

267 US 132, 69 L Ed 543, (1964) 379 US 89, 96-97, 13 L Ed 2d 142, 147, 148 (20) Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches a result this Court has consistently refused to sanction. See, e.g., Beck v. Ohio, supra, (1960) 364 US 253, 4 L Ed 2d 1688, (1959) 361 US 98, 4 L Ed 2d 134 And simple "good faith on the part of the arresting officer is not enough." ... If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." Beck v. Ohio, supra at 97, 13 L Ed 2d at 148

21. Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behaviour even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away, it would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighbourhood to have failed to investigate this behavior further.

378 US 108, 110-115, 12 L Ed 2d 723, 725-729, 84 S Ct 1509 (1964)

20 See also cases cited in n. 18, supra.

22. The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives (21)

23. In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

21. Fifty-seven law enforcement officers were killed in the line of duty in this country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policemen. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41 of them inflicted by handguns easily secreted about the person. The remaining two murders were perpetrated by knives. See Federal Bureau of Investigation, Uniform Crime Reports for the United States — 1966, at 45-48, 152 and Table 51

The easy availability of firearms to potential criminals in this country is well known and has provoked much debate. See e.g., President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 239-243 (1967). Whatever the merits of gun-control proposals, this fact is relevant to an assessment of the need for some form of self-protective search power.

24. We must still consider however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

25. Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or "mere" evidence, incident to the arrest.

26. There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon. (1964) 376 US 364, 367, 11 L Ed 2d 777, 780, is also justified on other grounds, *ibid.*, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. (1967) 387 US 294, 310, 18 L Ed 2d 782, 794, (Mr Justice Fortas, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a

"full" search, even though it remains a serious intrusion.

27. A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. (22) The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. See *Camara v. Municipal Court*, *supra*.

28. Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances

22. See generally W. LaFare, *Arrest—The Decision to Take a Suspect into Custody* 1-13 (1965).

would be warranted in the belief that his safety or that of others was in danger. Cf. (1964) 379 US 89, 91, 13 L Ed 2d 142, 145, Brinegar v. United States, (1949) 338 US 160, 174-176, 93 L Ed 1879, 1889-1891, Stacey v. Emery, (1878) 97 US 642, 645, 24 L Ed 1035, 1036 (23).

And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. Brinegar v. United States supra.

IV.

29 We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a "stick-up". We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed, and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

30. The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether

23. See also cases cited in n. 18, supra.

they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation. Compare (1967) 389 US 347, 354-356, 19 L Ed 2d 576, 583-585 The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." United States v. Poller, 43 F2d 911, 914 (CA 2d Cir 1930), see, e.g., (1965) 381 US 618, 629-635, 14 L Ed 2d 601, 608-612, (1961) 387 US 643, 6 L Ed 2d 1081, (1960) 364 US 206, 216-221, 4 L Ed 2d 1669, 1676-1679. Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation, (1967) 387 US 294, 310, 18 L Ed 2d 782, 793, (Mr. Justice Fortas, concurring).

31. We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. See *Sibron v. New York*, (1968) 20 L Ed 2d 917. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See (1964) 376 US 364, 367, 11 L Ed 2d 777, 780 The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

32. The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz's person beyond the outer surfaces of his clothes, since he discovered nothing in his pat down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

V.

33. We conclude that the revolver seized from Terry was properly admitted

In evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

34. Affirmed.

35. Mr. JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in *Katz v. United States* and the concurring opinion in *Warden v. Hayden*.

SEPARATE OPINIONS

Mr. JUSTICE HARLAN, concurring.

36. While I unreservedly agree with the Court's ultimate holding in this case, I am constrained to fill in a few gaps, as I see them, in its opinion. I do this because what is said by this Court today will serve as initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops.

37. A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court. Since the question in this and most cases is whether evidence produced by a frisk is admissi-

ble, the problem is to determine what makes a frisk reasonable.

38. If the State of Ohio were to provide that police officers could, on articulable suspicion less than probable cause, forcibly frisk and disarm persons thought to be carrying concealed weapons, I would have little doubt that action taken pursuant to such authority could be constitutionally reasonable. Concealed weapons create an immediate and severe danger to the public, and though that danger might not warrant routine general weapons checks, it could well warrant action on less than a "probability." I mention this line of analysis because I think it vital to point out that it cannot be applied in this case. On the record before us Ohio has not clothed its policemen with routine authority to frisk and disarm on suspicion; in the absence of state authority, policemen have no more right to "pat down" the outer clothing of passers-by, or of persons to whom they address casual questions, than does any other citizen. Consequently, the Ohio courts did not rest the constitutionality of this frisk upon any general authority in Officer McFadden to take reasonable steps to protect citizenry, including himself, from dangerous weapons.

39. The state courts held, instead, that when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection. This holding, with which I agree and with which I think the Court agrees, offers the only satisfactory basis I can think of for affirming this conviction. The holding has, however, two logical corollaries that I do not think the Court has fully expressed.

40. In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

41. The facts of this case are illustrative of a proper stop and an incident frisk. Officer McFadden had no probable cause to arrest Terry for anything, but he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery. His justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him, and Officer McFadden did so. When he did, he had no reason whatever to suppose that Terry might be armed, apart from the fact that he suspected him of planning a violent crime. McFadden asked Terry his name, to which Terry "mumbled something." Whereupon McFadden, without asking Terry to speak louder and without giving him any chance to explain his presence or his actions, forcibly frisked him.

42. I would affirm this conviction for what I believe to be the same reasons the Court relies on. I would, however, make explicit what I think is implicit in affirmance on the present facts. Officer McFadden's right to interrupt Terry's freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically.

43. Upon the foregoing premises, I join the opinion of the Court.

Mr. JUSTICE WHITE, concurring.

44. I join the opinion of the Court, reserving judgment, however, on some of the Court's general remarks about the scope and purpose of the exclusionary rule which the Court has fashioned in the process of enforcing the Fourth Amendment.

45. Also, although the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing ques-

tions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. In my view, it is temporary detention, warranted by the circumstances, which chiefly justifies the protective frisk for weapons. Perhaps the frisk itself, where proper, will have beneficial results whether questions are asked or not. If weapons are found, an arrest will follow. If none are found, the frisk may nevertheless serve preventive ends because of its unmistakable message that suspicion has been aroused. But if the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.

Mr. JUSTICE DOUGLAS, dissenting.

46. I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards, unless there was "probable cause." I to believe that (1) a crime had been com-

1. The meaning of "probable cause" has been developed in cases where an officer has reasonable grounds to believe that a crime has been or is being committed. See, e.g., *The Thompson*, 3 Wall 155, 18 L Ed 55, *Stacey v. Emery*, 97 US 642, 24 L Ed 1035; *Director General v. Kastenbaum*, 263 US 25, 68 L Ed 146, 44 S Ct 52, *Carroll v. United States*, 267 US 132, 69 L Ed 543, 45 S Ct 289, 39 ALR 790; *United States v. Di Re*, 332 US 581, 92 L Ed 210, 68 S Ct 222, *Brinegar v. United States*, 338 US 160, 93 L Ed 1879, 69 S Ct 1302, *Draper v. United States*, 358 US 307, 3 L Ed 2d 327, 79 S Ct 329; *Henry v. United States*, 361 US 93, 4 L Ed 2d 134, 80 S Ct 163. In such cases, of course, the officer may make an "arrest" which results in charging the individual with commission of a crime. But while arresting persons who have already committed crimes is an important task of law enforcement, an equally if not more important function is crime prevention and deterrence of would-be criminals. "[T] here is no war between the Constitution and commonsense." *Mapp v. Ohio*, 367 US 643, 657, 6 L Ed 2d 1081,

mitted or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

47. The opinion of the Court disclaims the existence of "probable cause." If loitering were an issue and that was the offence charged, there would be "probable cause."

1091, 81 S Ct 1684, 84 ALR 2d 933. Police officers need not wait until they see a person actually commit a crime before they are able to "seize" that person. Respect for our constitutional system and personal liberty demands in return, however, that such a "seizure" be made only upon "probable cause."

2. 29 Page's Ohio Rev Code § 2923.01.

3. This Court has always used the language of "probable cause" in determining the constitutionality of an arrest without a warrant. See e.g., *Carroll v. United States*, 267 US 132, 156, 161-162, 69 L Ed 543, 552, 554, 555, 45 S Ct 280, 39 ALR 790; *Johnson v. United States*, 333 US 10, 13-15, 92 L Ed 436, 439-441, 68 S Ct 367; *McDonald v. United States*, 335 US 451, 455-456, 93 L Ed 153, 158, 69 S Ct 191; *Henry v. United States*, 361 US 98, 4 L Ed 2d 134, 80 S Ct 168; *Wong Sun v. United States*, 371 US 471, 479-484, 9 L Ed 2d 441, 450-452, 83 S Ct 407. To give power to the police to seize a person on some grounds different from or less than "probable cause" would be handing them more authority than could be exercised by a magistrate in issuing a warrant to seize a person. As we stated in *Wong Sun v. United States*, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407, with respect to requirements for arrests without warrants: "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." *Id.*, at 479, 9 L Ed 2d at 450. And we said in *Brinegar v. United States*, 338 US 160, 176, 93 L Ed 1879, 1890, 69 S Ct 1302:

"These long-prevailing standards [for probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper

ble cause" shown. But the crime here is carrying concealed weapons; 2 and there is no basis for concluding that the officer had "probable cause" for believing that crime was being committed. Had a warrant been sought, a magistrate would therefore, have been unauthorized to issue one, for he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again. 3

In other words, police officers, up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their "seizure" without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty, that is not sounded by phrases such as "reasonable suspicion." Moreover, the meaning of "probable cause" is deeply imbedded in our constitutional history. As we stated in *Henry v. United States*, (1959) 361 US 98, 100-102; 4 L Ed 2d 134, 137-138,

"The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required.

"That 'philosophy [rebelling against these practices] later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest. And that principle has survived to this day.

"It is important, 'we think,' that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with pro-

law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

And see *Johnson v. United States*, 333 US 10, 14-15, 92 L Ed 436, 440, 441, 68 S Ct 367; *Wrightson v. United States*, 222 F2d 556, 559-560 (CA DC Cir 1955).

bable cause, he is protected even though it turns out that the citizen is innocent. . . And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause . . . This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen."

47A. The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inking and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every-day life on which reasonable and prudent men, not legal technicians, act." (1949) 338 US 160, 175, 93 L Ed 1879, 1890.

48. To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken it should be the deliberate choice of the people through a constitutional amendment. Until the Fourth Amendment, which is closely allied with the Fifth is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.

49. There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

4. See *Boyd v. United States*, 116 US 616, 633, 29 L Ed 746, 752:

"For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

50. Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his gib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

R. G. D.

Conviction affirmed.

AIR 1969 U. S. S. C. 46 (V 56 C 6)
(1968-20 L Ed. 2d. 733)*

BRENNAN, J.

Brenda K. Monroe et al, Petitioners v. Board of Commissioners of the City of Jackson, Tenn, et al, Respondents.

(No. 740) Decided on 27-5-1968.

†Constitution of India, Art. 14 — Constitution of America, 14th Amendment — Racially segregated school system — Conversion to unitary system — School Board's "free transfer plan" held inadequate to convert the system into unitary one.

The principles governing determination of the adequacy of the plan as compliance with the Board's responsibility to effectuate a transition to a racially non-discriminatory system are those laid down in AIR 1969 USSC 1. (Para 10)

Tested by those principles, School Board's "Free-transfer" plan which permits a child after registering in his assigned school in his attendance zone, to freely transfer to another school of his choice if space is available is clearly inadequate to comply with the Board's responsibility to effectuate a transition from racially segregated school system to a racially non-discriminatory system. The plan does not meet affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. Rather than further the dismantling of the dual system, the ("free transfer") plan has operated simply to burden children and their parents with a responsibility which the Supreme Court of America placed squarely on the School Board. (Para 12)

That the Board has chosen to adopt a method of achieving minimal disruption of the old pattern was evident from its long delay in making any effort whatsoever to desegregate, and the deliberately discriminatory manner in which the Board administered the plan until checked by the District Court. (Para 12)

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†Reference is given to a parallel Indian provision for the convenience of Indian Lawyers.

CM/CM/A328/69

While such "free-transfer" plan under some circumstances might be valid, no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment. (Para 13)

It cannot be held that "free transfer" can have no place in a desegregation plan. But if it cannot be shown that such a plan will further rather than delay conversion to a unitary, non-racial, non-discriminatory school system, it must be held unacceptable. (Para 14)

The vitality of constitutional principles cannot be allowed to yield simply because of disagreement with them. (Para 13)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 USSC 1 (V 56) = | |
| 20 Law Ed 2d 716, Green v. | |
| County School Board of New | |
| Kent County | 1, 12, 14 |
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| 244 F Supp 353 | 7, 9 |
| 302 F 2d 818, North-cross v. Board | |
| of Education of City of Memphis | 4 |
| 380 F 2d 955 | 9 |

James M. Nabrit III argued the cause, for Petitioners; Russell Rice argued the cause, for Respondents. Louis F. Claiborne argued the cause, for United States, as amicus curiae, by special leave of Court.

OPINION OF THE COURT

Mr. JUSTICE BRENNAN delivered the opinion of the Court.

This case was argued with No. 695, Green v. County School Board of New Kent County, (1968) 20 L Ed 2d 716: (AIR 1969 USSC 1 and No. 805, Raney v. Board of Education of the Gould School District, (1968) 20 L Ed 2d 727. The question for decision is similar to the question decided in those cases. Here, however, the principal feature of a desegregation plan—which calls in question its adequacy to effectuate a transition to a racially non-discriminatory system in compliance with Brown v. Board of Education (1954) 349 US 294, 99 L Ed 1083, (Brown II)—is not "freedom of

choice" but a variant commonly referred to as "free transfer."

2. The respondent Board of Commissioners is the School Board for the City of Jackson, located in mid-western Tennessee. The school district coincides with the city limits. Some one-third of the city's population of 40,000 are Negroes, the great majority of whom live in the city's central area. The school system has eight elementary schools, three junior high schools, and two senior high schools. There are 7,650 children enrolled in the system's schools, about 40% of whom, over 3,200, are Negroes.

3. In 1954 Tennessee by law required racial segregation in its public schools. Accordingly, five elementary schools, two junior high schools, and one senior high school were operated as "white" schools, and three elementary schools, one junior high school, and one senior high school were operated as "Negro" schools. Racial segregation extended to all aspects of school life, including faculties and staffs.

4. After Brown v. Board of Education, (1953) 347 US 483, 98 L Ed 873, (Brown I), declared such State-imposed dual systems unconstitutional, Tennessee enacted a pupil placement law, Tenn Code S 49-1741 et seq. (1966). That law continued previously enrolled pupils in their assigned schools and vested local school boards with the exclusive authority to approve assignment and transfer requests. No white children enrolled in any "Negro" school under the statute and the respondent Board granted only seven applications of Negro children to enroll in "white" schools, three in 1961 and four in 1962. In March 1962 the Court of Appeals for the Sixth Circuit held that the pupil placement law was inadequate "as a plan to convert a bi-racial system into a nonracial one." Northcross v. Board of Education of City of Memphis, 302 F2d 818, 821.

5. In January 1963 petitioners brought this action in the District Court for the Western District of Tennessee. The complaint sought a declaratory judgment that respondent was operating a compulsory racially segregated school system, injunctive relief against the continued maintenance of that system, an order directing the admission to named "white" schools of the plaintiff Negro school children, and an order requiring respondent Board to formulate a desegregation plan. The District Court ordered the Board to enroll the children in the schools in question and directed the Board to formulate and file a desegregation plan. A plan was duly filed and, after modifications directed by the court were incorporated, the plan was approved in August 1963 to be effective immediately in the elementary schools and to be gradually extended over a four-year period. to the junior high

schools and senior high schools. 221 F Supp 968

6 The modified plan provides for the automatic assignment of pupils living within attendance zones drawn by the Board or school officials along geographic or "natural" boundaries and "according to the capacity and facilities of the [school] buildings . . ." within the zones. *Id.*, at 974. However, the plan also has the "free-transfer" provision which was ultimately to bring this case to this Court. Any child, after he has complied with the requirement that he register annually in his assigned school in his attendance zone, may freely transfer to another school of his choice if space is available, zone residents having priority in cases of overcrowding. Students must provide their own transportation, the school system does not operate school buses.

7. By its terms the "free-transfer" plan was first applied in the elementary schools. After one year of operation petitioners, joined by 27 other Negro school children, moved in September 1964 for further relief in the District Court, alleging respondent had administered the plan in a racially discriminatory manner. At that time the three Negro elementary schools remained all Negro; and 118 Negro pupils were scattered among four of the five formerly all white elementary schools. After hearing evidence, the District Court found that in two respects the Board had indeed administered the plan in a discriminatory fashion. First, it had systematically denied Negro children — specifically the 27 intervenors — the right to transfer from their all-Negro zone schools to schools where white students were in the majority, although white students seeking transfers from Negro schools to white schools had been allowed to transfer. The court held this to be a constitutional violation, see *Goss v. Board of Education*, (1963) 373 US 683, 10 L Ed 2d 632, as well as a violation of the terms of the plan itself. 244 F Supp 353, 359. Second, the court found that the Board, in drawing the lines of the geographic attendance zones, had gerrymandered three elementary school zones to exclude Negro residential areas from white school zones and to include those areas in zones of Negro schools located farther away. *Id.*, at 361-362.

8. In the same 1964 proceeding the Board filed with the court its proposed zones for the three junior high schools, Jackson and Tigrett, the "white" junior high schools, and Merry, the "Negro" junior high school. As of the 1964 school year the three schools retained their racial identities, although Jackson did have one Negro child among its otherwise all-white student body. The facul-

ties and staffs of the respective schools were also segregated. Petitioners objected to the proposed zones on two grounds, arguing first that they were racially gerrymandered because so drawn as to assign Negro children to the "Negro" Merry school and white children to the "white" Jackson and Tigrett schools, and alternatively that the plan was in any event inadequate to reorganize the system on a non-racial basis. Petitioners, through expert witnesses, urged that the Board be required to adopt a "feeder system," a commonly used method of assigning students whereby each junior high school would draw its students from specified elementary schools. The groupings could be made so as to assure racially integrated student bodies in all three junior high schools, with due regard for educational and administrative considerations such as building capacity and proximity of students to the schools.

9. The District Court held that petitioners had not sustained their allegations that the proposed high school attendance zones were gerrymandered, saying

"Tigrett [white] is located in the western section, Merry [Negro] is located in the central section and Jackson [white] is located in the eastern section. The zones proposed by the defendants would, generally, allocate the western section to Tigrett, the central section to Merry, and the eastern section to Jackson. The boundaries follow major streets or highways and railroads. According to the school population maps, there are a considerable number of Negro pupils in the southern part of the Tigrett zone, a considerable number of white pupils in the middle and northern parts of the Merry zone, and a considerable number of Negro pupils in the southern part of the Jackson zone. The location of the three schools in an approximate east-west line makes it inevitable that the three zones divide the city in three parts from north to south. While it appears that proximity of pupils and natural boundaries are not as important in zoning for junior highs as in zoning for elementary schools, it does not appear that Negro pupils will be discriminated against". 244 F Supp, at 362.

As for the recommended "feeder system," the District Court concluded simply that "there is no constitutional requirement that this particular system be adopted." *Ibid.* The Court of Appeals for the Sixth Circuit affirmed except on an issue of faculty desegregation, as to which the case was remanded for further proceedings. 380 F2d 955. We granted certiorari. (1968) 389 US 1033 = 19 L Ed 2d 821 and set the case for oral argument immediately following *Green v. County School Board*, *supra*. Although the case pre-

6. I have already reproduced the preamble which categorically states that the impugned tax is one on profession, trades, callings and employments.

7. For the determination of the nature of a tax, the charging section is always considered to be very important. I have already reproduced that section earlier in this judgment. It is clearly provided therein that the tax is on trade, or profession or calling or on employment. The preamble and the charging section leave no scope for argument that it is a tax on income. Sections 4 and 5 read along with the schedule clearly indicate that the gross total income is itself not the subject-matter of tax but is only a yardstick to measure the tax liability. The most distinguishing feature of tax on income is that it is correlated to income. In the present case I have already pointed out that the maximum tax payable is Rs. 250 with the result that there is no correlation between the tax and the income.

8. Some argument was made on the basis of the definition of "person" and "gross total income" given in the Adhiniyam. I have already reproduced the clauses defining these two expressions. Learned counsel contends that the definitions of "person" and "gross total income" clearly show that apart from a Hindu undivided family, a firm or an association, the coparceners who constitute the Hindu undivided family, the partners of the firm and the members of the association are also liable to pay tax on the basis of gross total income. In my judgment, the definitions of the expressions "person" and "gross total income" do not, in any manner, advance the case of the petitioners and are not relevant for the determination of the question as to whether or not the impugned tax is a tax on income. I have already said earlier that the total gross income up to the limit of Rs. 12,000 per year is only the yardstick to measure the tax liability and over that amount there is the fixed sum of Rs. 250 which is payable as tax irrespective of the gross total income.

9. I am, therefore satisfied that the present is not a tax on income but one on trades, callings, professions and employments.

10. I now proceed to deal with the connected submission made by learned counsel. It is contended that Entry 60 of List II of the Seventh Schedule of the Constitution provides for "taxes on professions, trades, callings and employments". The argument is that assuming that the case fell in Entry 60, the U.P. Legislature was permitted to impose tax either on professions or on trades or on callings or on employments but could not pass compendious measure to tax all. Reliance is placed upon the use of the word "taxes" occurring in the entry and not "tax" and it is contended that the Constituent Assembly intended that there would

be separate taxes on professions, trades, callings and employment. I am unable to agree.

If the entries in the II List of the Seventh Schedule are properly looked into, it would appear that the word used throughout is "taxes" and not "tax" as, for example, Entry 46 speaks of "taxes on agricultural income", Entry 47 of "duties in respect of succession to agricultural land", Entry 49 of "taxes on lands and buildings", Entry 50 of "taxes on mineral rights...", Entry 51 of "duties of excise...", Entry 53 of "taxes on the consumption or sale of electricity", Entry 54 of "taxes on the sale and purchase of goods...", Entry 55 of "taxes on advertisements...", Entry 56 of "taxes on goods and passengers", Entry 57 of "taxes on vehicles", Entry 58 of "taxes on animals and boats", Entry 59 of "tolls", Entry 61 of "capitation taxes" and Entry 62 "taxes on luxuries...". It cannot be said that when the Constituent Assembly used the words "taxes on agricultural income", more than one kind of tax was intended. The same thing is in respect of other entries. In my opinion, there is no substance in this submission of the learned counsel, also. The result is that I overrule the first submission made before me.

11. Learned counsel contends that a statute imposing a tax on professions, trades, callings and employments must clearly state that it is for the benefit of a State, a municipality, etc., and, in any case, it must be clear from the provisions of the Act or from other material that the revenues to be received from that tax are to be utilised for the benefit of the State or the municipality, etc., i.e., are used for public purpose. The submission is based upon the provisions of Art. 276 of the Constitution which reads:

"(1) Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings, or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority, in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum:

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority, a tax on professions, trades, callings or employments, the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by

Parliament may be made either generally, or in relation to any specified States, municipalities, boards or authorities."

Learned counsel laid great emphasis on the expression "for the benefit of State or a municipality, district board, local board or other authority" occurring in Clause (1) of Article 276. The submission is that the use of the word "benefit" shows that the levy should be imposed only for "public purpose". I am unable to agree. In my opinion, all that the expression "benefit of the State...." means is for the benefit of the revenues of a State, municipality or of a district board or a local board or local authority, that is to say, in order to augment the revenues of State or of a municipality or a District Board or a local Board or a local authority. I have no difficulty in holding that the word "benefit" is not used in the sense of "public purpose", as used in Art. 31 of the Constitution and as alleged by the learned counsel for the petitioners.

No authority has been brought to our notice in which it has been held that the expression "for the benefit of a State...." in Article 276 means for "public purpose".

12. A tax on profession and trade is not a new tax. It was being levied by the municipalities in our country with the previous sanction of the local Government concerned as far back as the eighteenth century. (See comparative table of the income for the years 1912 and 1913 at pp 674 and 676 of Indian Constitutional Documents, Vol. I, by F. Makerjee). The position up to the time the Government of India Act of 1915-19 came into force, however, was that a tax on profession and trade could be imposed only for the benefit of the local authorities and not to benefit the exchequer of the Provincial Government. In the Devolution Rules framed under the Government of India Act, 1915-19, Item No. 9 was a tax on trades, professions and callings for the benefit or for the purposes of local bodies. Entry No 9 of Sch. II of the Schedule Taxes Rules framed under the 1915-19 Act was "a tax on trades, professions and callings". In the Government of India Act, 1935, however, the restriction that the tax could be imposed only for the benefit of the local bodies was removed and Entry 46 of List II, which is reproduced below was very widely worded.—

"Taxes on professions, trades, callings and employments, subject, however, to the provisions of Section 142-A of this Act."

The present entry, as already pointed out earlier, is No. 60 of List 2. It is clearly provided therein that the tax can be imposed for the benefit of a State also in addition to that of a local body. The legislative history of the tax shows that originally it was levied only for the benefit of or for the purpose of a local body. Now it can be imposed also in order to augment the revenues of a State. That is why the ex-

pression "for the benefit of" has been used. It is true that it has not been said in so many words in the Adhiniyam that the object of the tax is to augment the revenue of the State or to benefit the State, but the Adhiniyam does not state that it is imposed for the benefit of any one else. Besides, the very fact that the State Legislature has imposed the tax shows that it is for the benefit of the State exchequer.

Section 9 of the Adhiniyam provides for deduction of the tax at source, and sub-section (3) of that section provides that the officer deducting any tax at source shall, in the prescribed manner, deposit the amount in a Government treasury within thirty days of such deduction and shall furnish, along with the returns, required to be filed under sub-section (2) a receipt from such treasury in token of such deposit. In respect of the tax not deducted at source, Section 10 of the Adhiniyam provides that it shall be deposited in Government treasury. Section 12 of the Adhiniyam requires a person liable to pay tax to deposit the full amount in Government treasury and obtain a receipt for the same. These provisions show that the tax is to be deposited in a Government treasury. The circumstance that it is deposited in a Government treasury clearly shows that it is for the benefit of the State Government.

13. Unlike the law prevailing in several States of the United States of America where every law imposing a tax has distinctly to state the purpose and the object for which the tax would be applied, our Constitution does not require such a statement in the Act. The Due Process Clause to which reference has been made by Willis on Constitutional Law, p. 374 and in American Jurisprudence, Vol. 51, para 130, is not applicable to this country, and there is no constitutional statutory provision requiring a taxing measure to mention the object for which the revenues received from that tax would be utilised. Mr. Asif Ansari has placed reliance upon certain American cases. I am not considering them because those decisions are based on the special provisions that exist in the States from which they come.

14. It is trite that the basic difference between a tax and a fee is that whereas a tax is imposed in order to augment the general revenues of the State, a fee is levied only in order to render a particular service and, therefore, the amount realised as fee must be expended in rendering that particular service. It is well settled that the power to tax and consequently the taxation itself would be presumed to be for public good and would not be subjected to any judicial review or scrutiny on that account. See *Atahari Tea Company v. State of Assam*, AIR 1961 SC 232 at p. 254 and *Hingir Hampur Coal Co. v. State of Orissa*, AIR 1961 SC 459, para 9.

15. At this stage I would like to refer to the statement of the objects and reasons as mentioned in the Bill which ultimately became the Adhiniyam. It reads:

"As the outlay of the 4th Five-Year Plan of the State is to be more than double that of the Third Plan, it has become necessary to explore all sources of revenue. The present situation resulting from Pakistan's aggression on the country has further added to the State's responsibility. It is accordingly considered necessary in the larger interest of the community to impose a tax on professions, trades, callings other than agricultural and employments in the State. Care has, however, been taken to ensure that the burden of the tax on the lower income group remains within the reasonable limits."

The statement of objects and reasons can be looked into in order to find out the reasons which induced the Legislature to enact the statute. See *Gujarat University v. Sri Krishna Ranganath Mudholkar*, AIR 1963 SC 703, para. 10.

16. Under Art. 266 of the Constitution of India "all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans, or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled 'the Consolidated Fund of the State'". Clause (2) of this Article provides that "all other public moneys received by or on behalf of.....the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be". Sub-clause (3) of this Article provides that "no moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution". It is thus clear that the revenues received from this tax would flow in the coffers of the State Government. Article 283 (2) of the Constitution provides that the custody of the Consolidated Fund of a State and Contingency Fund of a State as also of any other money receipt and the disbursement of the same shall be regulated by law made by the State Legislature and until provision in that behalf is made (shall be regulated) by rules made by the Governor. That being the position, it is clear that the tax in question has been imposed for the benefit of the State of U. P. and that the Adhiniyam does not suffer from the legal defect that it is not categorically stated therein that the tax is being imposed for the benefit of the State Government. I, therefore, find no merits in the second submission of the learned counsel.

17. It is contended that the provisions of the Adhiniyam are discriminatory and hit by Article 14 of the Constitution of India

because exemption from tax has been granted to agriculturists and to the members of the Armed Forces in India.

18. It is not correct to say that any exemption has been granted to agriculturists. An agriculturist who carries on a trade, profession or calling in addition to agriculture would have to pay the tax. What has been done is that the tax has been imposed on trade, profession and calling except the occupation or the calling of agriculture. Therefore it is not correct to say that the agriculturists have been excluded from the operation of the Adhiniyam. The factual position is that the occupation of agriculture has been excluded from the expression "callings" occurring in Section 3 of the Adhiniyam. It is true that sub-section (4) of Section 5 of the Adhiniyam provides that "no tax shall be payable by a member of the Armed Forces of India". There is thus a clear exemption given to the members of the Armed Forces.

19. The question for consideration is whether the circumstance that the occupation of agriculture has been excluded from the expression "callings" and the members of the Armed Forces of India have been exempted from the liability to pay the tax would render the provisions of the Adhiniyam unconstitutional.

20. It is well settled that the power to exempt is inherent in the power of taxation. Tax exemptions are normally made on the grounds of public policy. The submission of Mr. Asif Ansari is that from what has been stated in the legislature a large amount of money received as tax would be payable as loan or subsidy to persons carrying on agriculture and it is contended that there could be no rational basis for excluding agriculture from the expression "callings". It is also contended that there is no rational basis for exempting the members of the Armed Forces in India.

21. The burden of proving that the impugned Adhiniyam is discriminatory and is hit by Article 14 of the Constitution of India lies on the petitioners and the initial presumption is in favour of constitutionality. See *Rani Ratna Prova Devi v. State of Orissa*, AIR 1964 SC 1195, Para. 12. In the first place, there is not enough material on the record to show that, in fact, there exists any discrimination. Therefore, because of the vagueness of allegations and lack of sufficient particulars, it is not possible to hold that the provisions of the Adhiniyam are discriminatory. See *Pema Chibar v. Union of India*, AIR 1966 SC 442, Para. 12, *Prabhudass Morarji Raj Kotiya v. Union of India*, AIR 1966 SC 1044, Para. 4 and *Ajai Kumar Mukerji v. Local Board*, AIR 1965 SC 1561, Para. 7.

22. That agriculture is a class by itself cannot be a matter of any doubt. In the first place it cannot be comprehended in the expression "trade or profession or employment" and it is very doubtful if it can be comprehended in the expression "call-

ing". In Commissioner of Income Tax West Bengal v. Vinai Kumar Sahai, AIR 1957 SC 768, Para 95 it was said:

"The primary sense in which the term agriculture is understood is agar-field and cultivation, i.e., the cultivation of the field and the term is understood only in that sense, agriculture would be restricted only to cultivation of the land in the strict sense of the term meaning thereby tilling of the land, sowing of the seeds, planting and similar operations on the land

They are operations to be performed after the produce sprouts from the land, e.g., weeding, digging of the soil around the growth, removal of undesirable undergrowths and all operations which foster the growth and preserve the same not only from insects, pests but also from depredation from outside, tending, pruning, cutting, harvesting and rendering the produce fit for the market".

23. That being the nature of agricultural activity it appears to me that even if Section 3 had not so expressly provided the vocation of agriculture would be outside the scope of "profession, trade, calling and employment". It is true that in Section 3 the words other than agriculture have been used, but, to my mind, that is by way of abundant caution and with a view to make express what was already implied. In no case, can the occupation of agriculture be included in the expression "trade or profession or employment". I have given my reasons for saying that normally it would not be comprehended even in the expression "calling". But, since there was the remote possibility of some confusion being caused in the sense of including it in the expression "calling" the legislature has made clear what was already implied by expressly excluding agriculture.

24. To my mind, the exclusion of agriculture, from the ambit of Section 3 of the Act does not, in any manner, amount to discrimination as it is a class by itself. If the legislature thought it proper to exclude that class it is a matter of policy over which the courts have no control. See *Oudh Sugar Mills v. State of U. P.*, AIR 1960 All 136 (FB) Para 47. Even if it be assumed that from the amounts realised by way of this tax considerable sums would be paid to farmers and agriculturists by way of subsidy or loans it would not render the provisions of *adhiniam* discriminatory. It is well known that the most serious problem before the country today is to increase the food production. In fact, the survival of the country depends upon whether or not she can solve the food crisis. Therefore, any subsidy or any loan paid to a farmer or an agriculturist with a view to help him to increase the agricultural production of the country would not only be a justified act but would be a worthy act. In this connection I would like to point out the provisions

of Article 48 of the Constitution which reads.

"The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle."

That our country has still primitive and outmoded method of agriculture is well known. Therefore, any step taken to modernise agriculture and to increase food production in the country is fully justified. It may be giving a fillip to it by excluding agricultural income from taxation in the *Adhiniam*.

25. It is not correct to say that the agriculturists, or farmers are being treated as a privileged class and are not being subjected to taxation. The case of agriculturists by the very nature of their occupation has got to be separately treated. They have been subjected to ceiling laws by the enactment of U. P. Ceilings on Land Holdings Act. They have to pay land revenue and a surcharge has been imposed on them by virtue of the provisions of *Vnhat Jot Kar Adhiniam*, 1963.

26. Similarly the Armed Forces are also, a separate Class from others. It is a matter of policy not to subject them to this *Adhiniam*. Considerations for doing so may be many: one may be the hard duty the armed forces have to perform, the other may be disproportion between their salary and the risk involved in their duties, the third may be the call of the highest sacrifices from them including the laying down of their lives for the country. The statement of aims and objects shows that people were called upon to bear this tax burden *inter alia* on the ground of financial strain caused by Pakistan's aggression. The armed forces having already borne the burden in the shape of laying down of their lives, limbs and security, during the Pakistani war the exemption in their favour was not only logical but irresistible and imperative.

27. Article 14 forbids class legislation but not reasonable classification for the purposes of legislation. It is well settled that there are two conditions for passing the test of permissible classification. One of them is that the classification must be founded on intelligible differentia which distinguish person or thing that are grouped together or others left out of the group and the second one is that the differentia must have a reasonable nexus to the object sought to be achieved by the statute in question.

28. The classification may be founded on geographical basis or according to the objects or occupations of life. So long as there is 'equality and uniformity within each group the law will not be condemned as discriminatory. In my judgment, the

Adhiniyam satisfactorily complies with both the tests.

29. The power of the legislature to classify is of wide range and is flexible so that it can adjust its system of taxation.

30. In the present case, the submission comes to this that inasmuch as the State has taxed something it ought to have taxed every thing, a submission which must necessarily be rejected. In tax matters "the State is allowed to pick and choose districts, objectives, persons, methods and even rates for taxation if it does so reasonably". (See Willis on Constitutional Law p. 587).

31. In East India Tobacco Company v. State of Andhra Pradesh, AIR 1962 SC 1733, Para. 4 it was observed:

"But in deciding whether a taxation law is discriminatory or not, it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally and that cannot be justified on the basis of any valid classification that it would be violative of Article 14".

It is not necessary to multiply authorities because the principles on which such questions are decided are well accepted. I have already said above that the two tests laid down by the courts of law have been complied with in the present case. I am, therefore, satisfied that the provisions of the Adhiniyam are not discriminatory and are not hit by Article 14 of the Constitution of

India. There have been a very large number of cases where the Supreme Court rejected the submissions challenging the validity of an Act on the ground of discrimination. It is not necessary to reproduce all of those decisions here and only some may be cited as illustrative cases. In AIR 1962 SC 1733 (supra) the alleged discrimination was between the two species of the same article i.e., tobacco and the law was held valid. In Orient Weaving Mills Pvt. Ltd. v. Union of India, AIR 1963 SC 98, discrimination was alleged between cotton fabrics produced by co-operative society formed of owners of cotton power looms and cotton fabrics produced by the mills. The proposed excise duty was held to be valid. In British India Corporation Ltd. v. Collector of Central Excise, AIR 1963 SC 104, the classification between big manufacturers of footwear and small manufacturers was upheld for the purposes of excise duty.

32. I find no merits in the submission that the Adhiniyam is confiscatory in its nature. The submission is based on a wrong assumption that the gross income of a person is taxed. I have already shown earlier, in this judgment that the maximum amount of tax which a person can be charged however high his income may be is Rs. 250. The levy of such a small amount cannot be said to result in the provisions of the Act being confiscatory. I have already pointed out that the gross annual income is the yardstick to measure the tax liability and not the subject-matter of taxation. I am reproducing below the Schedule giving the rates of tax:

Where the annual gross income—

| | | Amount of Tax |
|---|-----|---------------|
| | | Rs. |
| (1) exceeds Rs. 3,500 but does not exceed Rs. 4,000 | ... | 12 |
| (2) exceeds Rs. 4,000 but does not exceed Rs. 5,000 | ... | 36 |
| (3) exceeds Rs. 5,000 but does not exceed Rs. 6,000 | ... | 60 |
| (4) exceeds Rs. 6,000 but does not exceed Rs. 7,000 | ... | 84 |
| (5) exceeds Rs. 7,000 but does not exceed Rs. 8,000 | ... | 108 |
| (6) exceeds Rs. 8,000 but does not exceed Rs. 9,000 | ... | 132 |
| (7) exceeds Rs. 9,000 but does not exceed Rs. 10,000 | ... | 156 |
| (8) exceeds Rs. 10,000 but does not exceed Rs. 11,000 | ... | 186 |
| (9) exceeds Rs. 11,000 but does not exceed Rs. 12,000 | ... | 216 |
| (10) exceeds Rs. 12,000 | ... | 250 |

It would appear that on a gross income of Rs. 3,500 to Rs. 4,000 all that is payable is a sum of Rs. 12/-, and on a gross income of Rs. 4,000/- to Rs. 5,000/- a sum of Rs. 36/-. Similarly on a gross income of Rs. 5,000/- to Rs. 6,000/- the sum payable is Rs. 60/-, and on a gross income of Rs. 11,000/- to Rs. 12,000/- the sum payable is Rs. 216/-. The rates given in the Schedule are not high or excessive. Consequently, the argument that the Act is confiscatory in its nature must be rejected.

33. Submission no. V has been made only by Sri Bashir Ahmad who has appeared in Writ Petition No. 2598 of 1966.

It is contended that the gross income may not be a correct index of the actual income and in a case where the gross income is Rs. 15,000/- the net income may only be Rs. 3,000/-. Assuming it is so, the amount of tax would still not exceed Rs. 250/-. There are no merits in the submission of Mr. Bashir Ahmad that in a case like this there is a prospect of the business of the assessee being completely ruined on account of heavy taxation. His argument that the Act is hit by Article 19 of the Constitution, therefore, cannot be accepted. Besides, the Adhiniyam was passed after the Emergency had been enforced with the result that the

provisions of Article 19 stand suspended under the provisions of Article 358 of the Constitution. It is contended that inasmuch as there is no provision for making a reference to the High Court on a question of law and no appeal has been provided against the order of assessment in respect of escaped income the provisions of the Act are hit by Article 19 (1) (f) and (g) as also Article 31 of the Constitution of India. I am unable to agree as I see no application either of Article 19 or Article 31 to the case before us. Mr. Bashir Ahmad also contended that it is not quite clear whether the impugned tax would fall under Entry 82 of List I or Entry 60 of List II. He further submitted that the Adhuniyam conflicts with the Indian Income Tax Act and for that reason by virtue of the provisions of Art. 254 of the Constitution the Income-tax Act would supersede the Adhuniyam. The submission is based upon a wrong assumption. I have already stated earlier that the impugned tax is not a tax on income and that it clearly falls under Entry 60 of List II. It is next contended that the present tax being one on income it should be collected by the Union of India under the provisions of Art. 270 of the Constitution and inasmuch as it has to be collected by the State, the Adhuniyam is void. I have already said above that it is fallacious to consider the tax in question to be a tax on income. There is, therefore, no application of Article 270 of the Constitution. Mr. Bashir Ahmad also contended that the present Act is hit by Article 269 (1) (f) and (g) of the Constitution. I find no substance in the submission. Article 269 deals with taxes and duties enumerated in Clauses (a) to (g) of that provision and the impugned tax does not fall in any one of them. I have not been able to appreciate the submission of Mr. Bashir Ahmad that the Act is hit by Article 301 of the Constitution. Article 301 reads —

"Subject to the other provisions of this part, trade, commerce and intercourse throughout the territory of India shall be free."

What is intended by the expression "shall be free" is not that no tax shall be payable on trade, professions, callings, and employments which is expressly provided for by Article 276 of the Constitution but that an Indian will be free to carry on trade, commerce and intercourse in any part of the country. I find no substance in any of these submissions of Sri Bashir Ahmad.

34. In the end it was also contended on behalf of Sri Anand in Writ Petition No 8044 of 1966 that the salary paid to him comes out of the Consolidated Funds of India and goes straight to his Bank and inasmuch as he can draw it in any part of India including a place outside U. P. he is not liable to pay the tax. The tax is not on salary but on employment and so long

as Sri Anand is employed in U. P. I do not see how he can escape the tax liability. No other submission has been made before me.

35. As I find no merits in any of the submissions made before me I dismiss the writ petitions but direct the parties to bear their own costs.

36. S. C. MANCHANDA J.: I agree.

37. M. H. BEG, J.: I have had the benefit of reading the judgment of my learned brother Jagdish Sahai. I respectfully concur with the conclusions reached there. I may, however, deal with some of the questions raised, relating to the validity of the Uttar Pradesh Vntta, Vyapar, Ajivika Aur Sevayojan Kar Adhuniyam, 1965, (hereinafter referred to as the Adhuniyam), as they appeared to me. Questions raised in the course of arguments before us may be divided into three types. Firstly, there were questions about the nature of what are described as taxes on "professions, trades, callings and employments" in Entry No 60, List II of the Seventh Schedule to our Constitution. Secondly there were questions relating to the presence or absence of the objects or purposes of the Adhuniyam and the ensuing legal consequences. Thirdly, there were questions arising from particular provisions of the Adhuniyam which could, apart from the objects of the Adhuniyam, affect the validity of the Adhuniyam.

38. With regard to the nature of the taxes on professions, trades, callings and employments, the main submission on behalf of the petitioners was that the Adhuniyam, having imposed what was really income-tax and not a tax on trades, professions, and employments was beyond the legislative competence of the U. P. State Legislature. Reliance was placed on District Board, Farrukhabad v. Prag Dutt, AIR 1948 All 382, where Malik, C. J., observed:

"A tax on professions, trades, callings or employments may not be a graduated tax according to the income earned from the profession, trade, calling or employment. In that case it would be more in the nature of a licensing fee. It may again be a graduated tax and if it is on the basis of income derived from professions, trades, callings or employments and is payable only if there is income, a serious question for consideration may arise whether it is anything other than income-tax."

In this very case it was pointed out: "When a tax is a graduated tax calculated on the basis of so many pias per rupee of the income made from business and property, then the line of demarcation between a tax on 'income' and a tax on 'circumstances' becomes narrow and they almost converge. "By applying what is called the pith and substance rule, Malik, C. J. concluded that "the fundamental difference between a tax on 'income' and a tax on 'circumstances and property' is that income-tax can only be

levied if there is income and if there is no income, no tax is payable but in the case of Circumstances and Property Tax, where a man's status has to be determined his total business turnover may be considered for purposes of taxation, though he may not have earned any taxable income. "That was a case of tax on circumstances and property imposed under the U. P. District Boards Act, but such a tax was held to be a composite tax including within its ambit taxes on professions, trades, and employments.

39. In *Western U. P. Electric Power and Supply Company Ltd. v. Town Area Jaswantnagar*, AIR 1957 All 433, which also related to a tax on circumstances and property, it was observed by Srivastava, J.:

"An obvious distinction exists between a tax on trades, callings or professions and a tax on income arising from a trade, calling or profession. If a tax is imposed on a trade, calling or profession it will have to be paid by any person practising that trade, calling or profession, whether he derives any income from it or not.

It will be a tax on the trade, calling or profession itself. Such a tax may certainly be called a tax in respect of professions, trades, or callings but it cannot by any means be said that it relates to a tax on income. In respect of such a tax, no question can arise about its being invalid on the ground that the State Government had no authority to impose it."

40. We may also glance at the decision of the other High Courts on this subject. In *District Council Bhandara v. Kishori Lal*, AIR 1949 Nag 190 it was held by the Nagpur High Court that a tax imposed by a District Council at the rate of three pies per "Khandi" on persons carrying on the trade of husking, milling or grinding of grains was a tax on profession, trade, calling, or employment. The Madhya Bharat High Court in *Sri Krishna v. Ujjain Municipality*, AIR 1953 Madh Bha 145, held that a tax on cinema performances was within the purview of Article 276 of the Constitution and subject to the limit imposed by Article 276 (2) of the Constitution. A Division Bench of the Saurashtra High Court, however, criticised the view taken in *Sri Krishna's* case AIR 1953 Madh Bha 145 (supra) by the Madhya Bharat High Court on the ground that it ignored the specific Entry No. 62 of List II of Sch. VII relating to taxes on entertainments. The Saurashtra High Court observed in *K. C. Shah v. Palitana Municipality*, AIR 1955 Sau 90.

"The true test for determining whether a particular tax is a tax on 'calling' referred to in Article 276 of the tax on 'entertainments' under Item 62 of the State list is to ascertain the incidence of the tax. If the incidence falls on the person because he is engaged in the business of providing the entertainment for profit, it is a tax on his

calling; but if the incidence of the tax falls on the particular entertainment irrespective of whether the person providing the entertainment follows that calling or not, then it is a tax on the entertainment and falls within Item No. 62 of the State list and as such will not be hit by Art. 276. If for instance the tax is to be paid on a cinema show irrespective of whether it is given by a professional exhibitor or by one following a different calling, e.g. by a charitable society to raise funds for a charity, it is obvious that the tax can only be regarded as a tax on entertainment and not a tax on calling, for what is taxed is not the calling of the person providing the entertainment but the entertainment itself".

41. A Division Bench of the Bombay High Court, consisting of Shah and Gokhale, JJ. in the *Municipality of Chopda v. Motilal Manik Chand*, AIR 1958 Bom 487 held that the concept of a 'trade' found in Article 276 of our Constitution covered the case of a manager of a pressing factory whose liability to pay tax was computed by reference to the number of bales pressed by the manager within the limits of the taxing municipality. It was observed there:

"It is evident that the connotation of 'trade' is not limited to an occupation which primarily concerns itself with sale and purchase of goods. Pursuit of a skilled employment with a view to earn profit, such employment not being in the nature of a learned profession or agriculture, must be regarded as enagaging in 'trade' within the meaning of Art. 276 of the Constitution. A skilled occupation which involves the application of manufacturing processes to a commodity submitted to the person carrying on the occupation must, therefore, be regarded as trade. Evidently for remuneration the plaintiffs undertake by mechanical process to press cotton into bales and the tax levied from them is in respect of the pursuit of that activity".

In *T. K. Abraham v. State of Trav-Co.*, AIR 1958 Ker 129 a Full Bench of the Kerala High Court held:

"The 'base' of a tax — the object or objects to which the tax applies, such as the 'sales value' of tangible property or the 'net income' of an individual provides the chief element of distinction between the various tax forms obtaining in modern communities. The base of a profession tax, that is, of the taxes under Entry 60 of the State List, is either the occupation itself or the income derived therefrom. That is why the Taxation Enquiry Commission (1953-1954) says:

"Basic to the levy of the profession tax is a classification of the 'assessee' according to profession or income or both."

It is because a profession tax may savour of a levy on income that Cl. (1) of Article 276 takes care to say:

Notwithstanding anything in Art. 246, no law of the legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

The base, as we understand it, of the levy impugned is neither an occupation nor the income derived therefrom, but the commodity concerned, namely, the tobacco stocked by the licensee. In other words, the tax with which we are concerned is a tax not on an occupation or its income but a tax on a commodity.

42. The Madhya Pradesh High Court in *Mohanlal Hargovind v. Gram Panchayat Nagod*, AIR 1962 Madh Pra 186 pointed out that "a tax on trade, calling and profession must have as its base either the occupation itself or the income derived therefrom and that the classification of assessee in the levy of a tax on trade, calling, and profession is according to the profession or income or both." It held a tax graduated according to the number of buns manufactured to be an excise duty outside the purview of Article 276 of the Constitution. A Division Bench of the Patna High Court in *Calcutta Chemical Company Ltd. v. Bhagalpur Municipality*, AIR 1962 Pat 465 held a tax on joint stock companies transacting business graduated according to the capital value of the shares to be covered by Article 276 of the Constitution. It appeared that in that case a licence was also issued to the tax-paying company.

43. Recently, in *Bharat Kala Bhandar Ltd. (Pvt.) v. Municipal Committee, Dhamangaon*, AIR 1966 SC 249 at p 257 it was observed by Mudholkar, J., expressing the majority opinion.

"Taxes on professions, trades, callings and employments are taxes on income and are thus outside the provincial and now State lists and belong exclusively to Parliament and before that to the Central Legislature. Yet under a large number of laws enacted before the Government of India Act, 1935, came into force, power was conferred on local Government and local authorities to impose taxes on such activities. This was obviously in conflict with Section 100 of the Government of India Act. When this was realised S 142-A was enacted by the British Parliament which saved the power conferred by pre-existing laws but limited the amount payable to Rs 50/- after 31st March, 1939. A saving was made, however, of pre-existing laws subject to certain conditions with which we are not concerned. The provisions of this section have been substantially reproduced in Article 276 of the Constitution with the modification that the upper limit of such tax payable per annum would be Rs. 250/- instead of Rs 50/-."

Therefore, it appears that, although the Supreme Court held that taxes on professions, callings, and employments, may be viewed as taxes on income, yet such taxes were immune from attack if the permissible limits imposed by Article 276 (2) of the Constitution were not transgressed by the State Legislature. The above mentioned decision of the Supreme Court seems to have taken the wind out of the sails of the contention that a tax, if it is substantially one on income, is invalid on the ground that it is not contemplated by Entry 60 of List II of the Seventh Schedule. Hence, it does not appear necessary to embark upon any detailed discussion about the origins and nature of taxes on professions, trades, callings and employments.

44. It is possible that if some research was carried out into the origins of these taxes they may be shown to be related in some way to the impositions made by local satraps and landlords under a feudal set up upon the "reyaya" living on their Abadi lands and carrying on what were considered lonely but lucrative callings. Such, for example, was "Kargah" (See Bilgram's Commentary on the U P. Tenancy Act, 1939, 3rd edition, p 656) imposed on weavers. These exactions were sought to be connected by zamindars to the use of their lands, but, as we know, they were declared illegal by State legislation, when its administrative machinery developed, because such levies were considered to be in the nature of taxes which were within the exclusive province and competence of governmental agencies, including the local government authorities, to make.

45. Originally, such taxes or impositions may have resembled licensing fee and may have had an element of *quid pro quo* in the shape of some protection given or service rendered or amenity provided in return by the taxing authority. It was pointed out by Gajendragadkar, J in AIR 1981 SC 459 that compulsion to pay attaches to both licence fee and taxes, and that there is a concept of a 'quid pro quo' between the tax payer and the public authority lying behind a tax also, but the difference is that taxes are not earmarked for particular purposes as the licence fee is, and there is no need to show a reasonable co-relationship between the collections of tax and the expenditure incurred on some purpose as there is in the case of licence fee.

46. No tax similarly described in the Constitution of any modern country has been brought to our notice. Taxes on professions, trades, callings and employments seem to belong to a period when the modern system of an income tax had not been developed and adopted. These taxes appear to be indigenous in origin and growth. Looking back, all we can say with certainty is that these taxes were a well recognised class of taxes imposed by local authorities when the Government of India

Act, 1919, was passed. A table, given in P. Mukerji's Indian Constitutional Documents (1600-1918) at p. 674, shows that these taxes constituted a regular source of income of local authorities all over India in 1912. These taxes are mentioned in the Government of India Acts of 1919 and 1935. We also know that the British Parliament had to sanction, by introducing Section 142-A in the Government of India Act of 1935, the levy of such taxes, within the prescribed limits, by Provincial Legislatures, because it was realised that they would be substantially taxes on income, and, therefore, fall within the competence of the Central Legislature exclusively.

47. The result of this survey is that we cannot deny to a tax the character of a tax "in respect of professions, trades, callings and employments" merely because its incidence is on income. The object and effect of all taxation is to bring money into the coffers of the taxing authorities. Its incidents will naturally be on the incomes of the assesseees where the assesseees have incomes. The income could also be a very convenient yardstick for such a tax. Its incidence on income will not determine the legal character of a tax otherwise covered by Art. 276. In order to establish the character of such a tax two tests may be applied: one, by determining positively whether the reason for the incidence of a tax upon a person or his resources or income is the possession by him of a profession, trade, calling, or employment; and, another, negatively, by ascertaining whether the subject-matter or object or reason for the tax is not more properly referable to some other entry in the legislative lists of the Seventh Schedule apart from the entry for income-tax. An examination of the relevant provisions of Adhiniyam, set out in the judgment of my learned brother Jagdish Sahai, J., shows that the tax levied under it satisfies both these tests. Therefore, I am unable to accept the argument that the tax contemplated by the Adhiniyam does not fall within Entry No. 60 of List II of the Seventh Schedule.

48. A variety of arguments were advanced about the presence or absence of objects or purposes of the Adhiniyam and its legal effects. The argument that the Adhiniyam has no object or purpose apparent from it, which was seriously pressed by Mr. Asif Ansari, is not only devoid of substance but runs counter to other arguments advanced by the learned counsel about the purpose of the Adhiniyam. As the argument was elaborated, it was found that what the learned counsel meant was that the purpose and object of a taxing measure must be specified and so described in the enactment itself. The authorities placed before us by Mr. Asif Ansari related to the constitutional requirements of taxing enactments of the Legislatures of the American States. I do not think it is possible to use

them unless such a requirement could be found in our Constitution.

49. Learned counsel for the petitioners contended that words used in Art. 276 of the Constitution necessarily meant that the object or purpose of a taxing measure covered by it must be specified in the enactment itself or else it would not be possible to hold that the enactment passes the tests required by Article 276 of the Constitution. It was contended that Article 276 of the Constitution is a special provision in this respect: A comparison was sought to be made with the exercise of the State's power of Eminent Domain, dealt with in Art. 31 of the Constitution, which has to pass the test of a public purpose. It was urged that a taxing measure, to be covered by the exception made in the special case of certain kinds of "tax on income" permitted by Article 276, must, similarly, be shown to be "for the benefit of the State or of a municipality, district board, local board or other local authority". In other words, Art. 276 of the Constitution laid down a positive requirement of a taxing measure falling under it, and it was submitted that the fulfilment of this requirement was a condition precedent to the validity of an enactment covered by Art. 276. It was contended that there would be no means of judging whether the requirement was fulfilled unless the enactment itself stated what the benefit was or at least mentioned that the enactment was for the benefit of the State.

50. The comparison between Arts. 276 and 31 of the Constitution is not apt. Article 276 is an empowering provision which authorises a species of taxation. Article 31 occurs in Part III relating to fundamental rights and contains limitations on the powers of the State and is meant to safeguard basic rights of citizens against deprivation of property without complying with certain requirements. Moreover, Article 31(5) specifically mentions that Article 31(2) permitting acquisition of property only for a public purpose will not affect the provisions of any law made by a State "for the purpose of imposing or levying any tax". No authority was shown to us for the proposition that the public purpose must itself be expressly stated and specified in any enactment seeking to deprive citizens of their property and that it cannot be gathered from the provisions of the statute itself. It also seems impossible to contend that benefit of the State or a local Government body could not constitute a public purpose. It must be presumed that taxes collected for a State or local authority are for its benefit. Such benefit can only be a public and not a private purpose. This is inherent in the very nature and definition of "taxation" viewed as a process authorised by law. Aiyar's Law Lexicon correctly states:

"The terms 'tax' and 'taxes' have been defined as a rate or sum of money assessed on the person or property of a citizen by

Government for the use of the nation or State, burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, and the enforced proportional contribution of persons and property levied by authority of the State for the support of Government and for all public needs."

The very first definition of the term "taxation" given in "Words and Phrases" (West Publishing Co publication), Vol. 41, is: "absolute conversion of private property to public use".

51. Mr Jagdish Swarup, appearing for one of the petitioners, contended that the term "benefit of the State" had a narrower connotation than "public purposes". Even if this contention were accepted, it will only mean that the imposition contemplated by Article 276 of the Constitution has to satisfy a narrower test to be a tax under it and that test is satisfied here. After examining the possible implication of the word for the benefit of the State . . . or other local authority" used in Art. 276 of the Constitution, it is difficult to come to any conclusion except that these words were used only to describe the taxing process adopted by the various authorities covered by Article 276 of the Constitution. The words could not have been used to impose the need to specify, in the enactment itself, some special benefit to the taxing organs. As already indicated, the concept of tax itself necessarily implies benefit to the taxing public organs. It is not possible to read into these words any restriction upon taxing power by requiring the specific mention of the benefit to the taxing authority.

52. It was submitted that the purposes of the tax, as found in the preamble, were illusory. It was contended that the war with Pakistan was over long ago and that the Fourth Five-Year Plan for which money was sought to be raised, was intended for the benefit of particular classes of persons who did not need such help. Petitioners' arguments revolving round the preamble assumed that a statement of the context in which the need to augment the revenue of the State arose constituted a statement of the purpose of the Adhmiyam. An examination of the preamble reveals that it only sets out the reasons why the need to tap new sources of taxation arose, but the purpose of the Adhmiyam, as stated in preamble, was to increase the revenues of the State. If, as already indicated, the benefit to the State from taxation is itself an object inherent in the very concept of a tax, an explanation of the context in which some tax was required could not constitute the object. Even if one were to assume that the reasons for which new sources of taxation were to be tapped could be viewed as objects of the tax, one can find nothing in those objects to invalidate the tax. The discharge of financial obligations resulting from the waging of a war with Pakistan in

the past or the contemplated expenditure to be incurred on socialistic planning by a welfare State are not illegal activities, for which money could not be raised by taxation.

53. Our attention was drawn to the actual proposals contained in the Fourth Five-Year Plan which, according to the affidavits filed on behalf of the petitioners, provide for loans to individuals carrying on agricultural activities. It was urged that this meant that money was being raised for the private benefit of individuals of a particular class and not for the benefit of the State or the public at large. This submission overlooks that disbursements of money by the State are bound to benefit some individuals. Individuals are also members of the public. Moreover, we are not concerned in the cases before us with the soundness of the Fourth Five-Year Plan. There is no law which prohibits making of plans for the development of agriculture. Indeed, it is considered the foremost duty of modern socialistic States to formulate plans and no one can deny the primary need to develop agriculture in these days of acute food shortage. These questions, however, would not directly arise in the case once it is held that taxation need have no purpose beyond that of increasing revenues of the State. If the legal position is that a tax, unlike a licence fee, is not earmarked for any particular purpose but its proceeds must go into what is known as the Consolidated Fund, the statement of needs or of the occasion for the tax in the preamble to a taxing measure does not convert that need or occasion into what can be legally looked upon as the purpose of the tax.

54. In an attempt to show that the Adhmiyam was a colourable piece of legislation and a "fraud upon the Constitution", a reference was made to report of the Financial Commission submitted in 1961 where it was pointed out that expenditure on plans by States needed better control and rationalisation and that States tended to develop "an allergy to tap resources in the rural sector". It was submitted that the Adhmiyam was motivated by a desire to favour the rural population as compared with the urban population so that the Government which brought in the measure may not lose votes. Such vague and general assertions are more in keeping with political polemics and cannot provide grounds for holding that the Adhmiyam was designed deliberately to injure any particular classes or sections and to benefit other particular classes or sections of the population.

55. We are then asked to consider the provisions of the Adhmiyam itself in order to apply the well-recognised mode of judging whether the provisions of an enactment are hit by Article 14 of the Constitution after ascertaining the object of an enactment. From amongst the decisions cited on this mode of applying Article 14, it is suffi-

cient to quote from *Kangshri Haldar v. State of West Bengal*, AIR 1960 SC 457, where *Gajendragadkar, J.*, observed (at p. 464):

"In considering the validity of the impugned statute on the ground that it violates Art. 14 it would first be necessary to ascertain the policy underlying the statute and the object intended to be achieved by it. In this process the preamble to the Act and its material provisions can and must be considered. Having thus ascertained the policy and the object of the Act, the Court should apply the dual test in examining its validity: Is the classification rational and based on intelligible differentia; and, has the basis of differentiation any rational nexus with its avowed policy and object? If both these tests are satisfied, the statute must be held to be valid; and in such a case the consideration as to whether the same result could not have been better achieved by adopting a different classification would be foreign to the scope of the judicial enquiry. If either of the two tests is not satisfied the statute must be struck down as violative of Art. 14."

56. It was urged that even if the *prima facie* object of taxing statute is to augment the revenue of the State, as it is in the present case, the classification found in the provisions of the *Adhiniyam* is not such as to satisfy or serve the object but frustrates it largely by exempting from the ambit of the *Adhiniyam* such a wide and relatively better-off section of the population as that of persons who earn their livelihood by the pursuit of the agricultural activities. It was also urged that the exemption of the members of the Armed Forces of India could not be justified if the test mentioned above were applied. Speaking for myself, the contentions appeared to be serious enough to raise doubts whether the *Adhiniyam* is not hit by Article 14 of the Constitution, but the consideration which has prevailed with me was that mere doubts are not enough to justify the declaration of a statute as void in view of the presumption of constitutionality and the strong terms in which such a presumption has been repeatedly affirmed by Courts.

57. In *R. K. Dalmia v. Justice Tendolkar*, AIR 1958 SC 538, the Supreme Court summarised the propositions which may be deduced from the decisions of the Supreme Court. It said:

"The decisions of this Court further establish—

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

58. A consideration to which I attach importance is that Entry No. 46 of List II of the Seventh Schedule enables the Legislature to impose taxes on agricultural income without the limitations to which taxes on professions, trades, callings and employments falling in Entry No. 60 are subjected. It appears to me that agricultural income was referable to a separate entry and it has been the subject-matter of taxation under separate enactments of the State of Uttar Pradesh dealing with it. In fiscal matters, it must be left to the discretion of the taxing authorities, whether they would tax all kinds of income by one uniform enactment or by several enactments which deal with separate types of income from different sources. In AIR 1962 SC 1733, it was observed:

"It is not in dispute that taxation laws must also pass the test of Art. 14. That has been laid down recently by this Court in *Kunnathal Thathunni Moopil Nair v. State of Kerala*, AIR 1961 SC 552. But in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when, within the range of its selection, the law operates unequally, and that cannot be just—

fied on the basis of any valid classification, that it would be violative of Art. 14. The following statement of the law in Willis on "Constitutional Law", p. 587, would correctly represent the position with reference to taxing statutes under our Constitution —

"A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates, for taxation if it does so reasonably. The Supreme Court has been practical and has permitted a very wide latitude in classification for taxation."

In *Raja Jagannath Baksh Singh v. State of Uttar Pradesh*, AIR 1962, SC 1563, applying the test of constitutionality to taxing laws, Gajendragadkar, J., observed:

"It is not for the Courts to consider whether some other object should have been taxed or whether a different rate should have been prescribed for a tax."

In *Khyerbari Tea Co. Ltd. v. State of Assam*, AIR 1964 SC 925, it was observed:

"... the Legislature which is competent to levy a tax must inevitably be given full freedom to determine which articles should be taxed, in what manner and at what rate, vide *Raja Jagannath Baksh Singh v. State of Uttar Pradesh*, 1963-1 SCR 220 = (AIR 1962 SC 1563). It would be idle to contend that a State must tax everything in order to tax something. In tax matters, 'the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably.'"

59. Mr Shanti Bhushan, appearing for the State, directed our attention to Uttar Pradesh *Malguzari* *tatha* *Lagan* *par* *Apatk* *Adhinyam* 22 of 1965 which was notified on the same day as the *Adhinyam* with which we are concerned. He contended that other means of taxation of agricultural income had been, in conformity with the past practice, adopted by the Uttar Pradesh State Legislature. After going through the provisions of the *Malguzari Adhinyam* it is not at all possible to conclude that what is being taxed is not primarily land in the shape of land revenue but agricultural income. The *Malguzari* *tatha* *Lagan* *Adhinyam* (U. P. Act 22 of 1965) purports "to provide for the levy of emergency surcharge on land revenue and rent payable or deemed to be payable by the landholders". In any case, it is not enough to take into account the actual burdens imposed upon persons carrying on agricultural activities at a particular time when examining the question whether there was justification for not taxing the agricultural activities under the particular *Adhinyam* which we have to consider. It is enough if, as has been shown, agricultural income, as a matter of law and practice, can be and has been and is taxed and dealt with separately by separate enactments, and under a different legislative entry.

Therefore, apart from the consideration that there may be broader and other justifiable grounds for a preferential treatment at this time for those carrying on agricultural activities, the exclusion of agricultural income from the *Adhinyam* seems justifiable by a reference to separate Entries 48 and 60 and constitutional practice. Such distinction or classification is reasonably related to the basic purpose of taxation which is the augmentation of the revenue of the State. It only involves the choice of suitable and differing modes of taxation which may be adopted for taxing income from different sources or activities. The general question whether the urban sections of the population of Uttar Pradesh are inequitably taxed as compared with the rural sections at present would take us for a field. It will necessitate a consideration of the whole fiscal policy of the State of U. P. in the light of all the taxation laws of U. P. and of a very large number of facts which are not before us at all. Matters of taxation policy in general, in the light of principles such as those found in Sir Hugh Dalton's "Public Finance" or Sir Josiah Stamp's "Fundamental Principles of Taxation", are meant to be examined and discussed elsewhere. We can only consider specific legal questions affecting legal rights and obligations arising upon the materials before us.

60. It also appears that the exemption given to the Army personnel at a time when the sacrifices made by the Army were fresh in our minds is also not unjustifiable. It is for the Legislature to judge whether it is necessary to exempt the Army personnel on grounds similar to those on which charitable activities are exempted. The broader object of the welfare of the country and the nation as a whole could justify such exemptions. In such cases it may be necessary to look beyond any narrower purpose to the wider objects and aspects of national welfare which underlie all healthy legislation. These exemptions may be justified on the ground that they are reasonably correlated to these wide objects.

61. Coming now to the last set of questions raised, the first of these was that Article 270 of the Constitution relating to taxes on income would be applicable in the present case and bar "the levy and collection" of the tax by any authority except the Government of India. It is evident by reading the Article as a whole, that this Article applies only to those taxes in which a question of distribution of the proceeds of the tax between the Union and the States could arise. It is also clear that the term "tax on income" used here does not cover taxes which may only amount to taxes on income although their true legal character is different. In the present case we are concerned with a tax whose legal character is that of a tax on professions, trades, callings and employments. Even if the tax before us could be spoken of as having a double

character, it is apparent that Article 270 of the Constitution was not dealing with taxes of a dual character. It is confined, in my opinion, to what are exclusively taxes on income.

62. The second question which may be dealt with, among the last set of questions under consideration is the effect of Section 2(12) of the Adhiniyam which makes the gross income the basis of commuting the tax. It was contended that this may amount to taxing individuals who had no "income" whatsoever in the sense in which the term 'income' has been used under the law relating to income-tax. A person having no net income may still be taxed if he has a profession, calling, or employment. If the legal basis of a tax is not income, and gross income is only a yardstick for determining the quantity of the tax, I am unable to hold, on the ground that hardship may conceivably arise in hypothetical cases, that the Adhiniyam itself is illegal and void for this reason. If the basis or object of the tax is the possession of a profession, calling or employment, I do not see any legal obstacle in taxing a person who has the taxable object even though he may have no income.

63. A third question arises out of the charging Section 3 of the Adhiniyam. It is pointed out that a person who derives income from any agricultural operation as his calling in life may have, in addition, other more lucrative professions and callings, but he would, because of what may be spoken of as a "calling" consisting of an agricultural activity, escape liability to pay the tax. I do not think that such a forced interpretation is correct. The more natural interpretation of Section 3 is that every one who carries on a trade or has a profession or calling or employment may be taxed upon the basis of these, but if a person had a "calling" which consists of carrying on an agricultural activity, the agricultural "calling" will not be liable to be taxed. This appears to be the normal interpretation even on the assumption that agricultural activities can be spoken of as "callings" at all.

Lastly, there is a question arising out of the definition of the term "person" given in Section 2(6) of the Adhiniyam, which provides:

"'person' includes a Hindu undivided family, company, an incorporated body, a firm, a society or any other association of persons."

It is urged that this would mean that individuals who belong to joint Hindu families and other associations will be taxed in two capacities. This contention is based upon an erroneous assumption. An individual and a 'person' composed of a collection of individuals are separate legal entities. This question has been raised only in Writ Petn. No. 2600 of 1966 filed by Vijai Narain Kapoor. This petition only sets out hypo-

thetical hard cases. It does not state how the petitioner himself is an aggrieved person even if the definition of 'person' given in Section 2(6) of the Act may create a situation in which an individual may conceivably be able to complain that he is being discriminated against unjustifiably as compared with persons who are not members of Hindu undivided families or of associations. I, therefore, do not think it necessary to decide this point which could only affect the validity of the definition of the term 'person' given in Section 2(6) of the Adhiniyam. Even if that part of the Adhiniyam could be held to be invalid, it would not affect the validity of the other parts. I prefer to leave this point expressly open. In the cases before us we are concerned only with the validity of the taxing part of the Adhiniyam as it affects the petitioners before us.

64. In the result, I agree with my learned brother Jagdish Sahai, J., that the petitioners are liable to pay the taxes imposed under the Adhiniyam which are not invalid. The writ petitions before us are dismissed, but, in the circumstances of the case, parties will bear their own costs.

SSG/D.V.C.

Petition dismissed.

AIR 1969 ALLAHABAD 333 (V 56 C 58)

FULL BENCH

V. G. OAK, S. N. SINGH AND
A. K. KIRTY, JJ.

Shiv Nath, minor under guardian Sahu Girdhar Lal, Appellant v. Shri Ram Bharosey Lal, Respondent.

Special Appeal No. 209 of 1961, D/-16-5-1967, against judgment of Sharma, J., D/-14-3-1961, in S.A. No. 417 of 1955.

(A) Transfer of Property Act (1882), Ss. 106 and 116 — Tenant remaining in possession of premises after expiry of stipulated period — Presumption under S. 106 and principle of holding over.

B was the original lessee of the disputed shop. The original lease was for eleven months. It was stated in the document that on the expiry of the period the lessee would vacate the shop and hand over possession to the lessor without notice. B was also liable to be ejected in case of default in payment of rent for any one month. There was no provision for extension of the lease. B continued to be in possession after the stipulated period was over. After the death of B his son the defendant remained in possession of the shop for several years. There was also evidence that the rate of rent was increased subsequently.

Held, that B was not a tenant at will at the time of his death. Either he was a tenant under a specific renewed lease or he was a tenant holding over. In either

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case he was a tenant from month to month and consequently the defendant was also a month-to-month tenant and not a tenant-at-will. Case-law discussed. (Para 32)

According to S. 106, in the absence of a contract to the contrary, a lease of immovable property for a purpose other than agricultural and manufacturing purposes shall be deemed to be a lease from month to month. There is, therefore, a presumption that the relationship between the landlord and B was tenancy from month to month. According to the principle of holding over in S 116, if a lessee remains in possession after the determination of the lease, and the lessor accepts rent from the lessee, the lease is, in the absence of an agreement to the contrary, renewed from month to month. The principle of holding over is, therefore, attracted. The expression "in the absence of an agreement to the contrary" appearing in Section 116 does not imply that a special term in the original lease makes the doctrine of holding over inapplicable altogether. The only effect of such a special term in the original lease is that one has to read that special term in the renewed lease. According to the document, B was liable to ejectment in case of default in the payment of rent for any one month. Such a special term in the renewed lease did alter the fact that the renewed lease was from month to month. The doctrine of holding over under Section 116, Transfer of Property Act, was applicable in spite of the special term in the deed.

(Paras 30, 31)

(B) Transfer of Property Act (1882), S 106 — Contract of tenancy — Formal notice for a definite period required to be served in case of termination by either party — Tenancy is not tenancy at will. AIR 1950 All 583, Overruled.

There is a distinction between a tenancy at will and a tenancy from month to month. A tenancy at will is of precarious nature. Neither party can be certain about the duration of a tenancy at will. On the one hand, the tenant may leave the premises at any time he likes, and put an end to the relationship of landlord and tenant. On the other hand, the landlord may call upon the tenant to quit at a moment's notice. A tenancy from month to month is not a tenancy for a fixed period. Yet parties can be certain about duration for a minimum period. A tenancy from month to month is tenancy for one month certain. There is a reasonable prospect of the tenancy being renewed beyond one month. But there is no certainty. Either party may terminate such a tenancy by giving the appropriate notice to the Opposite Party.

(Para 20)

Oak and Kirty, JJ., (Singh, J., contra). If under a contract of tenancy, a party is required to serve on the other party, a formal notice for a definite period, the relationship between the parties cannot be described as

tenancy at will. AIR 1950 All 583, Overruled, 1965 All LJ 1129, Appr. (Para 23)

(C) Transfer of Property Act (1882), Ss. 105 and 106 — Interest of a tenant from year to year as well as a tenant from month to month is heritable. AIR 1950 All 583, Foll. (Point conceded.) (Para 33)

Cases Referred: Chronological

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|--|--|
| (1965) AIR 1965 All LJ 1129 = 1965 All WR (HC) 671, Tarif Elahi v. Smt. Lal Dei | 23, 46, 51 |
| (1957) AIR 1957 Pat 490 (V 44) = 1957 BLJR 291, Babu Lal v. Gopi Lal | 15 |
| (1955) AIR 1955 All 679 (V 42) = 1955 All LJ 304, Radha Ballabh v. B. Ram Chand | 28-a |
| (1954) AIR 1954 Bom 257 (V 41) = ILR (1954) Bom 448, Bavaasheeb v. West Patent Press Co. | 19 |
| (1950) AIR 1950 All 583 (V 37) = 1951 All LJ 179, Raman Lal v. Bhagwan Das | 21, 22, 23, 24, 33, 37, 38, 39, 45, 46, 47, 48, 51, 52, 53, 54 |
| (1949) AIR 1949 All 703 (V 36) = ILR (1949) All 840, Sultt Devi v. Banarsidas | 28 |
| (1941) AIR 1941 Pat 228 (V 28) = ILR 20 Pat 115, Ram Lal v. Bibi Zohra | 18 |
| (1940) AIR 1940 Oudh 401 (V 27) = 1940 Oudh WN 586, Bansidhar v. Ram Charan | 16 |
| (1938) AIR 1938 Nag 506 (V 25) = 1938 Nag LJ 317, Abdul Razak v. Nand Lal Sheolal | 14 |
| (1925) AIR 1925 Oudh 173 (1) (V 12) = 27 OC 224, Lalman v. Mt. Mullo | 29 |
| (1907) 11 Cal WN 225 = ILR 84 Cal 57, Deo Nandan Prasad v. Megha Mahton | 17 |
| (1886) ILR 8 All 198 = 1886 All WN 56, Khayali v. Husain Baksh | 11 |
| (1886) ILR 8 All 405 = 1886 All WN 170, Khuda Baksh v. Sheo Din | 12, 13, 45 |

K. C. Saxena, for Appellant; K. C. Agrawal, for Respondent.

OAK, J.: This special appeal arises out of a suit for ejectment and damages. Shiv Nath brought the suit against Ram Bharosey Lal in the Court of the Munsif of Moradabad on these allegations.

2. The plaintiff is the owner of a certain shop situate in the city of Moradabad. Baldeo Das was the tenant of this shop on a monthly rent of Rs. 10. Baldev Das is dead. Ram Bharosey Lal, defendant is his son. He continued to occupy the shop after his father's death. Defendant's occupation is unlawful. The plaintiff served upon the defendant a notice to quit. But he did not vacate the shop. In firing a certain machine in the shop, the defendant caused

substantial damage to the building. The defendant has wilfully caused a nuisance by fixing this machine in the shop. The plaintiff, therefore, brought the suit for the defendant's ejectment from the shop and to recover a sum of Rs. 60 as damages for use and occupation of the shop.

3. The defendant admitted that he was in possession of the shop. But it was denied that the occupation was unlawful. The defendant pleaded that he was in possession as plaintiff's tenant. It was denied that the defendant received a valid notice to quit. It was denied that the defendant created any nuisance, or caused substantial damage to the building. It was denied that the defendant is liable to ejectment.

4. The learned Munsif held that the charges of nuisance and substantial damage to the building have not been proved. The Court held that the defendant received a valid notice to quit. The Court accepted the plaintiff's case that occupation of the shop by the defendant was unlawful. The Court, therefore, passed in plaintiff's favour a decree for ejectment from the shop, for the recovery of Rs. 60 for damages up to the date of the suit, and for future damages at the rate of Rs. 10 per mensem.

5. The defendant appealed. The appeal was disposed of by the Additional Civil Judge, Moradabad. He agreed with the trial Court that the notice to quit was valid, and that there was not sufficient evidence to prove that the defendant created nuisance or caused wilful damage to the building. The Court, however, disagreed with the trial Court as regards the defendant's status. The Court held that the defendant was plaintiff's tenant, and was entitled to protection under Section 3 of U. P. Act No. 3 of 1947. He was not liable to be ejected except as provided under Section 3 of the Act No. 3 of 1947. The appeal was, therefore, partly allowed. All that the Court granted to the plaintiff was a decree for Rs. 60 towards arrears of rent. Other reliefs were refused. A second appeal by the plaintiff was dismissed by a learned single Judge of this Court. The plaintiff has, therefore, filed this special appeal.

6. When the special appeal came up for hearing before a Division Bench, the learned Judges entertained some doubt as to the correctness of a previous decision by another Division Bench in a similar case. The special appeal has, therefore, been referred to this Full Bench for decision.

7. The main question for decision in this special appeal is whether the defendant is a trespasser as alleged by the plaintiff, or is plaintiff's tenant as pleaded by the defendant. This question in its turn depends upon the question whether the defendant's father, Baldeo Das was a tenant at will or a monthly tenant. It is, therefore, necessary to ascertain the status of Baldeo Das at the time of his death. Initially, Baldeo

Das obtained the shop in dispute from the plaintiff's predecessor-in-interest, Kedar Nath through lease (Ext. 1) dated 22-3-1941. That lease was for a period of 11 months only, and expired in February 1942. But Baldeo Das continued to occupy the shop even after February 1942. It has been found that Baldeo Das died in July 1951. The question, therefore, arises whether occupation of the shop by Baldeo Das between February 1942 and July 1951 was as a tenant at will or as a tenant from month to month. These two expressions have not been defined in the Transfer of Property Act. But the two expressions have been explained in text-books and in cases decided by different High Courts.

8. Nature of tenancy at will has been explained in Halsbury's Laws of England, 3rd Edn., Vol. 23 on p. 505 under para 1150. A tenancy at will is a tenancy under which the tenant is in possession, and which is determinable at the will of either landlord or tenant. It is further stated in paragraph 1151 that a tenancy at will is implied when a person is in possession by the consent of the owner, and is not held in virtue of any tenancy for a certain term.

9. The expression "tenancy from year to year" and "tenancy at will" have been explained in Cheshire's Modern Law of Real Property, 9th Edn. on p. 354:—

"A tenancy from year to year differs from a tenancy for a fixed number of years, in that, unless terminated by a proper notice to quit, it may last indefinitely; and from a tenancy at will, in that the death of either party or the alienation of his interest by either party does not effect its determination. . . . A tenancy from year to year will arise by operation or presumption of law whenever a person is in occupation of land with the permission of the owner, not as a licensee nor for an agreed period, and he pays rent measured by reference to a year."

10. The expression "tenancy at will" has been explained in Foa's General Law of Landlord and Tenant, 10th Edn., under Section 5:—

"Tenancies at will are tenancies which endure at the will of the parties only, i.e., at the will of both . . . This, however, is only where no term is fixed in the demise between the parties, except the will of either or both."

Tenancy from year to year and other periodic tenancies have been explained in Section 6:—

"Tenancies from year to year, like tenancies at will, may be created by express agreement, or may arise by implication of law. They belong to the class of 'periodic' tenancies, i.e., tenancies which, while the holding continues, repeat themselves from period to period. Other common instances of this are tenancies from quarter to quarter, from month to month, and from week to week; and both in yearly tenancies (in which the tenant is regarded in law as hav-

ing an interest for a year certain, with a growing interest during every year thereafter springing out of the original contract and parcel of it) and in all others of a periodic nature, the holding, while the tenancy lasts, is continuous from period to period."

Tenancy at will has been discussed in Woodfall's Law of Landlord and Tenant on pages 280 and 281:—

"A tenancy at will is where lands or tenements are let by one man to another, to hold at the will of the lessor in this case the lessee is called tenant at will, because he has no certain or sure estates, for the lessor may put him out at any time, he pleases. Either party may at any time determine a strict tenancy at will, although expressed to be held at the will of the lessor only, and the landlord may determine it by demand of possession or otherwise without a previous formal notice."

11. In *Khavali v Husam Baksh*, (1886) ILR 8 All 198 a *kabuliat* contained this stipulation —

"I do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court."

It was held that the defendant was a mere tenant at will. The judgment was very brief.

12. In *Khuda Baksh v. Sheo Din*, (1886) ILR 8 All 405 it was stated in the early part of two leases that the land was given for more than a year. But it was mentioned later in those leases that at any time at the will and mere wish of the lessor the lessees were to give up the land only at 15 days' notice. It was held by Mahmood, J. that the rights created by the two leases were those of tenants at will.

13. The decision by Mahmood, J. is entitled to great respect. But it may be pointed out that the principal question before the High Court in *Khuda Baksh's case* (1886) ILR 8 All 405 was as regards admissibility of the two documents. The District Judge held that the two documents were not admissible in evidence. The High Court disagreed. The Court held that the two documents were admissible in evidence. The District Judge was directed to admit the two documents in evidence and reconsider the whole case. It will be seen that the order passed by the High Court was merely an order of remand. The case was not finally disposed of by the High Court.

14. In *Abdul Razak v. Nandlal Sheolal*, AIR 1933 Nag 508 a rent note contained the following provision:—

"You have got these houses . . . I have taken them on a rent of Rs 12-8-0 per mensem. I will pay the amount regularly every month. If I make a default for 3 months, you may get your houses vacated immediately . . ."

It was held that the rent note created a tenancy of indefinite term which, as soon as three months' rent was in arrears, reduced itself to tenancy at will, because on that event occurring, the landlord became entitled to eject the tenant without notice.

15. In *Babu Lal v. Gopi Lal*, AIR 1937 Pat 490 there was a stipulation in a lease that the lessees may remain in the house as long as they please. According to another clause in the lease, occupation was on monthly rental. It was held that as a matter of construction the tenancy was a tenancy at will, and not a monthly tenancy.

16. In *Bansidhar v. Ram Charan*, AIR 1940 Oudh 401 it was held that a tenancy at will is determined at will either of the landlord or of the tenant.

17. In *Deo Nandan Prasad v. Meghu Mahton*, (1907) 11 Cal WN 225 it was observed on page 230:—

"If on the other hand the status of the Defendants is that of a mere tenant-at-will, a demand for possession would be sufficient. Whether the Defendants are tenants-at-will or not, would depend upon the terms of the agreement between the parties. If the parties intended that the tenancy should be terminable at the will of either party, the position of the Defendants would be that of tenants-at-will."

18. In *Ram Lal v. Bibi Zohra*, AIR 1941 Pat 228 a lease was granted for the construction of a house. It was expressly stated that the lessee was free to give up the house and remove the materials thereof whenever he chose. It was held that the tenancy created under the lease was either a tenancy at will or a tenancy from month to month.

19. In *Bavasaheb v. West Patent Press Co.*, AIR 1954 Bom 257 it was explained that if a lease is expressed to be terminable at the option of the lessor or at the option of the lessee, it creates a tenancy at will, and such tenancy is determined at the option of either party to the contract.

20. We are now in a position to distinguish between a tenancy at will and a tenancy from month to month. In certain cases it has been held that a tenancy at will is not a lease at all, it is just a licence. One need not go to that length. However, a tenancy at will is of precarious nature. Neither party can be certain about the duration of a tenancy at will. On the one hand, the tenant may leave the premises at any time he likes, and put an end to the relationship of landlord and tenant. On the other hand, the landlord may call upon the tenant to quit at a moment's notice. A tenancy from month to month is not a tenancy for a fixed period. Yet parties can be certain about duration for a minimum period. A tenancy from month to month is tenancy for one month certain. There is a reasonable prospect of the tenancy being re-

newed beyond one month. But there is no certainty. Either party may terminate such a tenancy by giving the appropriate notice to the opposite party.

21. This special appeal has been referred to a Full Bench on account of a conflict between decisions by two Division Benches of this Court in two cases. Those two decisions may now be examined. In *Raman Lal v. Bhagwan Das*, AIR 1950 All 583 the facts were these. Raman Lal let out a certain shop to Lallo Mal, who was the father of Bhagwan Das, defendant. The lease, dated 23-10-1942 ran thus:—

"I have taken the shop on rent of Rs. 15 per month for the period of eleven months. I shall pay the rent month by month; if I fail the landlord would have the right to eject me at once from the shop. After the expiry of eleven months the landlord can at his will whenever he likes give me a month's notice to vacate and I will vacate without any objection, or I can myself vacate at my will whenever I like after giving a month's notice to the landlord."

The lease was in the first instance for a period of 11 months only. That period expired in September 1943. Lallo Mal continued to be in possession after September 1943. The question arose as regards Lallo Mal's status after September 1943. It was held that Lallo Mal was a tenant at will.

22. The learned Judges laid stress on the fact that the notice prescribed in Lallo Mal's lease need not have expired on the last date of the month of the tenancy. Reliance was apparently placed on the provision of Section 106, Transfer of Property Act. This is a Central Act. The first paragraph of Section 106, T. P. Act ends with the expression "expiring with the end of month of the tenancy". It may, however, be pointed out that Section 106, T. P. Act has been amended by U. P. Act No. XXIV of 1954. The amendment has introduced two changes in Section 106, T. P. Act. Firstly, the words "thirty days' notice" have been substituted for the words "fifteen days notice." Secondly, the expression "expiring with the end of a month of the tenancy" has been omitted from Section 106, T. P. Act.

According to Section 106, T. P. Act in force in Uttar Pradesh, a notice to quit need not expire with the end of a month of the tenancy. It has never been suggested that a tenant governed by Section 106, T. P. Act (as in force in Uttar Pradesh) is not a tenant from year to year or a tenant from month to month, as the case may be. The provision that a notice should expire with the end of a month of the tenancy is not the essence of a monthly tenancy. That position is also clear from Section 106, T. P. Act itself. The presumption mentioned in that section arises only in the absence of a contract to the contrary. It is always open to parties to stipulate for a special form or period of notice. The fact that

Lallo Mal or his landlord could give a month's notice at any time had little bearing on the nature of the tenancy. It is true that the word "will" was repeatedly used in Lallo Mal's rent note. But the use of the expressions "at his will" and "at my will" were not decisive. It will be seen that there was a provision in the lease that each party had to give a month's notice to the other party in order to terminate the tenancy. A lease of this nature cannot be described as a tenancy at will. In my opinion, Raman Lal's case AIR 1950 All 583 was wrongly decided.

23. Raman Lal's case AIR 1950 All 583 came up for consideration before another Division Bench of this Court in *Tarif Elahi v. Smt. Lal Dei*, 1965 All LJ 1129. The learned Judges expressed their disapproval of the view taken in Raman Lal's case AIR 1950 All 583. B. Dayal, J. observed on page 1131.

"... a person whose tenancy has to be determined by service of a formal notice for whatever period it may be is not a tenant at will. A tenant at will under the English law is nothing more than a licensee under the Indian law. It is a personal relationship between a landlord and the tenant and that relationship can be terminated either by the landlord or by the tenant by a mere expression of intention".

I agree with the learned Judge that if, under a contract of tenancy, a party is required to serve on the other party a formal notice for a definite period, the relationship between the parties cannot be described as tenancy at will.

24. The lease (Ex. 1) in the instant case differs from the lease in AIR 1950 All 583 in one respect in Raman Lal's case the lease itself provided for continuance of tenancy beyond the period of 11 months mentioned in the document. That is not the position in the instant case. The lease (Ex. 1) was for a period of 11 months. It was stated in the document that on the expiry of the period the second party would vacate the shop and hand over possession to the first party without notice.

25. It will be seen that the lease (Ex. 1) did not contain any provision for extension, of the lease beyond the period of 11 months. Yet, Baldeo Das remained in possession for several years after the expiry of that period of 11 months. Such a situation attracts the doctrine of holding over.

26. The effect of holding over has been described in Section 116, T. P. Act. Section 116, T. P. Act states:—

"If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary,

renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.

27. Mr. K. C. Saksena appearing for the appellant urged that Section 116, T. P. Act applies only in the absence of an agreement to the contrary. He urged that in the present case there was an agreement to the contrary. Consequently, Section 116, T. P. Act cannot apply. Mr. K. C. Saksena pointed out that there was a condition in the lease (Ex. 1) that in case of default in the payment of rent for any one month, the first party could require the second party to vacate the shop during the period of the lease without notice. Mr. K. C. Saksena urged that such a condition in the lease renders Section 116, T. P. Act inoperative.

28. In *Suit Devi v Banarsidas*, AIR 1949 All 703 it was held that the words "in the absence of an agreement to the contrary" occurring in Section 116, T. P. Act cannot be taken as referring only to the existence of an agreement as to the terms of the holding over. They also refer to the existence of an agreement to the contrary regarding the period of notice provided in Section 106, T. P. Act for a particular kind of notice. Where a lease for manufacturing purpose is held over on the terms of the original lease and the original lease provides for three months' notice for the termination of the lease under certain circumstances, the provision of six months' notice laid down in Section 106, T. P. Act cannot apply.

28a. In *Radha Ballabh v. Ram Chand*, AIR 1955 All 679 it was held that renewal of a lease from year to year or from month to month according to the purpose for which the property is leased is to be presumed only when there is no agreement to the contrary. Where there is an agreement to the contrary, it cannot be said that by holding over the tenant acquires greater rights than what he possessed under the original lease.

29. In *Lalman v. Mt. Mullo*, AIR 1925 Oudh 173 it was held that where a new tenancy is created by reason of the landlord allowing the tenant to hold over after the original lease terminates, then, in the absence of any terms in respect of the new tenancy, the terms governing the original lease will be deemed to have been accepted by the parties and if there was a provision in the original tenancy dispensing with a notice to quit, the same applies with regard to the new tenancy.

30. The lease (Ex. 1) was for a period of 11 months. The rate of rent was Rs 5/- p.m. But it is stated in the plaint that Baldeo Das was a tenant of the shop on a monthly rent of Rs 10/-. It, therefore, appears that rent was enhanced after the expiry of the period of 11 months mentioned in Ex. 1. Enhancement of rent suggests a fresh contract of tenancy. We do not know

the terms of the new contract between the landlord and Baldeo Das. According to Section 106, T. P. Act, in the absence of a contract to the contrary, a lease of immovable property for a purpose other than agricultural and manufacturing purposes shall be deemed to be a lease from month to month. There is, therefore, a presumption that the relationship between the landlord and Baldeo Das was tenancy from month to month.

31. According to the principle of holding over discussed in Section 116, T. P. Act, if a lessee remains in possession after the determination of the lease, and the lessor accepts rent from the lessee, the lease is, in the absence of the agreement to the contrary, renewed from month to month. It is common ground that the landlord accepted rent from Baldeo Das for several years after February 1942. The principle of holding over is, therefore, attracted. The expression "in the absence of an agreement to the contrary" appearing in Section 116 does not imply that a special term in the original lease makes the doctrine of holding over inapplicable altogether. The only effect of such a special term in the original lease is that one has to read that special term in the renewed lease. According to Ex. 1, Baldeo Das was liable to ejectment in case of default in the payment of rent for any one month. We may read that very term in the renewed lease. Such a special term in the renewed lease does not alter the fact that the renewed lease was from month to month. The doctrine of holding over under Section 116, T. P. Act is applicable in spite of the special term in Ex. 1 pointed out by Mr. K. C. Saksena.

32. On any view of the matter, Baldeo Das was not a tenant at will at the time of his death. Either he was a tenant under a specific renewed lease, or he was a tenant holding over. In either case he was a tenant from month to month.

33. The question now arises whether the rights of Baldeo Das were heritable. In Woodfall's Law of Landlord and Tenant it is stated on page 464 that a tenancy does not determine by the death of the lessee, but will vest in his legal personal representatives, who are entitled to give or receive the usual notice to quit. In AIR 1950 All 583 it was pointed out on page 586 that the interest of a tenant from year to year is heritable. A tenant from month to month is in the same position. Mr. K. C. Saksena conceded that the interest of a tenant from month to month is heritable. Consequently, upon the death of Baldeo Das, his son, Ram Bharosey Lal became a tenant from month to month.

34. Although the defendant's possession was described in the plaint as unlawful occupation, the plaintiff did not pay court-fee on the plaint as in a suit

against a trespasser for his ejection. Court-fee was paid on the basis of rent for one year. The plaintiff raised the pleas of nuisance and substantial damage to the building. These are some of the grounds recognised in S. 3 of U. P. Act No. III of 1947. The frame of the suit suggests that the plaintiff had no serious objection if the defendant was treated as a tenant of the shop.

35. The shop is situate at Moradabad. It was not disputed for the appellant that U. P. Act No. III of 1947 applies to Moradabad. It was not suggested for the plaintiff that he obtained permission from the District Magistrate for filing a suit for ejection of the defendant. The plaintiff failed to establish any ground for ejection mentioned in Section 3 of the Act. The learned single Judge, therefore, rightly held that the defendant is not liable to eviction from the shop.

36. In my opinion, the special appeal should be dismissed with costs.

37. S. N. SINGH, J.:— I have read the judgment prepared by my learned brother Mr. Justice Oak and I agree that the Special Appeal should be dismissed with costs. I agree that the lease Ex. 1 in the present case differs from the lease in AIR 1950 All 583 and for the reasons given in the judgment of my learned brother I hold that the status of Baldeo Das and after him of his son Ram Bharose Lal was that of a tenant from month to month and that the defendant Ram Bharose Lal was not liable to ejection in absence of any ground as contemplated by Section 3 of the Rent Control and Eviction Act.

38. Since we are of the opinion that the terms of the lease in the present case differ from the lease which was interpreted in Raman Lal's case, AIR 1950 All 583 it is not necessary to express any opinion about that case for any expression of opinion will only be an obiter. However, in view of the referring order as it has been considered necessary to examine that case I also propose to examine it.

39. Before examining the lease in Raman Lal's case, AIR 1950 All 583 it is necessary to notice relevant portions of some of the paragraphs in Halsbury's Laws of England, 3rd Edition, Vol. 23 on pages 505, 507 and 508 under paras. 1150, 1153 and 1154 and Foa's "The Relationship of Landlord and Tenant" pages 579 and 580.

40. 1150. Nature of tenancy at will: A tenancy at will is a tenancy under which the tenant is in possession, and which is determinable at the will of either landlord or tenant; and although upon its creation it is expressed to be at the will of the landlord only or at the will of the tenant only, yet the law implies that it shall be at the will of the other party also; for every lease at will must in law be at the will of both

the parties. As in other tenancies, a tenancy at will arises by contract binding both landlord and tenant, and the contract may be express or implied.

41. A tenancy expressed to be at will takes effect according to its tenor, notwithstanding that a rent at an annual rate is reserved.

42. 1153. Possession after expiry of lease: A tenant, who, with the consent of the landlord, remains in possession after his lease has expired, is tenant at will until some other interest is created; until, for instance, the tenancy is turned into a yearly tenancy by payment of rent; thus, where a lease of war damaged premises was disclaimed and so deemed to have been surrendered and the landlord and the tenant were willing that the tenant should remain in occupation as a trespasser, in law the tenant continued in possession as tenant at will

43. 1154. Determination of tenancy at will: A tenancy at will is determinable by either party on his expressly or impliedly intimating to the other his wish that the tenancy should be at an end. Until the intimation is thus given the tenant is lawfully in possession, and accordingly the landlord cannot recover the premises in an action for recovery of land without a previous demand of possession or other determination of the tenancy. Where rent is payable under a tenancy at will, and the tenancy is determined between the rent days, the rent is apportioned.

44. Foa, in his book "The Relationship of Landlord and Tenant", Fifth Edition at pages 579 and 580 has dealt with as follows as to how tenancies at will are determined:

A tenancy at will may be determined at any time and by either party during the tenancy. The right, however, is subject to this limitation, that such determination by one party will not be allowed to operate to the prejudice of the other. Thus, if the tenancy be determined by the lessor, the lessee, being possessed only of an uncertain interest, will be entitled to emblements (whilst if determined by the lessee it is otherwise), and may claim to have a reasonable time allowed to him to remove his goods from the premises, though not to retain exclusive possession for that purpose. So, on the other hand, if under a tenancy at will rent were made payable periodically, the lessee could not by determining the tenancy deprive the lessor of his right to rent for the current period whilst if the tenancy were determined by the lessor the rent would be lost; but cases of this kind would now fall within the Apportionment Act.

By the lessor:— A demand of possession, or anything equivalent thereto, made on the land by the lessor is sufficient; So an agreement between the lessor and lessee that the latter shall purchase the

reversion also operates as a determination of the will. And the tenancy is likewise determined by the death of the lessor.

By the lessee.—A notice by the lessee, followed by his giving up possession, is a valid determination of the tenancy by him. And so is any act done by him which is inconsistent with his will that the tenancy should continue assigning or underletting the premises, for instance, is a determination of his estate, although in order to bind the lessor notice thereof must have been given to him. If the lessee die, or commit voluntary waste, the tenancy is also determined.

45. The above quotations along with the provisions of other text books and the case law cited at the bar and noticed by my learned brother in his judgment would show that a tenancy at will is a tenancy under which the tenant is in possession is determinable at the will of the landlord or the tenant. Merely because there is a period given in the lease for vacating the demised land it will not cease to be a tenancy at will. The guiding principle for determination of the nature of tenancy is the tenor of the document. If on a fair reading of the document the intention of the parties can be gathered that they intended to terminate the tenancy at the sweet will of anyone of them the tenancy should be held to be tenancy at will, words expressing such intention cannot be ignored and should be held to be decisive of the nature of tenancy. The terms of the lease in AIR 1950 All 583 have been given in the judgment of my learned brother, the lease at the first instance was for a period of 11 months only and after that period it was stipulated that the continuance of the tenancy would be at the will of the landlord or the tenant. A further stipulation was incorporated that on the termination of the tenancy one month's notice was to be given by the landlord or the tenant as the case may be for the benefit of the other.

This stipulation does not mean that the tenancy would be determined after a month. The stipulation about one month's notice should not be confused with a notice to quit which is necessary for the determination of a monthly or yearly tenancy. On the terms of the lease in Raman Lal's case AIR 1950 All 583, the tenancy would be deemed to be terminable at the will of the lessor or the lessee. On the determination of a tenancy at will some reasonable time has to be given to the tenant to vacate. He cannot be thrown out as soon as the tenancy is determined. This reasonable time may be a few days, a week, a fortnight or a month as agreed to between the landlord and the tenant. In Raman Lal's case AIR 1950 All 583, this reasonable time was considered to be a month. Similarly in the case of ILR 8 All 405, 15 days was considered to be the reasonable time.

In my opinion in neither of the two cases giving of notice was considered to be a condition precedent to the determination of the lease. As I interpret the lease in Raman Lal's case, AIR 1950 All 583 I find that formal notice to quit was not considered necessary for the determination of the tenancy, on the other hand it was determinable at the will of the lessor and the lessee. For the reasons given above and in view of paragraph 1153 of the Halsbury's Laws of England quoted above and in view of the passages quoted from Foa's "The Relationship of Landlord and Tenant" I am of opinion that the leases in Raman Lal's case, AIR 1950 All 583 as well as in that of ILR 8 All 405 conferred rights of a tenant at will on the respective lessees, as such it cannot be said that any of the two cases was wrongly decided.

46. I agree with the observation of B. Dayal, J in 1965 All LJ 1129 when he observed at page 1131:—

"... a person whose tenancy has to be determined by service of a formal notice for whatever period it may be is not a tenant at will. A tenant at will under the English Law is nothing more than a licensee under the Indian Law. It is a personal relationship between a landlord and the tenant and that relationship can be terminated either by the landlord or by the tenant by a mere expression of intention." But with great respect I am of opinion that on the terms of the lease in Raman Lal's case AIR 1950 All 583 no formal notice was necessary to determine the lease, it was terminable at the will of the landlord or the tenant.

47. I regret my inability to concur in holding that AIR 1950 All 583 was wrongly decided; at the same time for the reasons already given above I concur in dismissing the Special Appeal with costs.

48. A. K. KIRTY, J.: I have had the benefit of reading the judgments of my learned brothers Oak, J. and S. N. Singh, J. I agree that the special appeal should be dismissed with costs. I further agree with Oak, J., that Raman Lal's case, AIR 1950 All 583 was wrongly decided.

49. The facts have been set out in detail in the judgment of Oak, J. The original lease in favour of Baldeo Prasad was for a period of 11 months and it was stipulated in the deed that he would hand over possession on the expiry of the specified period. The fact, however, remains and is also admitted that Baldeo Prasad throughout remained in undisturbed possession right upto the time of his death which occurred in July, 1951. The original rent agreed upon was Rs 5 per mensem. In the plaint, however, it was mentioned that Baldeo Prasad was the tenant of the shop on a monthly rent of Rs 10. The point of time at which the rent was enhanced from Rs. 5 to Rs 10 is not known. The conten-

tion of the plaintiff-appellant was that Baldeo Prasad was a tenant at will and, therefore, on his death his son did not acquire any interest in the tenancy which was not heritable. On the other hand, it was contended on behalf of the defendant-respondent that Baldeo Prasad was a month-to-month tenant and, therefore, the tenancy was heritable and on Baldeo Prasad's death his son became a tenant by right of inheritance.

50. It has been held by Oak, J., that Baldeo Prasad was a month-to-month tenant and that on his death the tenancy was inherited by his son. With this view S. N. Singh, J., has concurred. The basis of the decision of Oak, J., is that on the expiry of the period of eleven months stipulated in the original lease deed, the status of Baldeo Prasad was that of a tenant holding over under Section 116 of the Transfer of Property Act. It was also observed by his Lordship that enhancement of rent from Rs. 5 per month to Rs. 10 per month suggested a fresh contract of tenancy and that, in the absence of a contract to the contrary, under Section 106 of the Transfer of Property Act, a presumption would arise that Baldeo Prasad was a tenant from month to month. The contention of Mr. K. C. Saxena that the doctrine of holding over under Section 116 of the Transfer of Property Act could not be applicable, inasmuch as there was a contract to the contrary in Ext. 1, has not been accepted as correct by Mr. Justice Oak and, if I may say so with respect, rightly.

I am further of the view that, even if it be assumed that Section 116 of the Transfer of Property Act was not applicable to the case, the fact that Baldeo Prasad was throughout in possession and had been paying rent either at the rate of Rs. 5 per month or at the rate of Rs. 10 per month would be sufficient to raise a legal presumption that Baldeo Prasad was not a tenant at will but was a tenant from month to month. Under the lease deed itself the status of Baldeo Prasad was that of a lessee as defined under Section 105 of the Transfer of Property Act and under S. 106 of that Act the lease was a lease from month to month. It is true that on the expiry of the period of 11 months the landlord might have immediately required him to hand over possession. This evidently the landlord did not do. The old contract had come to an end and, in my opinion, even if Sec. 116 of the Transfer of Property Act did not apply, by necessary implication a fresh contract of tenancy can and should be presumed to have come into being.

Since there is nothing to show as to what were the terms of the fresh contract, a presumption under Section 109 of the Evidence Act would also arise that Baldeo Prasad continued to remain a month-to-month tenant as he had been before. This implied fresh contract of tenancy would further be

strengthened by the fact that the rent at some period, after the expiry of the period specified in the original lease deed, had been agreed upon to be paid at the enhanced rate of Rs. 10. It is almost impossible to believe that Baldeo Prasad would have agreed to the enhancement in rent if he was merely a tenant at will and was to continue to remain so. In the circumstances, I respectfully agree with Oak, J., that under Section 106 of the Transfer of Property Act in the absence of any contract to the contrary, a presumption would arise that the tenancy of Baldeo Prasad was from month to month. This being so, it must also follow, as held by Oak, J. and conceded to by Mr. K. C. Saxena, that the tenancy of Baldeo Prasad was heritable. The legal character and incidents or tenancies at will have been elaborately considered by my learned brother Oak, J. and I respectfully agree with his Lordship's view. There is nothing which I can usefully add.

51. In holding that Raman Lal's case, AIR 1950 All 583, was not correctly decided, Oak, J. has referred to the amendment made in Section 106 of the Transfer of Property Act under U. P. Act No. 24 of 1954. Since at the time when Raman Lal's case AIR 1950 All 583 was decided there was no amendment in S. 106, the case had to be decided on the basis of the provisions of Section 106 as it stood at that time. I am, however, of the view that even under the provisions of Section 106, as it obtained at the time when Raman Lal's case was decided, it was not legally correct to hold that the status of Lalloomal was that of a tenant at will. In fact, under the Transfer of Property Act a tenant at will, as known to English law does not appear to have been contemplated or provided for at all. I think the legal position was correctly expressed by B. Dayal J. in the case of 1965 All LJ 1129 in which he had observed: "a tenant at will under the English Law is nothing more than the licensee under the Indian Law. It is a personal relationship between a landlord and the tenant and the relationship can be terminated either by the landlord or by the tenant by mere expression of intention."

52. It may, however, be said that the Transfer of Property Act is not exhaustive and that, although there is no specific provision therein for creation of a tenancy at will, such tenancy may still be created by act of parties. This may be so, but then the nature of such tenancy in that event would be, in my opinion, akin to that of a licence as observed by Dayal J. In Raman Lal's case, AIR 1950 All 583, there was a lease for a period of 11 months and it was provided in the lease deed that after the expiry of the period of 11 months the landlord would be entitled, at his will whenever he liked to give a month's notice to the tenant to vacate and similarly the tenant was given a right to vacate whenever he

liked after giving a month's notice to the landlord. The lease clearly indicated that at least during the period of 11 months there neither was nor could there be any tenancy at will at all.

It was held by the learned Judges who decided Raman Lal's case, AIR 1950 All 583, that after the expiry of the stipulated period the tenant Lalloo Mal who continued to remain in possession had become a tenant at will. The learned Judges laid stress on the fact that the notice provided for in the lease deed need not have expired on the last date of the month of tenancy. The matter was dealt with by the learned Judges in para 4 of their judgment as follows —

"A year-to-year tenancy arises by implication of law, if the contract does not contain anything to the contrary, a lease is deemed to be a lease from year to year (or a month to month, as the case may be), see S 106. In the present case, it is expressly stated in the rent note that the appellant could give at his will a month's notice at any time when he wanted the shop to be vacated, the words 'at his will' and 'at any time when he wanted the shop to be vacated' are important; the notice to be given by the landlord was not required to expire on the last day of a month but could expire on any day. And if it could expire on any day, it follows that the tenancy was not a month-to-month tenancy. When there was a special contract about the termination of the lease, a month-to-month tenancy could not be implied under the law."

53. Under the definition of lease under Section 105 of the Transfer of Property Act, it is not necessary that a lease should be from year to year or from month to month. All that is necessary is that a lease should be for a certain time, express or implied, or in perpetuity. From the definition it will appear that a lease must be for a certain time and, therefore, tenancy at will does not appear to have been contemplated or provided for by the definition. Under the Transfer of Property Act, ordinarily leases are either from year to year or month to month. This position is further clarified by the opening words of Section 106 of the Act, which are "in the absence of a contract or local law or usage to the contrary". I think, therefore, from Sec. 105 and the opening words of Sec. 106 of the Transfer of Property Act, it may be reasonably inferred that leases, whether from year to year or from month to month or otherwise, could be created by act of parties and that even in cases of leases from year to year or from month to month, by agreement, the parties could provide for termination of the lease by notice different from the notice provided for in Section 106. That is to say, even in cases of a lease from year to year or of a lease from month to

month, the parties concerned by agreement would be entitled to stipulate that the lease would be terminable by giving notice of a particular duration and that such notice need not expire with the end of the year or the month of tenancy.

What could, in my opinion, be done by express acts of parties has been made a general provision by amendment in S. 106 of the Transfer of Property Act made under the Uttar Pradesh Civil Laws Reforms and Amendment Act of 1954. Therefore, in my opinion, the learned Judges who decided Raman Lal's case, AIR 1950 All 583, were not correct in holding that Lalloomal was a tenant at will because the notice, which it was stipulated, could be given by either party, was not to expire with the end of the month of tenancy.

54. I, therefore, concur with Oak J., that Raman Lal's case, AIR 1950 All 583, was not correctly decided, although my reasons are somewhat different from those adopted by his Lordship.

BY THE COURT

55. The special appeal is dismissed with costs.

MVJ/D.V.C.

Appeal dismissed.

AIR 1969 ALLAHABAD 342 (V 56 C 59)

FULL BENCH

B DAYAL, K. B. ASTHANA AND
M. H. BEG, JJ.

Sita and others, Petitioners v State of U. P. and others, Opposite Parties.

Civil Misc. Writ No. 3279 of 1961, D/- 2-8-1967.

(A) Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), Ss. 12, 19, 20, 21, 22, 23, 38 and 48 — Prior to amendment of 1958 — Scheme of S. 12 — Objection under S. 12 claiming sirdari right in land under consolidation — Dismissal — Decision of Consolidation Officer not attaining finality due to pendency of revision under S. 48 — Same objection cannot be raised under S. 20 — Publication of Statement of tenure-holders under S. 19 does not operate as stay of proceedings under S. 12 by virtue of S. 22(2) — Clerical error or error apparent on face of record — Power to correct under S. 38 — When can be exercised, 1965 R. D. 12, Overruled.

Per Asthana and Dayal JJ. (Beg, J. dissenting). —

The provisions of the Act do not contemplate an end to the proceedings under section 12 of the Act whether before the Consolidation Officer or pending in appeal or revision in which the question of Bhumidhari, Sirdari, rights are involved in respect of land under consolidation and the intentment of the Act is that the

KL/L/LF270/68

same objection cannot again be raised under Section 20 of the Act. 1964 R. D. 411 & 1962 All LJ 888, Approved, 1965 R. D. 12, Overruled. (Para 39)

Questions of title as emphasized in sub-section (1) of Section 22 can arise on account of some thing done in laying down the principles of consolidation and in framing the proposals under Chapter 3 of the Act. It does not envisage a question of title which could be competently raised under Section 12 of the Act. Hence, it is not correct to say that merely because section 12 has been placed in Chapter 2 whose heading is "The Revision and correction of Maps and Records" that any decision arrived in those proceedings is to be regarded as of a summary nature and the same question was permitted to be determined in a more elaborate manner under Section 21 of the Act. (Para 41)

Section 21 of the Act envisages proceedings up to the stage of an appeal and does not cover revisions filed under Section 48 of the Act. Thus, in any view of the matter if a revision were pending in a proceeding arising out of objections under Section 20 of the Act that may not stand in the way of the Settlement Officer (Consolidation) confirming the statement of proposals under Section 23(1) of the Act. 1966 All LJ 287, Ref. to.

It is, therefore, not correct to say that unless all decisions on objections filed under Section 20 of the Act attain finality the statement of proposals cannot be confirmed as in the exercise of revisional jurisdiction under Section 48 of the Act the appellate decision can be varied, modified or set aside. Any argument based on the effect of Section 23, therefore, does not necessarily establish that Section 20 permits filing of objections of similar nature which could be filed under Section 12 of the Act. (Para 42)

Section 12 is a self-contained and complete provision for determining a dispute relating to the correctness or nature of an entry or of any omission therefrom. A person who claims to be tenure holder but whose name is not shown in the statement of tenure holders as published under Section 11 of the Act must get the statement corrected and the only provision under the Act for the purpose is section 12. (Para 45)

When the stage comes for preparation of the statement of proposals then the particulars in respect of each tenure holder to be shown in the statement of proposals would be based on the entries in the village records as they emerge after corrections have been made in proceedings under Section 12 of the Act. S. 12(3) of the Act which gives finality to the decision of a Consolidation Officer only means that the decision of the Consolidation Officer would be super-imposed

by the decision in the appeal or revision if any as the case may be and it is the entry in accordance with that decision which would serve as the basis of particulars in respect of each tenure holder contemplated under Section 19(1)(a) of the Act. (Para 45)

A mere publication of the statement of tenure holders under section 19 pending an appeal or a revision in proceedings under Section 12 of the Act would not operate as stay of the hearing of such appeal or revision. Therefore, the appellate authority or the revisional authority as the case may be is bound to proceed with the hearing and arrive at a decision. The proceedings in subsequent stage remain subject to correction according to final decisions in the earlier stages. In any case it is always open under sub-section (2) of Section 38 of the Act to the Consolidation Officer or Settlement Officer (Consolidation) to correct a clerical error or error apparent on the face of the record in any document prepared under any provision of the Act, even though the statement of proposals achieves confirmation under Section 23(2) of the Act. The power under sub-section (2) of Section 38 can be exercised at any time before the notification under Section 52 is issued. (Para 46)

(B) Civil P. C. (1908), Pre — Interpretation of Statutes — Language of statute itself not clear — Legislative intent to be gathered from its provisions read as a whole together with the purpose of the enactment bearing in mind the malady which it was designed to cure. (1584) 3 Co. Rep. 8, Ref. to. (Per Beg, J.)

(C) Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), Pre. — Object and interpretation.

Per Beg, J. :— The Act was not meant to deprive persons affected by the process of consolidation of either their substantive or remedial rights with regard to land. It provides for the re-adjustment of these rights to the scheme of consolidation formulated under the Act and the adaptation of the scheme to these rights as and when they arise for consideration in the course of a continuing process of consolidation. Recourse to ordinary suits in Civil courts was practically barred by S. 49 of the Act during the course of consolidation. But, alternative machinery was provided by the Act for decision of disputes which may arise in the course of consolidation proceedings. The Act affords ample opportunities to all those who could genuinely object to put forward their objections and grievances of various types, while there is still time, that is to say, before the process, which ends with a notification under Section 52 of the Act, is finalised. The repeated provisions for the filing of objec-

tions could not, however, be meant to enable any person to re-agitate precisely the same question on the same facts between the same parties at every stage. To interpret the provisions in such a way as to allow repeated trials of questions already decided earlier would be to permit a misuse of the provisions which would frustrate the objects of the enactment AIR 1959 SC 564 & AIR 1959 All 525, Ref. to (Para 8)

(D) Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 22(2) — Term Court in S. 22(2) does not include consolidation authorities

The functions of the consolidation authorities, when adjudicating upon rights of individuals, are akin to those of courts. But, they combine the roles of administrators with those of adjudicators in participating in the process of consolidation. Even Section 38 of the Act gives these authorities only specified powers of Civil Courts and does not equate them with Courts for all purposes. Therefore, the term 'Court' in S. 22(2) does not include the consolidation authorities, viz. Consolidation Officer, Settlement Officer (Consolidation) and Deputy Director or Director of Consolidation. 1964 R.D. 411, Approved, 1962 R. D. 107, Ref. (Paras 14, 39)

(E) Civil P. C. (1908), S. 11 — Principle of res judicata — Applicability to proceedings before consolidation authorities under U. P. Consolidation of Holdings Act (5 of 1954).

Per Beg, J. — The consolidation authorities acting at each stage under the Act are performing judicial acts in deciding the rights of contesting parties. Therefore, their decisions must bind parties at each stage for the purposes of succeeding stages 1960 R.D. 323 & AIR 1965 All 296, Ref. on. (Para 21)

The principle of res judicata bars retrial and decision once again of what is concluded but not merely the "raising" of a question. 'Raising' does not include trial and decision, the next stages which will be barred where there is a previous adjudication on the same facts. The mere filing of an objection under Section 12 of the Act or the pendency of that objection cannot bar even the raising of a 'similar' objection under Section 20 of the Act before the objection under section 12 of the Act has been finally decided. Even if the bar of res judicata could be spoken of as a bar to the very raising of an objection itself, as distinguished from its trial, the bar could not come into existence before the proceedings under section 12 of the Act had reached finality (Para 31a)

Per Asthana and Dayal, JJ. — The doctrine of res judicata pertains to the jurisdiction of a court and what has

been decided between the parties in an earlier litigation is barred from being raised in a subsequent litigation. That is to say, a court cannot allow a question to be raised which has already been adjudicated upon between the parties in an earlier case. In other words, law makes it incompetent for any court to entertain such a question. If the subsequent objection filed under Section 20 of the Act raises the same questions which had already been adjudicated upon in the earlier proceedings under Section 12 of the Act then the doctrine of res judicata itself would render any objection filed under Section 20 of the Act raising similar questions as incompetent. But if the proceedings in the first stage are still pending and have not been finally decided then the question of res judicata will not arise. (Para 40)

(F) Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), S. 12(7) — Scope and object — Section creates an estoppel by record and cannot be used to cut down application of doctrine of res judicata—(Civil P. C. (1908), S. 11)—(Evidence Act (1872), S. 115).

Per Beg, J. — Sec. 12(7) of the Act bars the raising of a question by means of an objection under Section 20(2) or Section 34(1) even when such an adjudication did not take place but could have taken place on an objection which could and ought to have been made. In other words, the object of Section 12(7) of the Act clearly appears to be to go even beyond the doctrine of res judicata. This section cannot be used to cut down the application of the doctrine of res judicata in any way whatsoever. It contains within it something more than the principles of constructive res judicata itself. Its result can be, more appropriately, described as an "estoppel by record", inasmuch as what has taken place and is recorded and declared final cannot be questioned subsequently by a party which has already had an opportunity to object. The term estoppel by record can be used for matters formally recorded and declared final by statute where opportunity to object had been afforded to persons estopped. (Para 22)

Per Asthana and Dayal, JJ. — Sub-section (7) of Section 12 only restates the rule of constructive res judicata as contained in the Civil Procedure Code but no argument can be built on its basis to establish that under the scheme of the Act same questions can be raised by a tenure-holder under Section 20 of the Act in respect of land which can be raised under Section 12 of the Act in respect of the same land. (Para 40)

(G) Tenancy Laws — U. P. Consolidation of Holdings Act (5 of 1954), Sections 12, 54 — Rules under Section 54, R. 34 —

Rule 34(3) which provides for appeal against order of Consolidation Officer in proceedings under Section 12 is as much part of the Act as any other provision of Act and is a valid provision in existence from very inception of Act. (Para 41)

(H) Civil P. C. (1908), Pre. — Precedents — Judgment affirmed in appeal — Determination of ratio decidendi.

Per Beg, J.:— A Judgment given on an appeal can confirm the conclusion arrived at in the Judgment appealed against without adopting all the reasons of the Judgment appealed from. The ratio decidendi of the two Judgments has to be determined separately. (Para 32)

Cases Referred: Chronological Paras

- (1967) Misc. Writ Nos. 610 and 611 of 1963, D/- 7-7-1967=1967 All WR (HC) 653, Hanuman Rai v. Deputy Director of Consolidation 28
- (1967) 1967 RD 1=1967 All WR (HC) 10, Sheoraj Singh v. Deputy Director of Consolidation 33, 42
- (1967) 1967 RD 51=1966 All WR (HC) 646, Bansidhar v. Deputy Director of Consolidation 33, 42
- (1966) 1966 All LJ 162=ILR (1966) 1 All 652, Garala Dhvaj v. Bhadeshwar 28
- (1966) 1966 All LJ 287=1966 All WR (HC) 237, Raghunandan v. Regional Deputy Director of Consolidation 42
- (1965) AIR 1965 All 296 (V 52)=1964 All LJ 1112, Smt. Kanizan v. Ghulam Nabi 21
- (1965) 1965 All LJ 1161, Ahsan Ali v. Deputy Director of Consolidation 28
- (1965) 1965 RD 12=1964 All WR (HC) 589, Ganga Singh v. Deputy Director of Consolidation 31a, 32, 33, 34, 36, 38, 42, 47
- (1964) 1964 RD 411=1964 All WR (HC) 424, Ram Bharosey Lal v. Deputy Director of Consolidation 14, 36, 39, 46
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- (1962) 1962 RD 107=1962 All WR (HC) 450, Ganga Singh v. Deputy Director of Consolidation 14, 26, 29, 31a, 32
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- (1960) Civil Misc. Writ No. 473 of 1958, D/- 21-9-1960=1960 RD 323, Raghubir Singh v. Deputy Director of Consolidation 21
- (1959) AIR 1959 SC 564 (V 46)=1959 All LJ 601, Attar Singh v. State of U. P. 8

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- (1959) 1959-2 WLR 377=1959-1 QB 462, Society of Medical Officers of Health v. Hope 20
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- (1953) 1953 Ch. 51=1952-2 TLR 676, Re: 56 Denton Road Twickenham 20
- (1952) 1952 Ch. 359=50 LGR 353, In re, Birkenhead Corporation 20
- (1904) 1904-2 KB 109, Livingstone v. Westminster Corporation 20
- (1584) 3 Co Rep 8=76 ER 637, Heydon's Case 7
- Sripat Narain Singh, for Petitioners; Standing Counsel, for Opposite Party.

M. H. BEG, J. :— This reference to a Full Bench arises out of a petition under Article 226 of the Constitution seeking writs of certiorari to quash the orders of the Deputy Director of Consolidation, the Settlement Officer (Consolidation), and the Consolidation Officer, Azamgarh, rejecting the petitioners' objection under Section 20 of the U. P. Consolidation of Holdings Act, 1954, (hereinafter referred to as the Act), as it stood before its amendment in 1958. The petitioners' objection before the Consolidation authorities was that their names were wrongly omitted from the statement of proposals published under Section 19 of the Act. These statements in C. H. Form 23, prescribed by Rule 46, must contain a number of particulars laid down in Section 19 of the Act. Among the details to be entered in C. H. Form 23, are the name and parentage of each tenure-holder and the class of tenure of each plot in the village which is undergoing consolidation proceedings. The petitioners claimed to be Sirdars of plots nos. 1011 and 1191 in their village. Their objection was rejected by the Consolidation authorities, in proceedings under Sections 20 and 21 of the Act, on the ground that this question had already been decided between the same parties in favour of Suraj Bhan, opposite party no. 5, who had been held to be the Bhumidhar in previous proceedings under Section 12 of the Act.

2. The petitioners contended that the proceedings under Section 12 of the Act had not resulted in a final order, inasmuch as a revision application under section 48 of the Act was pending against the decision in proceedings under Section 12 of the Act, when the petitioners' objections under Section 20 of the Act were rejected by the Consolidation Officer and the Settlement Officer. The Deputy Director, however, had revision applications arising out of proceedings both under Section 12 and under Section 20 of the Act before him. He decided them together

by means of the same order on 5-3-1961. The Deputy Director (C) laconically observed that he was unable to find any substantial irregularity or illegality in the orders of the authorities below him and dismissed both the revision applications. The result was that the Settlement Officer and the Consolidation Officer had disposed of the petitioners' objection under section 20 of the Act before the revision application of the petitioners under S. 48 of the Act, pending against the decision of the petitioners' case under Section 12 of the Act with regard to Plots Nos. 1011 and 1191, was finally disposed of.

3. The petitioners' submission was that proceedings under section 12 of the Act were superseded by proceedings under Sections 20 and 21 of the Act. This contention was supported by a reference to section 22(2) which read, after an amendment, as follows:—

"Upon the publication of the Statement of Proposals under sub-section (1) of the Section 20 all suits or proceedings in the Court of first instance, appeal, reference or revision, in which the question of title or a question whether any person is a Sirdar, Adhivasi or Asami in relation to the same land has been raised, shall be stayed."

4. The petitioners urged that, even if the principles of *res judicata* were to be found embodied in various sections of the Act, for proceedings at various stages, the principles were only applicable to a case in which there was a final decision; Section 22(2) of the Act was utilised to build the argument that proceedings under the Act, which were not concluded or finalised, were meant to be stayed so that it followed that an adjudication under Sections 20 and 21 of the Act was meant to take place in all cases where the prior proceedings under Section 12 of the Act had not reached finality.

5. A still bolder stand, adopted by Mr. Sripat Narain Singh on behalf of the petitioners was that all matters relating to right or title were meant to be really agitated or to be reagitated and determined afresh by means of an elaborate trial in proceedings under Ss. 20 and 21 of the Act. Proceedings under Sec. 12 of the Act (as it stood before the amendment of the Act in 1958) were sought to be equated with proceedings in revenue courts for mutation of names and correction of entries in revenue records, and proceedings under Ss. 20 and 21 of the Act were sought to be placed, by comparison, in the position of regular suits before Civil and Revenue Courts. This analogy does not appear to be apt at all. It is true that the Consolidation proceedings, as found in the U. P. Act 5 of 1954, seem to proceed upon a distinction between rectification of errors under Sections 8 and 9 of the

Act and the more elaborate proceedings under Section 12 of the Act, which may even raise questions of title referable, through a Civil Judge, to the Arbitrator, but, there the similarity ends. It may be mentioned here, in passing, that this scheme was replaced, little later, by enlarging the scope of the enquiries under S. 9 as it was found after the U.P. Act XXXVIII of 1958 which amended the original provisions of the Act so as to better serve the objects of Consolidation. The line of thinking based upon any possible division of proceedings into those concerned with mere mutations or corrections of entries and those proceedings which decide questions of right or title of tenure-holders seems to have been entirely abandoned by the amendment of 1958.

6. We are concerned here with the provisions of the Act as they stood before the amending of U. P. Act XXXVIII of 1958. Even under the unamended Act, the adjudication under section 12 was as elaborate as one under Sections 20 and 21 of the Act. It is intended to decide questions of right and title which could be decided at that stage of the Consolidation proceedings under the Act just as well as under Sections 20 and 21 of the Act. Section 12 (7) specifically provided that an objection relating to title which could be raised in proceedings under Section 12 could not be raised subsequently under Section 20(2) or Sec. 34(1) of the Act. Moreover the hierarchy of authorities and Presiding Officers conducting the proceedings at different stages is the same. The proceedings pass through the same hands and decisions have to be taken repeatedly by the same Officer. Furthermore, the basic distinction between mutation proceedings, which are primarily meant for fiscal objects of the State, and litigation between parties on questions of individual right and title, is absent here. The consolidation proceedings have what may be called a "consolidated" purpose.

7. I think the correct meaning of the various provisions of the Act dealing with finality of orders passed could only be properly understood in the light of the intent gathered from the provisions, viewed as a whole, together with the purpose of the enactment which has to be considered where the language of the enactment itself is not clear. It is necessary, in such cases, to keep in mind the malady which an enactment was designed to cure. It was said long ago, in Heydon's case, (1584) 3 Co. Rep. 8.

"And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and the evasions for the continuance of the mischief and pro privata

commodo, and to add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono publico."

8. The preamble of the Act shows that the consolidation of Agricultural holdings in Uttar Pradesh appeared necessary "for the development of agriculture." Its object has been explained by Wanchoo, J., in *Attar Singh v. State of U. P.*, AIR 1959 SC 564 at p. 565. The evil it was designed to check, the fragmentation of holdings, was also commented upon by Dhavan, J. In *Smt. Rani v. Deputy Director of Consolidation*, 1959 RD 108=(AIR 1959 All 525). It is sufficient for me to observe that the Act before us was not meant to deprive persons affected by the process of consolidation of either their substantive or remedial rights with regard to land. It provides for the re-adjustment of these rights to the scheme of consolidation formulated under the Act and the adaptation of the scheme to these rights as and when they arise for consideration in the course of a continuing process of consolidation. Recourse to ordinary suits in Civil Courts was practically barred by Sec. 49 of the Act during the course of consolidation. But, alternative machinery was provided by the Act for decision of disputes which may arise in the course of consolidation proceedings. The elaborate provisions of the Act for determination of various, sometimes over-lapping — I would like to emphasize that they are over-lapping at times — questions involving individual as well as collective rights of villagers affected by the process of consolidation, seem to be designed to guard against possible injustice or oversights in the course of preparing and enforcing the scheme. The Act affords ample opportunities to all those who could genuinely object to put forward their objections and grievances of various types, while there is still time, that is to say, before the process, which ends with a notification under Section 52 of the Act, is finalised. The repeated provisions for the filing of objections could not, however, be meant to enable any person to reargue precisely the same question on the same facts between the same parties at every stage. To interpret the provisions in such a way as to allow repeated trials of questions already decided earlier would be to permit a misuse of the provisions which would frustrate the objects of the enactment. The process of consolidation may be examined a little more closely now.

9. We have to interpret the Act as it stood in its original form when it was notified and published as U. P. Act No. V of 1954 in the U. P. Gazette on March 8, 1954. This Act divides the process of consolidation into three main parts, and each of the first three parts falls into two

halves so that we get the following stages Part I, "Revision and Correction of Maps and Records", (Chap. 2); (a) "Preliminary survey and Report" (Sections 4 to 8); (b) "Statement of plots and tenure-holders" (Sections 11 and 12); Part II (Chapter 3) "Preparation of Consolidation Scheme"; (a) "Statement of Principles" (Sections 14 to 18); (b) "Statement of Proposals" (Sections 19 to 21); and, finally, Part III Chapter 4 "Enforcement of the Scheme" (Sections 24 to 36).

10. The first part dealt with in chapter 2 of the Act is concerned with "Revision and Correction of Maps and Records". Here we find that, after a declaration by the State Government under Section 4 of the Act that a particular district or area is under consolidation from the date specified, the duty of preparing and maintaining the maps, the Khasras, and the annual registers under Chapter 3 under Land Revenue Act 1901 is transferred to the Settlement Officer (Consolidation). The functions of the Collector, the Assistant Collector, and the Tahsildar, under the Land Revenue Act, are to be exercised by the Settlement Officer (Consolidation), the Consolidation Officer, and the Asstt. Consolidation Officer, so long as the area remains under consolidation operations. The Assistant Consolidation Officer is then required to examine and test the accuracy of the village maps, khasras and the current annual registers by making a field to field Partial of the entire village. The Asstt. Consolidation Officer is also required to prepare a statement showing the mistakes discovered and the nature of existing disputes about these. After that, the Assistant Consolidation Officer has to make a report to the Settlement Officer, under Section 8 of the Act, who may hold an enquiry and direct corrections to be made.

There is a provision for a further Partial by the Assistant Consolidation Officer before making a correction in the Annual Register and there is an appeal to the Consolidation Officer from the decision made by the Assistant Consolidation Officer. The decision of the Consolidation Officer is "final" under Section 8(4) of the Act "except" as otherwise provided by or under this Act. It appears that this stage is only concerned with the preliminary survey and the result of the Partial, which was to be carried out by the Assistant Consolidation Officer under the Act. This survey could not finally determine questions of right or title. The decision of the Consolidation Officer was apparently only final as regards the entries made in the annual registers after the survey and not on other matters concerning the rights of tenure-holders with which Section 11(1) deals. These entries would raise rebuttable presumptions of

correctness, but they could not conclude matters of right or title evidenced by them.

11. The second half of the process covered by the "Revision and Correction of Maps and Records" takes place under Sections 11 and 12 of the Act. Here we find that the Assistant Consolidation Officer has to prepare statements of plots and tenure-holders showing not only the area, the nature of the soil, the revenue or rent, the hereditary sanctioned rates of rent, the rental value, but also the character of the rights enjoyed by each tenure-holder. Section 12(1) expressly enables and obliges any person who disputes the correctness or nature of an entry in the statement of plots and tenure-holders to put forward his objections. It requires the Assistant Consolidation Officer to hear the views of Land Management Committee. Section 12(3) makes a decision of the Consolidation Officer upon a contest "final except as otherwise provided by or under this Act."

It is important to note here that what is expressly made final is a decision upon a contest and nothing else. An appeal under Rule 34 has been held by this Court to be validly provided under the Act. There is also a provision for reference of questions of title for decision by the arbitrator whose decision is to be "final" under Section 12(4) of the Act. We also find that Section 12(5) provides that "all suits or proceedings in the court of first instance, or appeal in which a question of title in relation to the same has been raised shall be stayed." The term 'Court' could not have been used for the Consolidation Officer. It has been evidently used for other authorities before which questions of title relating to the "same" land has been raised. Such authorities could only be those operating outside the Act.

12. The next or second part of the consolidation proceedings consists of "Preparation of Consolidation Scheme" dealt with in Chapter 3 of the Act. Here, we find a provision, in Section 14 (1), for the "Statement of Principles" which has to contain the broad outlines of the lay out of the villages and the proposed re-arrangement. The particulars which have to be shown here relate to the provisions for common paths, pastures, fisheries manure pits, khalhans, cremation grounds, grave yards, abadi areas, and works of public utility and other common uses. It has to be noted that the matters dealt with here are very distinctly different from those to be mentioned in the statements of plots and tenure-holders under Section 11(1) of the Act. These questions do, however, affect tenure-holders individually and as a whole. The tenure-holders are also affected by the proposed scheme of allocations of land for various purposes

and by proposed formations of blocks. The "statement of principles" under Section 14, prepared after keeping in view the principles laid down in Section 15 of the Act, is published under Section 16(1) of the Act. Persons "likely to be affected by the Scheme" of redistribution and allocation of land for various purposes were permitted to object. The Consolidation Officer had to decide the objections subject to an appeal before the Settlement Officer whose decision was "final" under Section 17(1) of the Act "except as otherwise provided by or under this Act." The Settlement Officer (Consolidation) was authorised to make a local inspection before giving his decision and also to hear the Land Management Committee which was to be informed. At the conclusion of this stage, the "Statement of Principles", as confirmed and published, was declared "final" under Section 18 of the Act. It should be noted that the rights of tenure-holders in land are not as such, declared "final" here, but the allocations of land for various purposes under the scheme are finalised at this stage.

13. The second phase of the "Preparation of the Consolidation Scheme" was then to commence by means of a "statement of proposals" prepared under Section 19(1) of the Act. An examination of the particulars prescribed by Section 19 for the statement of proposals shows that it is meant to give combined results of proceedings under Sections 11 and 14(1) of the Act after the objections at the earlier stages have been disposed of. In fact, the statement of proposals under Sec. 19(1) has to take place in accordance with the statement of principles as confirmed and published "under section 18 of the Act." In addition, at this stage, reasons have to be given in support of the proposed allotments to tenure-holders. Certain additional matters, such as compensation for trees, wells, buildings, or, other improvements are to be mentioned in the statement of proposals.

The statement of proposals is also to be preceded by consultation with the Land Management Committee, and, in case of a difference between the Assistant Consolidation Officer and the Land Management Committee, the decision of the Settlement Officer on the question on which there is a difference is declared "final" under Section 19(5) of the Act. The statement of proposals is then published under Section 20 sub-section (1) The Assistant Consolidation Officer may, "if necessary, hear parties," under Section 21 (1) of the Act, on objections made under Section 20 (1) by "any person likely to be affected by the proposals". The officer then reports to the Consolidation Officer who disposes of the objections after hearing parties and their evidence. There is an appeal to the

Settlement Officer (Consolidation) under Section 21(2). The appellate order of the Settlement Officer (Consolidation) is final "except as otherwise provided by or under this Act." The Consolidation Officer and the Settlement Officer (Consolidation) have, before deciding cases under Section 21, to make local inspections after giving due notice to the parties and the Land Management Committee.

14. We also find that there is a provision, in section 22 sub-section (1) of the Act, for reference of questions of title to an arbitrator by the Consolidation Officer. It is in this connection that it was provided, in Section 22(2), as it was originally worded, that "all suits and proceedings in the Court of the first instance or in appeal in which a question of title in relation to the same land has been raised shall be stayed. "It is clear that here the "suits and proceedings" mentioned are those which were pending in "courts" and which raise questions which could be referred to the arbitrator. There is no provision at all for an automatic stay of any proceedings before the Consolidation Officer or the Settlement Officer (Consolidation) or the Director of Consolidation. The consolidation authorities are not defined or described at all as "Courts" anywhere in the Act although the word "court" is repeatedly used when referring to stay of suits and proceedings relating to title. The context in which Section 22 (2) occurs is precisely similar to the context in which the similar provision in section 12(5) occurs. Each of these provisions is followed by the provision that "the decision of the arbitrator shall be final." The mere fact that later on questions or sirdari, adhivasi, and asami rights were added after questions of title here, by an amendment, would not alter the context in which the word "court" is used here. The functions of the consolidation authorities, when adjudicating upon rights of individuals, are akin to those of courts. But, they combine the roles of administrators with those of adjudicators in participating in the process of consolidation. Even Section 38 of the Act gives these authorities only specified powers of Civil Courts and does not equate them with courts for all purposes. Therefore, I respectfully prefer the interpretation given to the term "court", as used in Section 22(2) of the Act, by Gupta, J. in the Division Bench case of Ram Bharosey Lal v. Deputy Director of Consolidation, 1964 RD 411 to that adopted by Srivastava, J. in Ganga Singh v. Deputy Director of Consolidation, 1962 RD 107.

15. Section 23 of the Act provides for the publication and confirmation of the statement of proposals which is declared "final except in so far as it relates to land which is the subject matter of references made to the Civil Judge and which

have not been disposed of till then. "This section is important for deciding the question before us. It demonstrates that the statement of proposals", which also contains particulars specified in Section 11(1) of the Act, is not "final" until this stage is passed.

16. The third and the last stage of process of consolidation covers the enforcement of the scheme dealt with in Chapter 4 of the Act. This part provides for the handing over of possession of plots allotted to the tenure-holders and preparation of the new revenue records under Sec. 27, sub-section (1) of the Act. The entries in the new records of rights, prepared under sub-section (1) of section 27 are declared to be "final and conclusive". At this stage, there is provision in section 34(1) of the Act for objections by persons aggrieved only by orders passed on certain matters arising out of compensation for crops (Section 29), transfer of encumbrances (section 31), and award of costs (Section 33). These objections are to be disposed of by the Consolidation Officer under Section 35 of the Act. But, even at this stage, there is a provision in Section 36, sub-section (1) of the Act that "where the objection filed under Section 34 involves a question of title in land and such question has not already been finally determined by a competent Court, the Consolidation Officer shall refer it for determination to the Civil Judge having jurisdiction who shall thereupon refer it to the arbitrator." The decision of the arbitrator is again declared to be final. Section 36-A added by the U. P. Act 16 of 1957 clarifies that if a question arise in any proceeding under the Act whether a person possessed the rights of a Sirdar, Adhivasi, or Asami on any particular land at any particular time, such a question shall not be deemed to raise a question of title.

17. There was a provision introduced in this part, by an early amendment, which indicated very clearly that decisions on questions of rights of tenure-holders, apart from question of "title", remained only "provisional" until the "statement of proposals" was confirmed under S. 23(2) of the Act. This provision, Section 26-A, which was deleted in 1958 shows the intentions of the framers of the Act. It reads as follows:—

"Notwithstanding anything contained in Ss. 27 and 30, the maps and record and the tenure-holder's right to land in respect of which the statement of proposals has not become final under sub-section (2) of Section 23 shall remain provisional."

The provision was repealed by the U. P. Act XXXVIII of 1958 perhaps because of some inconsistency with other provisions, and Section 30 of the Act was considered enough. Section 30 read as follows:—

"With effect from the date on which a tenure-holder, in pursuance of the provisions of Section 26, enters into possession of the plots allotted to him, his rights, title, interest and liabilities in his original holding shall be extinguished and he shall have the same rights, title, interest and liabilities subject to notification, if any, specified in the final consolidation scheme in the plots allotted to him under Section 25"

Section 30, which continued with slight modifications, also shows that extinguishment of old rights took place only on the acquisition of new rights under the "final consolidation scheme." Questions relating to nature of rights of tenure-holders in plots seem to cut across various stages and are not confined to the stage of proceedings under section 12 of the Act. Other questions may arise at particular stages only. The reason for this difference appears obvious. Rights in particular plots are not static. They are altered with devolution, and with maturity and loss of rights during the course of the process of consolidation.

18. The general survey, made above, of the various stages of the process of consolidation show that each of the three parts of the process of consolidation is directed towards achieving a separate and distinct set of objects. In the process of attaining these objects, questions involving individual rights, sometimes of the same nature or character, may turn up in different forms and contexts or with differing catenations of fact at each stage. Therefore, provision has been made, at every stage, for safeguarding these rights by enabling all those who may have possible grievance, which they could not put forward earlier for reasons beyond their control, to object. Decisions upon these objections are at the same time declared to be final. This means that they cannot, upon the same facts, be re-agitated between the same parties. In other words, the doctrine of *res judicata* was obviously meant to be incorporated in the provisions of the Act whenever finality is given to a decision. I confess that I am unable to see any difficulty in recognising this position clearly. There is nothing difficult or abstruse about the doctrine of *res judicata*. It rests on two well recognised principles; one of public policy, contained in the Roman maxim: "*interest reipublice ut sit finis litium*" i.e. "the republic's interest require that litigation must have an end"; another of justice and equity, embodied in another Roman maxim; "*nemo debet bis vexari pro una et eadem causa*" i.e. no man should be vexed twice over for the same cause." Adjudication would lose its purpose if there could be no reasonable finality to the process of obtaining it and both public and private time and resour-

ces would be wasted if the process of adjudication were unending or repeated without any justifiable object.

19. It is not difficult to find the doctrine of *res judicata* whenever it is sought to be embodied in statutory provisions. It is well established that Section 11 C. P. C. is only one instance of it in a very comprehensive form but even this does not exhaust it. Indeed, the doctrine is a logical corollary of the process of adjudication both judicial and quasi judicial. It has been described as "a principle of universal jurisprudence" (See: American jurisprudence V-30 A. P. 371).

20. Our Supreme Court observed in *Smt Ujjam Bai v. State of U. P.*, AIR 1962 SC 1621, at p 1630:

"The characteristic attribute of a judicial act or decision is that it binds whether it be right or wrong. An error of law or fact committed by a judicial or quasi judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts *stricto sensu* but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction, and provided that they keep within those limits their decisions must be accepted as valid unless set aside on appeal. Even the doctrine of *res judicata* has been applied to such decisions. (See *Livingstone v Westminster Corporation*, 1904-2 KB 109; *Re Birkenhead Corporation*, 1952 Ch. 358; *Re 56 Denton Road, Twickenham*, 1953 Ch. 51; *Society of Medical Officers of Health v. Hope*, 1959-2 WLR 377 at pp. 391, 396, 397, 402. In *Burn & Co., Calcutta v. Their Employees*, 1956 SCR 781 = AIR 1957 SC 38 this court said that although the rule of *res judicata* as enacted by S 11 of the Code of Civil Procedure did not in terms apply to an award made by an industrial tribunal, its underlying principle which is founded on sound public policy and is of universal application must apply. In *Daryao v State of U. P.* 1961-2 SCA 591 = AIR 1961 SC 1457, this court applied the doctrine of *res judicata* in respect of applications under Article 32 of the Constitution."

21. It is clear that the consolidation authorities acting at each stage are performing judicial acts in deciding the rights of contesting parties. Therefore, their decisions must bind parties at each stage for the purposes of succeeding stages. In *Raghubir Singh v. D.D.C.*, Civil Misc. Writ No 473 of 1958 (decided on 21-9-1960) (reported in 1960 RD p. 323) Jagdish Sahai J. observed:

"It was contended on behalf of the petitioners that Section 11 of the C. P. C. in terms did not apply to proceedings under the Act. Whether or not Section 11 applies, the principles of *res judicata* apply."

In that case a decision of the Board of Revenue was held to bind parties to it. In *Kanizan v. Ghulam Nabi*, AIR 1965 All 296=1964 All LJ 1112, Sharma, J. held that a decision in proceedings under the Act was binding in other proceedings under the Act. I respectfully concur with the views expressed in both these cases.

22. It may also be observed that the Division Bench decision of this court in *Rup Narain v. State*, 1962 All LJ 888 contains the following observation of Desai C. J. :—

"The legislature probably enacted Sec. 12 (7) to give effect to the rule of constructive *res judicata*."

Section 12(7) of the Act, reads as follows :—

"12(7): A question of title in respect of any plot mentioned in the statement in clause (c) of sub-section (1) of Section 11, which might and ought to have been raised under sub-section (1) but had not been raised, shall not be raised in any objection filed under sub-section (2) of Section 20, or under sub-section (1) of Section 34."

It was contended that Section 12(7) of the Act shows that the doctrine of *res judicata* under the Act is confined to an application of the principle of constructive *res judicata* in cases where a question of title arises and goes no further. This argument overlooks the effect of Section 12(7) of the Act even in those cases in which there has been no objection whatsoever under Section 12 by a party so that there has been no dispute or adjudication. The rule of constructive *res judicata* is a logical corollary of extension of the principle of *res judicata*. It applies in cases where an adjudication which has taken place and enables it to be construed as one which covers matters which could or might have been raised in the course of that adjudication.

On the other hand, Section 12(7) of the Act bars the raising of a question by means of an objection under Section 20(2) or Section 34(1) even when such an adjudication did not take place but could have taken place on an objection which could and ought to have been made. In other words, the object of Section 12(7) of the Act clearly appears to be to go even beyond the doctrine of *res judicata*. This section, could not, in my opinion, be used to cut down the application of the doctrine of *res judicata* in any way whatsoever. It contains within it something more than the principles of constructive *res judicata* itself. Its result,

could be, more appropriately, described as an "estoppel by record", inasmuch as what has taken place and is recorded and declared final cannot be questioned subsequently by a party which has already had an opportunity to object. It may be observed here that although the term "estoppel by record", as used in English law, corresponds broadly to our *res judicata*, it has also a wider connotation. It has been explained as follows: An estoppel by record is the preclusion to deny the truth of matters set forth in a record whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction "(See American Jurisprudence 2nd Ed. Vol. 28 page 600; also Corpus Juris Secundum Vol. 31 page 193). It appears that the term can be used for matters formally recorded and declared final by statute where opportunity to object had been afforded to persons estopped.

23. S. 12(1) of the Act may also be now closely examined. It reads as follows:—

"(1) Every person interested to disputing the correctness or nature of an entry to the statement published under Section 11 or pointing out any omission therefrom shall within thirty days of the publication of the statement under sub-section (2) of Section 11, file objection, if any, on the statement before the Assistant Consolidation Officer in the manner prescribed."

24. This provision also imposes an obligation, by the use of the word "shall", upon a person who could and might raise an objection against an entry to do so at this stage. If no objection is raised at this stage there cannot be a decision taken by the Consolidation Officer to which finality could attach under Section 12(3) of the Act. The decision of the Consolidation Officer can only be taken on objections filed on which the Assistant Consolidation Officer submits a report, "after hearing the parties, if necessary", under section 12(2) of the Act. Therefore, if a party has already objected but omits to take up, as a part of his objections, a question which he might and should have taken up, the doctrine of constructive *res judicata* could be applied against him. If, however, a party does not perform his duty to object, under Section 12(1) of the Act, so that there is no adjudication whatsoever upon an objection, which he could and should have put forward, he may still be debarred by the principle of estoppel by record from objecting at a subsequent stage because he will be deemed to be aware of the contents of the statement published under Section 11 (2) of the Act. This is, as already indicated, somewhat wider and different from the principle of *res judicata*. Section 12 (7) seems to have been introduced as a subsequent amendment of the original

Act, by way of abundant caution, to make this position clear so far as questions of title to land are concerned.

25. Does it follow, from the above mentioned provisions of Ss. 11 and 12 and 14 to 23 of the Act, that objections of the nature contemplated by Sec. 12 are excluded entirely in all cases from the purview of objections under S 20(2) of the Act? The observations made by Desai C J in 1962 All LJ 888 certainly indicate that the answer to this questions should be in the affirmative. It may, however, be observed that the question directly arising in that case was whether an objection could be raised for the first time under section 20(2) of the Act against the inclusion of certain land, which had ceased to be grove-land, in the consolidation scheme notwithstanding that the statement of principles, as confirmed and published under section 18 of the Act, showing the land to be within the scheme, had become final. It was also pointed out there, incidentally, that the objector had another previous opportunity of objecting to the inclusion of this land in the scheme with the statement of plots and tenure-holders was framed under S 11(1) of the Act. Thus, the petitioner had neither objected under Section 12(1) nor under Section 16(2) of the Act. It is, however, significant that Desai C. J. held, "What prevents certain matters being agitated in an objection is the confirmation and finality of the statement of principles" The statement of facts in that case indicated that, although, the question of inclusion of the land in the consolidation scheme, as land which had lost its character of grove-land, could be viewed as having overlapped and passed through two previous stages, yet at the third stage of objections under Section 20(2), Desai C. J. apparently considered the question as finally determined and settled only at the subsequent or second stage because of the specific provision at the second stage giving finality to that type of question. If finality depends upon specific applicable provisions in the Act, it will be noticed that such provisions related either to cases where there has been an objection and an adjudication between parties, such as that provided by Sec. 12 (2) of the Act, or to cases where, as provided by Sections 12(7) and Section 18 read with S 16(2) aggrieved persons have had opportunities to object but have allowed them to slip without objection. They did not go beyond such cases. In other words, all the bars of finality found in the Act can be correlated to and covered by either the principles of res judicata or of estoppel by record and do not go further.

26. It was not absolutely necessary to go beyond applying the principle of estoppel by record, contained in Section 18 of

the Act, for deciding 1962 All LJ 888 Desai C. J., however, did proceed further to determine the scope of objections under Section 20(2) of the Act also. In doing so, he referred, as it was perhaps inevitable, to the scheme of the Act and recorded, as follows (at P. 893) the disagreement of the Division Bench with the view expressed by Srivastava J in 1962 RD 107. "With great respect we do not agree that Section 20(2) is not confined to new matters included in the statement of proposals or that an objection can be filed against an entry in a statement of proposals even though there existed previously a right to object to such an entry contained in another statement prepared earlier. The words 'any person' are wide enough, but their width is controlled by the scope of the objection permitted under Section 20(2). If the objection is of the nature contemplated by sub-section (2) it can be raised by 'any person'."

The reasoning adopted by the Division Bench was (p 892)

"If a consolidation scheme has reached the state of preparation of statement of proposals and a tenure-holder has still a right to object to any entry in the records, or in the statement of principles, it would mean upsetting everything that was done previously and undertaking revision of these documents on a large scale and again there would be no finality."

It was also observed there: (p 892)

"Every provision allowing an opportunity to file an objection after an earlier provision confirming and making final something must mean that the former provision relates to an objection in respect of a matter not confirmed and made final. In other words, Section 20(2) allows a tenure-holder to file an objection against anything contained in the statement of proposals which has not been confirmed or made final under any of the provisions, such as Section 18"

It was also held there (at p 891):

"The proposals referred to in Section 20(2) by which a person should be affected in order that he has a right to file an objection are the new proposals contained for the first time in the statement of proposals. They are the proposals mentioned in Section 19(1)(b)(c)(d)(f) and (g). Neither are the particulars specified in clause (a) proposals though they are required to be recorded in the statement of proposals, nor are the areas earmarked for public purposes. The words 'likely to be affected' in Section 20(2) are highly significant; a person already affected by something done previously (such as the inclusion in the consolidation scheme of his land exempt from consolidation) cannot be said to be a person likely to be affected in future.

Here the appellant was already affected by the confirmation and the finality of the statements of plots and tenure-holders and of principles which recorded the fact that the grove in dispute was included in the consolidation scheme and was reserved for public purposes. He was, therefore, not a person contemplated by Section 20 (2)."

27. The line of reasoning underlying the above mentioned quotations certainly is that the proposals which a person has had an opportunity of questioning earlier could not be questioned by him after they had attained finality declared by statute. If, however, going further, the scope of objections under section 20 (2) is also limited, in the manner indicated above, serious legal and practical difficulties must arise in protecting the rights and titles of persons in land in the course of the consolidation which the Act obviously was designed to do. It cannot be overlooked that Section 49 of the Act bars the institution of any suit or other proceedings in any civil court "with respect to any matter arising out of consolidation proceedings" and "in respect to any other matter in regard to which a suit or application could be filed under the provisions of this Act." Hence, the object of the repealed provisions in the Act for decisions on questions of right and title in land apparently was to enable decisions of any new questions which may arise between two stages of the process of consolidation. These new questions cannot, in my opinion, be restricted to what is new in the proposals contained in statement of proposals under Section 19(1) of the Act. They may also arise as a result of fresh facts which may make the contents of statements of proposals incorrect so far as the rights of tenure holders are concerned by the time the stage of objections under Section 20(2) is reached although they were correct, or could be deemed to be correct, at the time of proceedings under Sec. 12 of the Act. Section 22(1) shows that an objection under section 20(2) may raise a question of title in or over land which had not already been finally determined. This provision also indicates that there may be questions of title left over for the stage of objections under Section 20(1) which fall even outside the wide scope of Section 12(7) of the Act. It appears to me that the scheme of the Act was not only to enable the consolidation operations to progress rapidly and efficiently from stage to stage but also to enable consolidation authorities, instead of ordinary courts, to decide new questions of right and title of individuals in land as the consolidation scheme progresses from stage to stage. The scheme of the Act is to preserve and not to destroy substantive and remedial rights during the process of consolidation

so far as it is reasonably possible to do so.

28. I may illustrate the kind of difficulties which may arise by reference to what has been decided by a Division Bench, consisting of Desai C. J., and Manchanda, J. in *Garala Dhvaj v. Bhadeshwar*, 1966 All LJ 162. Here it was held that the commencement of consolidation proceedings cannot ipso facto prevent the accrual of rights under Section 210 of the U. P. Zamindari Abolition and Land Reforms Act. This view has also been taken by G. C. Mathur, J. in *Ahsan Ali v. Deputy Director of Consolidation*, 1965 All LJ 1161 and by other learned Judges and by me in connected Miscellaneous Writ Nos. 610 and 611 of 1963, *Hanuman Rai v. Deputy Director of Consolidation*, decided on 7th July 1967 (All). It follows that rights in land arising by the application of Section 210 U. P. Z. A. & L. R. Act may, in some cases, mature in the course of consolidation proceedings. They may not be ripe for assertion at the stage of objections under Section 12(1), but may be capable of being asserted at the stage of objections under Section 20(2) of the Act.

Again, a person may be, so far as the record of consolidation proceedings in a village is concerned, apparently "affected" by what has taken place in proceedings under Section 12 of the Act. But, he may not, in the eye of law, be really affected by such proceedings inasmuch as he was a minor or a lunatic or a victim of fraud at the stage of proceedings under Section 12 of the Act. The disability of such a person may have been removed by the time the stage of objections under Section 20(2) is reached. I confess that I am not able to find any provision in the Act which could bring even such persons suffering from some legal incapacity, within the class of persons already "affected" irreparably by what has already taken place in proceedings under Section 12 of the Act. But, such persons would fall within the category of person "likely to be affected." If they did not object under S. 20(2) in spite of removal of their disabilities before that stage their rights may vanish. They would not be able to object at all if the stage for objections of this nature were held to have passed for ever without the possibility of any return or recurrence.

29. It, therefore, appears to me that the interpretation put upon the scope of the right to object under Section 20(2) in 1962 All LJ 888 is too narrow. It is true that the word "proposals" as used in Sec. 20(2) can be interpreted, if it was absolutely necessary to do this, so as to confine the proposals to what is contained in Sec. 19(1) (b), (c), (d), (f) and (g) as held by Desai, C. J. in *Rup Narain's case*

(supra) But, the objections permitted by Section 20(2) appear to be all those which are possible legally against anything contained in the statement of proposals mentioned in Sec. 20(1) which immediately precedes S 20(2). It may be noticed that the statement of proposals as defined in section 19(1) includes the particulars specified in Section 11(1). The term "proposals" has not been defined separately from "the statement of proposals" in the Act. Broadly, everything remains "a proposal" until the scheme is finalised. And, the actual effect is only produced when possession is taken under the last part of the process. The legal effect of whatever has happened during the process is given in the specific provisions of the Act for it. What actually happens at a stage does not necessarily have an unalterable legal effect. I have given other reasons also earlier in support of this view when dealing with other provisions. Therefore, speaking for myself and with great respect, I prefer the view expressed by Srivastava, J in 1962 RD 107 on the scope of objections under Section 20(2) when he observed:

"There is nothing in this sub-section to show that the objections must be confined only to some particular matters or that the objection cannot raise the same point which has already been raised under Section 12 but in respect of which the decision had not become final."

30. The above mentioned statement of the scope of S 20(2) by Srivastava, J. does not conflict with the view that the objector, although not barred by section 20(2) from raising a question of right and title, may yet be prevented from obtaining a fresh adjudication on his objection as he may be barred by the doctrine of res judicata or by an estoppel by record. But, as I have already indicated, I do not, with great respect, endorse the view taken by Srivastava, J in Ganga Singh's case (supra), that proceedings under Sec 12 of the Act which have not reached finality must necessarily and automatically be stayed by applying Section 22(2) of the Act. Even if convenience and need for speedy decision were to operate as guiding factors at the stage of objections under Section 20(2), I do not see why the consolidation authorities cannot stay the proceedings under section 21 and await final decisions which should be speeded up in proceedings under Section 12 of the Act in those cases in which proceedings under Section 12 have not reached finality. It certainly seems to be contemplated by the legislature that proceedings under S. 12 of the Act will be ordinarily completed before the next stage is taken up. Obvious complications and difficulties arise when this is not done.

31. The language of Section 20(2) shows that the scope of objections which "may" (converted into "shall" in 1957) be taken under it is wider than that of objections to entries which "shall" be taken under Section 12 (1) by a person who can question them. Nevertheless, a person not objecting at all under Section 12 (1), without showing exceptional facts and circumstances preventing him from doing so, will be faced with an estoppel by record when objecting to the same entries under Section 20(2) on the same facts. Again, a person who has already objected under section 12(1), when a final decision on his objection has not been taken, should, in these exceptional circumstances, object to the same allegedly wrong entries again under Section 20(2). But, in such a case, the objector has no right to get a re-adjudication or redetermination on the same facts. The objection he could properly take under section 20(2), in such a case, will be that, although he has already objected under Section 12(1), there has been no final adjudication. Such an objector should ask, under Section 20(2) for a rectification of the entry in accordance with the final decision on his objection under Section 12(1), so as to present finalisation of the statement of proposals under Section 23 of the Act. The purpose of the objection at each of the two stages will be to secure the correction of wrong entries. In this sense, Section 20(2) is another provision where an objection to an entry affecting the right of a tenure-holder may be taken. But, the view that proceedings under sections 20 and 21 of the Act must replace all proceedings under Section 12, which have not reached finality, so that there is re-adjudication or duplication in proceedings under Sections 20 and 21, rests upon an erroneous interpretation of Section 22(2). Section 22(2) was not meant for stay of or wiping off of previous proceedings before the consolidation authorities.

31a. I may now deal with the Division Bench decision in Ganga Singh v Deputy Director, Consolidation, 1965 RD 12 where Bhargava, J. giving the judgment of the Division Bench, dismissed a special appeal from the above mentioned judgment of Srivastava, J. The first ground of the short decision given by the Division Bench was that the statement of proposals having been confirmed under Section 23 of the Act had attained finality. Therefore, the Court would not issue a writ which was ineffective. It appears to me that this ground of decision proceeds upon an application of the doctrine of estoppel by record contained in section 23 of the Act. Desai C. J., also applied this principle in Rup Narain's case, 1962 All LJ 888 (supra) to finalisation under Section 18 of the Act. The facts of

Ganga Singh's case, as detailed in the judgment of Srivastava, J., (1962 RD 107) indicated that the petitioner had neither filed a revision under section 48 nor come to this Court for a writ of prohibition to challenge the jurisdiction of the consolidation authorities to proceed with a re-adjudication under section 21 of the Act. And, a re-adjudication under Section 21 of the Act had actually taken place so that the question of sirdari rights was determined afresh in favour of the respondent who had raised this question again under Section 20 of the Act. It was not even clear whether this re-adjudication was on the same facts as those which existed at the time of the adjudication under Section 12 of the Act which had not become final. On the other hand, the statement of proposals had become final under section 23 of the Act. On these special facts, the refusal of this Court to interfere on the first ground mentioned above, under the law as it then stood, could not be held to be erroneous.

The second point decided was that the filing of an objection under Section 20(2) of the Act cannot be barred on the ground that a 'similar' objection — i. e. perhaps not identical — had been filed under Section 12. It is true that it was noticed that the objection had been dismissed. But, that dismissal had not, as observed by the Division Bench, attained finality because an appeal was pending from it. This proposition also appears to be unquestionable inasmuch as the filing of an appeal is a continuation of the original proceedings. The assumption underlying the proposition is that the principle of *res judicata* applied to proceedings under the Act. There appears to me to be no inconsistency in holding that an individual's right to file an objection is not barred by a provision while, at the same time, taking the view that the trial of the question raised by the objection may be barred by *res judicata*. Indeed, this appears to me to be the strictly correct way of stating the position. The principle of *res judicata* bars retrial and decision once again of what is concluded but not merely the "raising" of a question. 'Raising' does not include trial and decision, the next stages which will be barred where there is a previous adjudication on the same facts. With great respect, I may observe that I too am unable to see that the mere filing of an objection under section 12 of the Act or the pendency of that objection bars even the raising of a 'similar' objection under Section 20 of the Act before the objection under Section 12 of the Act has been finally decided. Even if the bar of *res judicata* could be spoken of as a bar to the very raising of an objection itself, as distinguished from its trial, the

bar could not come into existence before the proceedings under section 12 of the Act had reached finality. The third ground upon which the Division Bench decision was based was that even if the proceedings under section 21 of the Act were without jurisdiction, this Court will not interfere in exercise of its jurisdiction under Article 226 of the Constitution as there was no injustice shown to have been perpetrated. The correctness of this ground of decision is not assailed before us. I am, therefore, clearly of opinion that there is no need whatsoever to overrule this Division Bench decision which does not lay any law incorrectly.

32. I may mention that I am not able to accept the proposition that the Division Bench, in its decision in 1965 R. D. 12, must be assumed to adopt, by implication, all the reasoning and the points decided in the judgment of Srivastava, J., in 1962 RD 107. A judgment given on an appeal can confirm the conclusion arrived at in the judgment appealed against without adopting all the reasons of the judgment appealed from. The ratio decidendi of the two judgments has to be determined separately. As Prof. Arthur L. Goodhart put it, in an article on "Determining the Ratio Decidendi of a Case, in Jurisprudence in Action" (1953) (Legal Essays collected by the Association of the Bar of City of New York): "The principle of the case is found by taking account of the facts treated by the judge as material and his decision as based on them" it is only the facts which the Division Bench considered as material which could enter into a consideration of the principles laid down by it.

33. The view taken by our learned brother Nigam, J., in *Sheoraj Singh v. Deputy Director, Consolidation*, 1967 RD 1, was also placed before us. Here, it was held, relying on the above mentioned Division Bench decision in 1965 R. D. 12, that a person who had objected under section 12 of the Act but had failed to get a final decision and then neglects to file an objection at the stage of section 20, will lose all advantage that might be secured to him by any proceeding or continuation of any proceeding under sections 9 to 12 of the U. P. Consolidation of Holdings Act."

In this case, which is apparently governed by the Act as it stood before 1958, the statement of proposals had been confirmed under section 23 of the Act without objections under S. 20(2). If a tenure-holder's objection under S. 12 of the Act has not been finally decided, he should certainly point that out when a statement of proposals containing wrong entries is published under Sec. 20(1) of the Act. He should not wait until the final decision

upon his objections under S 12, and then come to this Court for the correction of an error which he did not question at the proper stage. In such a case, an objection under section 20(2) of the Act would not have been barred by the principles of res judicata. Even if a person has objected under section 12 and that objection has been decided in his favour, but the statement of proposals published under Section 20(1) contains an entry which is contrary to the decision arrived at in proceedings under section 12 of the Act, he should point out this error under section 20 (2) which does not bar such an objection. However, if he has already objected to the entry under section 12 and the objection is decided in his favour after confirmation of the proposals, he could still get the error rectified under Section 38(2) of Act, which could be used, in such a case, to prevent loss of the rights of a successful objector under section 12 of the Act. Indeed, Sec. 38(2), which was there until 1958, seemed to cast a duty upon the consolidation authorities to rectify such an error suo motu.

It will be observed that Nigam, J., also held here that the confirmation of proposals under Section 23 would not have prejudiced or affected the petitioner's case if he could have filed a revision application under section 48 against some order passed under section 21. This means that failure to object under section 20 (2) and to secure an order upon the objection before finalisation of proposals under section 23 must result in the loss of even a fresh or additional right to invoke interference under section 48 which may really arise only after finalisation of proposals under section 23. The normal and regular course of consolidation, contemplated by the legislature, is that proceeding under section 20 should commence after all proceedings under section 12 have reached finality. If, for some reason, they commence before that, the objector could not complain of prejudice or substantiality of the irregularity for him if he ultimately falls in his objection under Sec. 12 (sic). But, the position would be different if he actually succeeds under Section 12 even after finalisation of proposals under Section 23. In such a case, he secures an additional or fresh right to complain which did not exist before. Moreover, powers under S. 48 do not depend for their exercise upon objections taken under S 20 (2) or orders passed under S. 21 or any other section. They can be exercised by the Director suo motu and are expressly made wide enough to cover cases of orders passed as well as proceedings taken. Finalisation under Section 23 is a "proceedings taken." It is, therefore, expressly subjected to possible interference under section 48 provid-

ed other conditions are satisfied. It is not one of the conditions precedent to interference under Section 48 that some order must have been previously passed upon an objection made through a prescribed channel. The limitation of powers of interference under Section 48 with orders of Deputy Directors came only in 1958. Therefore, such a view seems to go too far and must, with great respect, be overruled. In *Bansidhar v. Deputy Director, Consolidation*, 1967 RD 51, Nigam, J., did not go beyond what was laid down in 1967 RD 1. Therefore, this case need not be separately considered.

34. The only question on which there could be said to be a conflict between the ratio decidendi of the Division Bench in 1962 All LJ 888 and that of the Division Bench in 1965 RD 12 relates to the scope of objections under Section 20(2) of the Act. I think the case before us is distinguished, on facts from both the cases mentioned above. Although, I prefer the ratio decidendi of 1965 RD 12 on this limited point, yet, I think that the petitioner before us is not entitled to any relief on the facts of his case. The petitioner had only a technical right to file an objection under Section 20(2) of the Act. He was not able to show any fresh facts between the earlier and the later stage. The petitioner has also not been able to show why the bar of finality imposed by Rule 34(3) of the Rules made under the Act should not have been applied against him by the Consolidation Officer and the Settlement Officer when they dismissed his objections under Section 20(2) of the Act. It is true that, having filed the revision application under section 48 of the Act against the decision in proceedings under section 12 of the Act, the petitioner could, theoretically, have asked the consolidation authorities to await the decision on his earlier revision application before rejecting his objection under Section 20(2). It, however, seems to me that an objection under Section 20(2) can be rejected on the ground that the same matter has already been raised and decided finally under Section 12 and no new facts are disclosed. The petitioner never objected under section 20 (2) that a final decision on his revision application against proceedings under Section 12 should be awaited.

Moreover, a presumably final decision was already there in this case. An appeal filed as of right could certainly postpone finality attached to an order passed by the Consolidation Officer under Section 12 of the Act, but the mere filing of a revision application does not, either on general principles or on the language of the provisions of the Act or of rules framed thereunder, by itself remove the bar of finality imposed by rule 34(3) un-

til the revision application is allowed. On the view taken by me, the petitioner could have obtained a fresh or additional right if his first revision application were actually allowed. The petitioner has not disclosed any possible ground upon which his revision application under section 48 against the decision in proceedings under Section 12 of the Act could be allowed so as to remove the bar. The earlier decision under Section 12 was not assailed as void. No want of jurisdiction in giving that decision was even alleged. In fact, the revision application filed by the petitioner against decision in proceedings under Section 12 of the Act was actually dismissed before he came to this Court. No injustice was shown to have been suffered by the petitioner. Even though his right to object under Section 20(2) technically survived, his right to obtain readjudication on the same facts was not shown to survive after the decision under section 12 of the Act. The petition before us is liable to be dismissed, on the facts of the case, by applying one of the grounds of the Division Bench decision in Ganga Singh's case, 1965 RD 12 (supra) itself.

35. For the reasons given above, I would dismiss this petition with costs.

36. **ASTHANA J.:**— This case has been referred to a Full Bench for resolving the apparent conflict between the two Division Bench decisions of this court, namely 1965 RD 12 and 1962 All LJ 888. There is yet another Division Bench decision in the case 1964 RD 411 which also requires to be reconciled with the aforementioned decisions.

37. The petition under Article 226 of the Constitution which has given rise to the above reference was filed by Sita, Naumi and Kumar as petitioners against the State of Uttar Pradesh, the Deputy Director of Consolidation, the Settlement Officer (Consolidation), the Consolidation Officer and one Surajbhan Rai. The validity of the orders passed by the above mentioned Consolidation authorities in the proceedings arising out of an objection filed by the petitioners under section 20 of the U. P. Consolidation of Holdings Act as unamended before 1958 (hereinafter called the Act) were questioned in the petition and a writ in the nature of certiorari was sought for quashing of the orders of the said Consolidation authorities and for other necessary directions. By the impugned orders the claim of the petitioners to be recorded as Sirdars of two plots numbers 1011 and 1119 stood rejected and the name of Surajbhan Rai was recorded as Bhumidhar of the said plots.

The consolidation proceedings commenced in the village in which the plots in dispute were situate in the year 1955. In the statement of tenure holders pub-

lished under S. 11 of the Act in C. H. Form No. 20, the name of the petitioners was shown as Sirdars of plot no. 1191 but their name did not appear and Surajbhan Rai's name appeared as against plot no. 1011. The petitioner thereupon filed an objection under Section 12 of the Act claiming to be Sirdars of plot no. 1011 and prayed for recording of their names after expunging the name of Surajbhan Rai who was shown as the Bhumidhar of that plot. In his turn Surajbhan Rai filed an objection under Section 12 of the Act in respect of plot no. 1119 and prayed that his name be entered as Bhumidhar against that plot after expunging the names of the petitioners. The Consolidation Officer consolidated the two objections and heard them together. By his order dated 13-2-1960 the Consolidation Officer rejected the objection of the petitioners and allowed the objection of Surajbhan Rai with the result that the entries were directed to be corrected by entering the name of Surajbhan Rai as Bhumidhar of both the disputed plots. The petitioners thereupon filed two appeals both of which were dismissed by one judgment by the Settlement Officer on 29-11-1960. The petitioner then went up in revision under section 48 of the Act against the order of dismissal of the appeals.

While this revision was pending before the Deputy Director the Statement of proposals under Section 19 of the Act was published and CH Form 24 was distributed showing the name of Surajbhan Rai as the Bhumidhar of the two disputed plots. The petitioners thereupon filed an objection under Section 20 of the Act claiming to be the Sirdars of the said plots and prayed for the correction of the entries in CH Form 24 by entering their names as Sirdars after expunging the wrong entry in favour of Surajbhan Rai. The Consolidation Officer by his order dated 24-2-1961 rejected the objection of the petitioner filed under Section 20 of the Act. The Consolidation Officer did not think it proper to record any findings and pass any order on merits as he took the view that the petitioners had already lost their case in the proceedings arising out of objections filed under section 12 of the Act. An appeal by the petitioners from this order of the Consolidation Officer was dismissed by the Settlement Officer by his order dated 18-3-1961 on the view that the same dispute between the parties stood decided in the proceedings under section 12 of the Act. The petitioners then went up in revision against the appellate order dated 18-3-1961. The Deputy Director decided this revision along with the earlier revision arising out of proceedings under Section 12 of the Act which was pending and dismissed both the revisions by his order dated 8-8-1961.

holding that there did not appear to be any substantial irregularity or illegality in the orders passed by the subordinate authorities.

38. When the petition was heard by one of us sitting singly, it was urged on behalf of the petitioners that the proceedings arising out of objections filed under section 12 of the Act not having become final as the revision was pending before the Deputy Director when the statement of proposals were published under section 19 of the Act and CH Form No 24 distributed, the petitioners were within their right to file objections under Section 20 of the Act for correction of the entries in respect of the two disputed plots and the Consolidation authorities in rejecting the objections of the petitioner on the ground that it was incompetent manifestly erred in exercise of their jurisdiction. Reliance was placed by the learned counsel for the petitioners on the case of 1965 RD 12 in which it was held that there was no provision in the U P Consolidation of Holdings Act barring the filing of objection under Section 20 simply on the ground that an objection had already been filed under section 12 and heard. It was submitted that since the decision given by the Consolidation Officer under Sec. 12 had not attained finality because of the pendency of the revision, the objection under Section 20 of the Act would be competently decided by the appropriate authorities. On behalf of the contesting opposite party, Surajbhan Rai, reliance was placed on the case of 1962 All LJ 888 in which it was held that objections which could be raised at the stage of Section 12 before the Consolidation Officer were not contemplated to be raised under section 20 of the Act.

39. Sri Sripat Narain Singh, learned counsel for the petitioners, contended that under Section 20 of the Act any person affected by the proposals is entitled to file an objection in writing and since under section 19(1)(a) the particulars specified in clause (b) of sub-section (1) of Section 11 in respect of each tenureholder are required to be shown and since the proposal published did not contain the correct particulars about the two plots in dispute and wrongly showed the name of Surajbhan Rai as the Bhumidhar and not the name of the petitioners as Sirdar which would have been correct, the petitioners were directly affected by the said proposals so published and their objection ought to have been considered by the Consolidation authorities. It was submitted if the same mistake in respect of the particulars of the tenure holder which occurred in the statement published under Section 11 continues in the statement of proposals published under Section 19, it becomes the duty of the

consolidation authorities to correct the mistake on objections being filed when no final decision has been taken by the consolidation authorities in respect of the objections of the same nature filed under section 12 of the Act. Learned counsel relied upon sub-section (2) of section 22 of the Act and pointed out that upon the publication of the statement of proposals, all proceedings pending before the Consolidation authorities whether in the first instance, in appeal, in reference or revision in which question of Bhumidhari, Sirdari, Adhvani or Asami right is involved in relation to the land which is included in the statement of proposal, shall be stayed and submitted that that clearly indicated that the previous proceedings under section 12 of the Act involving questions of Bhumidhari or Sirdari rights would no longer be adjudicated as similar questions could competently be raised in objections under section 20 of the Act for adjudication. This argument of the learned counsel implies that the word 'Court' in sub-section (2) of section 22 includes Consolidation Officer, Settlement Officer (Consolidation), and Deputy Director or Director of Consolidation. In the case of 1964 RD 411, a Division Bench has held that the word 'court' in sub-section (2) of Section 22 did not include the aforementioned authorities. Learned counsel tried to persuade us that Ram Bharosey Lal's case has been wrongly decided and needed re-consideration. All the arguments which were considered by the Bench in the case of Ram Bharosey Lal, were reiterated before us. The learned counsel did not advance any new argument. Having given careful consideration to the submissions made before us we think no such compelling circumstance has been pointed out which will throw any doubt on the correctness of the decision in Ram Bharosey Lal's case, 1964 RD 411. We do not agree, therefore, with the learned counsel for the petitioner that the provisions of the Act contemplated an end to the proceedings under section 12 of the Act whether before the Consolidation Officer or pending in appeal or revision in which the questions of Bhumidhari, Sirdari, right are involved in respect of land under consolidation and the intentment of the Act was that the same objection could again be raised under Section 20 of the Act.

40. There is yet another difficulty in accepting this line of argument. If what Sri S. N. Singh argues were to be accepted then an intention to the legislature must be attributed that the same kind of proceedings before the class of Officers will have to be undergone once over again. The same evidence will again have to be assessed and the same issues will have again to be determined by the cri-

ginal authority, or by the appellate authority, or by the revisional authority as the case may be. Unless the language of the statute is expressly clear and definite it is difficult to accept that the law contemplated a repetition of the same proceedings. It was tried to be suggested on behalf of the petitioners that there will be no practical difficulty inasmuch as it will always be open to the authorities to apply the doctrine of res judicata and decide the objection in terms of the previous decision. This argument is fallacious. Firstly, the doctrine of res judicata pertains to the jurisdiction of a court and what has been decided between the parties in an earlier litigation is barred from being raised in a subsequent litigation. That is to say, a court cannot allow a question to be raised which has already been adjudicated upon between the parties in an earlier case. In other words, law makes it incompetent for any Court to entertain such a question. If the subsequent objection filed under section 20 of the Act raises the same questions which had already been adjudicated upon in the earlier proceedings under Section 12 of the Act then the doctrine of res judicata itself would render any objection filed under Section 20 of the Act raising similar questions as incompetent. Secondly, if the proceedings in the first stage are still pending and have not been finally decided then the question of res judicata will not arise. In this connection the learned counsel referred to sub-section (7) of Section 12 of the Act and submitted that only a question of title in respect of any plot which might and ought to have been raised but had not been raised shall not be allowed to be raised in any objection filed under sub-section (2) of Section 20 of the Act. Therefore questions involving Sirdari rights whether raised or not raised under Section 12 and question involving Bhumidhari rights which had been raised under Section 12 can always be raised under Section 20. What the learned counsel submitted was that even the doctrine of res judicata has a very limited application under the scheme of the Consolidation of Holdings Act and sub-section (7) of Section 12 confines its applicability to a question of Bhumidhar which might and ought to have been raised under section 12 of the Act but was not raised. We do not think that this argument in any way, even if tenable, improves the case of the petitioners. We think the learned judges who decided the case of 1962 All LJ 888 rightly observed that sub-sec. (7) of Sec. 12 only re-stated the rule of constructive res judicata as contained in the Civil Procedure Code. We do not think the learned counsel for the petitioners can build any arguments

on its basis to establish that under the scheme of the Act same questions can be raised by a tenure-holder under section 20 of the Act in respect of land which can be raised under Section 12 of the Act in respect of the same land.

41. It was then contended that section 12 is placed in Chapter 2 of the Act which deals with the Revision and Correction of Maps and Records; therefore Sec. 12 related to the correction of the records only and under the scheme of the Act the real questions of title or questions relating to Sirdari, Adhivasi and Assami rights were left to be determined under Section 21 of the Act. A reference was made to sub-section (1) of Section 22 and it was pointed out that a question of title in or over land is to be determined by raising objection under S. 20 of the Act and the Consolidation authorities are bound to entertain such objections and are under a duty to determine the same. We think the questions of title as emphasised in sub-section (1) of Section 22 can arise on account of some thing done in laying down the principles of consolidation and in framing the proposals under Chapter 3 of the Act. It does not envisage a question of title which could be competently raised under Section 12 of the Act. We do not agree that merely because section 12 has been placed in Chapter 2 whose heading is "The Revision and Correction of Maps and Records" that any decision arrived in those proceedings is to be regarded as of a summary nature and the same question was permitted to be determined in a more elaborate manner under section 21 of the Act. If that were the intention of the legislature then under Section 12 of the Act provision for arbitration through a Civil Court would not have been made.

It was submitted that there is no provision in the Act for appeals from a decision of the Consolidation Officer in the proceedings under section 12 of Act, but there is a provision for appeal from a decision in proceedings under Section 21 of the Act which shows that the legislature considered the latter proceedings as determinative of the question of title or of questions involving rights to Sirdari, Adhivasi and Asami rights, hence it provided for an appeal, while proceedings under Section 12 of the Act were regarded merely as summary proceedings in the nature of mere mutation proceedings under the Land Revenue Act. We think there is no warrant for such a proposition. Rule 34 of the Rules framed under Section 54 of the Act from the very inception of the Act provided for an appeal from the order of the Consolidation Officer in the proceedings under Section 12 of the Act. The rules framed are as much part of the Act as any other

provision enacted by the legislature itself. Rule 34 (3) has been held to be valid by this Court. Thus this argument has not tenability.

42. It was next emphasised by Sri S N Singh that there is nothing in sections 20 and 21 of the Act and for the matter of that in any other provision of the Act or the rules which bar an objection of the same nature which could be raised under section 12 of the Act and submitted that the case of Ganga Singh, 1965 RD 12 (supra) was correctly decided. A reference was made to a decision of a learned single Judge in the case of 1967 RD 1 in which a view has been expressed to the effect that where a person after having filed an objection under Section 12 of the Act neglects to file an objection at the stage of section 20 or the allotment of chaks he will lose all advantage that might secure to him by any proceeding or continuation of any proceeding under Sections 9 to 12 of the Act. It would be seen that the decision in Sheoraj Singh's case, 1967 RD 1 was based on the Division Bench ruling in Ganga Singh's case, 1965 RD 12. The learned Single Judge in Sheoraj Singh's case, 1967 RD 1 did not notice the Division Bench ruling in the case of 1962 All LJ 888 (supra). Another case which was referred by Sri S N Singh is a decision by the learned Judge who decided the case of Sheoraj Singh. That case is 1967 R. D 51. In Banshidhar's case the learned Judge expressed the opinion that there being no provision in the Act that orders passed in objection under section 9 of the Act (equivalent to Section 12 of the old Act), if the objections are decided after the stage of objections under Section 20 of the Act, shall be given effect to, it, therefore, followed that if any objection under Section 9 of the Consolidation of Holdings Act was pending either before the Assistant Consolidation Officer or before any superior officer that will not affect the petitioner's liability to file an objection under Section 20 of the Act. Ganga Singh's case, 1965 RD 12 was again relied upon in Banshidhar's case, 1967 RD 51. On the basis of the ratio decidendi of these cases it was submitted that once the provisional Consolidation scheme is confirmed under Section 23(2) of the Act, the proceedings under section 12 of the Act still pending would become infructuous. We fail to appreciate how the reasoning that once the provisional consolidation scheme is confirmed under Section 23 of the Act the proceeding under Section 12 pending on that date will be rendered infructuous helps the petitioner in establishing that the same objections which could be raised under Section 12 of the Act can be raised under Section 20 of the Act. A proceeding pen-

ding before the Consolidation Officer under Section 21 of the Act or a decision given by a Consolidation Officer in that proceeding pending in appeal or revision on the date when the provisional Consolidation scheme is confirmed under Section 23(2) of the Act would equally be affected and would be rendered infructuous. It was urged that the provisional Consolidation scheme cannot be confirmed under Section 23(2) of the Act unless all the objections filed under Section 20 of the Act have attained finality and sub-section (1) of Section 23 was referred in this connection which provides that the Settlement Officer (Consolidation) shall confirm the statement of proposals if no objections were filed within the time specified in section 20 or where such objections are filed, after such modification or alterations as may be necessary in view of the orders passed under Section 21. The only exception which has been made by sub-section (2) of section 23 is in regard to the reference made to the Civil Judge and which had not been disposed of till then. It will be seen that section 21 of the Act envisages proceedings up to the stage of an appeal and does not cover revisions filed under section 48 of the Act. Thus in any view of the matter if a revision were pending in a proceeding arising out of objections under section 20 of the Act that may not stand in the way of the Settlement Officer (Consolidation) confirming the statement of proposals under Section 23(1) of the Act. (See Raghunandan v. Regional Deputy Director of Consolidation, 1966 All LJ 287) It is, therefore, not correct to say that unless all decisions filed under section 20 of the Act attain finality the statement of proposals cannot be confirmed as in the exercise of revisional jurisdiction under Section 48 of the Act the appellate decision can be varied, modified or set aside. Any argument based on the effect of Section 23, therefore, does not necessarily establish that section 20 permits filing of objections of similar nature which could be filed under section 12 of the Act.

43. Sri S N. Singh then emphasised that to avoid the inconvenience which would otherwise be caused by long delay if the Consolidation Authorities were to wait till the time when all the decisions on objections under Sec. 12 of the Act attain finality, before they enter upon further stages of consolidation, the legislature by enacting section 20 and permitting objections against the proposals by affected persons clearly intended that similar objections could be filed again which were filed under section 12 of the Act when the decisions thereon did not attain finality, the proceedings still remaining pending either in appeal or revision. In our judgment there is no sub-

stance in this submission of the learned counsel. How the delay would be avoided by permitting objections of the same nature repeatedly at different stages of consolidation is not easy to understand? In fact repeated objections of similar nature at different stages would result in further prolonging the proceedings and will cause more delay. Consolidation is a complicated and protracted operation. The legislature could not have intended that a tenure-holder should have an unlimited right to have his same rights or interests examined and re-examined at different stages. It is not possible to attribute an intention to the legislature that it expected a tenure-holder to incur expenses repeatedly for vindication of the same right before the same authorities on the same evidence in support of his claim over and over again. Such a procedure would not only be onerous and burdensome to the tenure holder but would result in waste of public time, and unnecessarily occupying the time of the officers responsible for consolidation.

44. On an examination of the material provisions of the Act it would be found that the process of Consolidation of Holding has been divided into various stages. The tenure could not be consolidated unless it were determined who were the tenure-holders of particular tenures. The first stage envisaged under scheme of the Act is a revision and correction of the village records. This is accomplished either by wholesale revision of maps or records of the village or by directing the Assistant Consolidation Officer to proceed with the correction of maps or records who after Partial corrects the entries in the annual registers. At this stage any person aggrieved may appeal to the Consolidation Officer whose decision will be final except as otherwise provided by or under the Act. After the entries have been so corrected then they are duly recorded. The next stage is the publication of statement of plots and tenure-holders on the basis of the records. Any person interested in disputing the correctness or nature of an entry in the statement of tenure-holders or pointing out any omission therefrom is entitled to file an objection. When objections have been disposed of and the statement of tenure-holders is corrected then the next stage of preparation of statement of principles is reached. The statement of principles is then prepared on the basis of the statement of plots and tenure-holders. Any person aggrieved by any mistake in the statement of principles has a right to have it corrected by filing objections. After the corrections, if any, have been made then a further stage is reached of readjustment of plots according to the principles. A statement of proposals is then drawn up which would be based on

all what had preceded. Any person affected by anything in the statement of proposals, that is by re-allocation of plots according to the principles, may file objections. After the objections have been disposed of and the statement of proposals corrected and modified then they are confirmed and made final. The next stage is the transfer of possession of the allotted chaks in accordance with the confirmed statement of proposals. The last stage is the preparation of the village records and maps in accordance with the confirmed proposals. The Consolidation proceedings finally close by issue of a notification just as they commence by issue of a notification. It would be seen that it is a well-knit scheme and the operations at each subsequent stage depend upon the result of the operation carried on at the preceding stage which must become final before the next stage of operation is taken up. The scheme under the Act will be difficult of accomplishment and fulfilment if at each stage the tenure-holder or any person affected was permitted to take up controversies which could be settled or had been settled at the earlier stage. That is why it would be found that there are provisions in the Act laying down that what is done at various stages becomes final, except as otherwise provided by or under the Act.

45. When the scheme under Section 12 of the Act is examined in the light of the overall scheme of Consolidation operations as envisaged by the Act, it is not possible to contemplate that a dispute relating to the correctness or nature of an entry in the village records or supplying of any omission therein survives at the subsequent stages of the consolidation operation and can be raked up again. Section 12 is a self-contained and complete provision for determining a dispute relating to the correctness or nature of an entry or of any omission therefrom. The entries in the village records serve as the very foundation of consolidation. Section 12 contains a machinery for correcting the records after giving opportunity to the persons interested and hearing them in support of their claims so that when the next stage in consolidation operations commences the entries in the village records are no longer open to challenge and the statement of principles and the statement of proposals can be based thereon. It is to be noted that in the statement of proposals as required by section 19 of the Act the particulars specified in clause (b) of subsection (1) of Sec. 11 in respect of each tenure-holder have to be shown. It is presumed that it is the correct particulars in respect of each tenure-holder which would be entered in the statement. A person who claims to be tenure

holder but whose name is not shown in the statement of tenure-holders as published under section 11 of the Act must get the statement corrected and the only provision under the Act for the purpose is section 12. If he files an objection under section 12 and succeeds then the statement of tenure-holders would be corrected accordingly. If he does not file any objection then the statement of tenure-holders will not require any correction. When the stage comes for preparation of the statement of proposals then the particulars in respect of each tenure-holder to be shown in the statement of proposals would be based on the entries in the village records as they emerge after corrections have been made in proceedings under Section 12 of the Act. There is no provision in the Act or in the rules which prevents the correction of the statement of tenure holders in accordance with the appellate or the revisional order. Sub-section (3) of section 12 in clear terms lays down that the decision of the Consolidation Officer shall, except as otherwise provided by or under this Act, be final. That is to say, if the Consolidation Officer's decision is not appealed against it becomes final. If, however, an appeal is taken from it, then it would be the appellate decision which would be final. So also if a revision is filed against the appellate decision then it is the decision in revision which would be final. In other words the decision of the Consolidation Officer would be super-imposed by the decision in the appeal or revision, as the case may be and it is the entry in accordance with that decision which would serve as the basis of particulars in respect of each tenure-holder contemplated under section 19(1) (a) of the Act.

46. We have already pointed out above that the decision in Ram Bhary Lal's case, 1964 RD 411 lays down the correct law and mere publication of the statement of tenure-holders under Section 19 pending an appeal or a revision in proceedings under Section 12 of the Act would not operate as stay of the hearing of such appeal or revision. Therefore, the appellate authority or the revisional authority as the case may be is bound to proceed with the hearing and arrive at a decision. On a correct appreciation of the scheme under the Act it appears that it was never contemplated that the stage for framing of statement of principles or for framing of statement of proposals will be reached before the statement of tenure-holders that is the village records have finally been corrected but if in practice the Consolidation authorities do not await the final decision in such appeals or revisions and proceed with the subsequent stages, then

it only means that the officers are proceeding provisionally and would regularise the work of the subsequent stage finally after the decisions in the pending appeals or revisions in the earlier stage have become known and necessary corrections made. In other words the proceedings in subsequent stage remain subject to correction according to final decisions in the earlier stages. But that cannot be a circumstance to be taken into consideration to give a forced interpretation to the provisions of section 20 of the Act and so read, it permits any person to file objections disputing the correctness or nature of an entry or pointing out any omission in the statement prepared in respect of a tenure-holder for such particulars are based on an entry which already under the law would be deemed to be correct. In any case it is always open under sub-section (2) of section 38 of the Act to the Consolidation Officer or Settlement Officer (Consolidation) to correct a clerical error or error apparent on the face of the record in any document prepared under any provision of the Act. We have no doubt that if the statement of proposals is prepared on the basis of the particulars contained in the statement of tenure-holder or village records which particulars are still to be corrected in accordance with the appellate or revisional order then once the appellate order is passed and it becomes final or a revisional order is passed which is at variance with the particulars in respect of a tenure-holder either entered in the statement of tenure-holders or entered in the statement of proposals, would clearly be a clerical error or an error apparent on the face of the record in documents prepared under the provisions of the Act and both of them can be corrected and brought in accordance with the final decision in the appeal or revision. The further proceedings in consolidation then would be in accordance with the correct statements. This can be done even though the statement of proposals achieves confirmation under Section 23(2) of the Act. The power under sub-section (2) of section 38 can be exercised at any time before the notification under Section 52 is issued.

47. The decision, therefore, in Ganga Singh's case, 1965 RD 12 proceeded on a wrong assumption and is hereby overruled. We respectfully agree with the ratio of the decision in the case of 1962 Ali LJ 888 and hold that it has been correctly decided.

48. As far as this petition is concerned, the Deputy Director has dismissed the revision arising out of the proceedings under section 12 of the Act. Thus there was no mistake in the statement of pro-

posals published under section 19 of the Act.

49. 'This petition' falls and is dismissed with costs.

50. B. DAYAL, J.:— I agree with brother Asthana, J.

51. By the Court — This petition fails and is dismissed with costs.

KSB Petition dismissed.

AIR 1969 ALLAHABAD 363 (V 56 C 60)
(LUCKNOW BENCH)

V. G. OAK C. J. AND U. S.
SRIVASTAVA, J.

State Govt. of Uttar Pradesh, Appellant v. Kashi Prasad Saxena, Respondent.

Spl. Appeal No. 9 of 1969, D/- 29-1-1969, against judgment of Laxmi Prasad J., in Writ Petn. No. 754 of 1967, D/- 3-12-1968.

Notaries Act (1952), S. 10(d) — Scope — Section contemplates professional and other misconduct — Professional misconduct involves moral turpitude — Charges not indicating professional misconduct — Notification barring notary from practising as notary on ground that he was found unfit to practise on grounds of professional misconduct, quashed — (Words and Phrases — Professional misconduct) — (Legal Practitioners Act (1879), S. 13).

According to the plan of clause (d) of Section 10, misconduct can be of two kinds. Some misconduct may amount to professional misconduct. There may be misconduct of another kind. Such misconduct may not amount to professional misconduct. It is clearly implied in the plan of section 10 of the Act that every irregularity or negligence on the part of a notary would not amount to professional misconduct. Professional misconduct suggests dishonesty or some conduct involving moral turpitude.

(Para 6)

Where the notification debaring a notary from practising mentions that he was found guilty of professional misconduct but it was difficult to take the view that the charges framed against him constituted professional misconduct and that the notice calling upon him to render explanation to the charges did not give any hint that the charges might amount to professional misconduct nor was there any indication in that notice that those charges were of such a nature that, if proved the notary was likely to be declared unfit to practise as a notary, the notification debaring him from practising would be quashed. AIR 1967 All 173, Ref.

(Para 8)

DM/DM/B681/69

Cases Referred: Chronological Paras (1967) AIR 1967 All 173 (V 54)=

ILR (1966) 2 All 886, Kashi Prasad v. State

8

Chief Standing Counsel, for Appellant.

OAK, C. J. :— This special appeal arises out of a proceeding under the Notaries Act, 1952 (hereinafter referred to as the Act). Kashi Prasad Saxena, respondent, was enrolled as a Notary public in the year 1959 to practise as such at Lucknow. His certificate was renewed for a period of three years with effect from 20-8-1962. One Krishna Chandra, Advocate made a complaint against Kashi Prasad Saxena, Notary public. The State Government referred the complaint for enquiry to the competent authority, namely the District Judge, Lucknow. He framed three charges against Kashi Prasad Saxena, and submitted a report that the charges had been proved. On receiving that report from the competent authority, the State Government issued a notification on 11-3-1964 under section 10 of the Act cancelling the certificate of practice granted to Kashi Prasad Saxena. He was perpetually debarred from practising as a Notary public. Kashi Prasad Saxena filed a writ petition in this Court challenging the State Government's order dated 11-3-1964. That writ petition was dismissed by a single Judge of this Court, but was allowed by a Division Bench in special appeal. The State Government's order dated 11-3-1964 was quashed. Kashi Prasad Saxena's certificate was thereafter renewed. The State Government decided to resume action on the basis of the original complaint of Krishna Chandra, Advocate. On 3-3-1967 a notice was given to Kashi Prasad Saxena calling his explanation. He submitted an explanation. The State Government was not satisfied with the explanation. On 30-6-1967, the State Government issued another notification under Sec. 10 of the Act cancelling the certificate of practice granted to Kashi Prasad Saxena. It was ordered that his name be removed from the Register of Notaries.

2. Kashi Prasad Saxena filed in this Court another writ petition challenging State Government's order, dated 30-6-1967. This second writ petition has been allowed by a single Judge of this Court. He has quashed the State Government's order dated 30-6-1967. The State Government has, therefore, filed the present special appeal.

3. The impugned notification was issued by the State Government under Section 10 of the Act. Section 10 enables the State Government to remove a name from the Register of Notaries. Section 10 of the Act states:—

"The Government appointing any notary may, by order, remove from the

Register maintained by it under Section 4 the name of the notary if he—

- (a) : : :
 (b) : : :
 (c) : : :

(d) has been found, upon inquiry in the prescribed manner, to be guilty of such professional or other misconduct as, in the opinion of the Government, renders him unfit to practise as a notary."

In the instant case the State Government took action under clause (d) of section 10 of the Act.

4. Rules have been framed under the Act Rule 13 provides for an enquiry into allegations of professional and other misconduct of a notary.

Sub-rule (1) of rule 13 states:—

"Whenever there is any allegation of professional or other misconduct on the part of a notary, the appropriate Government may direct an enquiry to be made by the competent authority into the allegations."

5. Annexure 9 to the writ petition is a copy of the Government notification dated 30-6-1967. After narrating the history of the case, the recital in the notification proceeded thus:—

"And whereas, the State Government after considering the explanation of the said Sri Kashi Prasad Saxena, notary, Lucknow, . . . is of the opinion that the said Sri Kashi Prasad Saxena, notary, Lucknow, is guilty of such professional misconduct as renders him unfit to practise as notary. . . ."

The question arises whether it was open to the State Government to take action against the respondent on the footing that he has been guilty of such professional misconduct as renders him unfit to practise as a notary.

6. The charges against the respondent have been detailed in the judgment of the learned single Judge. Charge No. 1 was to the effect that the notary made no entry in his register regarding certain affidavits. Charge No. 2 was that none of the four affidavits was stamped with notarial stamp as prescribed by Article 42 of the Stamp Act. Charge No. 3 was that none of the four affidavits was stamped with adhesive stamps in accordance with Sections 10 and 11 of the Stamp Act.

The question arises whether these charges were of such a nature as to lead to the conclusion that the notary was guilty of professional misconduct. According to the plan of Clause (d) of Sec 10 of the Act, misconduct can be of two kinds. Some misconduct may amount to professional misconduct. There may be misconduct of another kind. Such misconduct may not amount to professional misconduct. It is clearly implied in the plan of Section 10 of the Act that every irre-

gularity or negligence on the part of a notary would not amount to professional misconduct. Professional misconduct suggests dishonesty or some conduct involving moral turpitude. The charges framed against Kashi Prasad Saxena do not suggest dishonest acts or acts involving moral turpitude.

7. When enquiry was resumed by the State Government against Kashi Prasad Saxena as a result of the proceeding in the previous writ petition, the notice dated 3-3-1967 was issued to the notary. Annexure 7 to the writ petition is a copy of the notice, dated 3-3-1967. That notice ran thus:—

" I am directed to send herewith a copy of the report of the Competent Authority . . . and you are required to submit your explanation in your defence within fourteen days of the receipt of this letter to the Secretary to the Government of U. P., Judicial (A-I) Department"

There was no indication in Annexure 7 that the three charges levelled against Kashi Prasad Saxena might amount to professional misconduct. Nor was there any indication in Annexure 7 that such professional misconduct might render the notary unfit to practise as such.

8. The decision of the Division Bench in the previous writ proceeding is reported in Kashi Prasad v. State, AIR 1967 AII 173. The learned Judges observed on page 180 thus:—

"It does not appear that the State Government ever addressed itself to question as to whether or not on the facts proved in the case the petitioner-appellant could be adjudged guilty of professional misconduct as distinct from negligence or mere lapse and whether the professional misconduct, if any, was so gross as in the opinion of the Government renders him unfit to practise as a notary."

The enquiry held against Kashi Prasad Saxena subsequent to that decision is open to similar criticism. In the first place it is difficult to take the view that the charges framed against Kashi Prasad Saxena constitute professional misconduct. Secondly, the notice dated 3-3-1967 did not give any hint that the charges might amount to professional misconduct. Nor was there any indication in that notice that those charges were of such a nature that, if proved, Kashi Prasad Saxena was likely to be declared unfit to practise as a notary. In view of these defects in the proceedings, the notification dated 30-6-1967 was rightly quashed by the learned single Judge.

9. The special appeal is dismissed.

RGD

Appeal dismissed.

AIR 1969 ALLAHABAD 365 (V 56 C 61)

FULL BENCH

(LUCKNOW BENCH)

R. A. MISRA, LAKSHMI PRASAD AND GUR SHARANLAL, JJ.

Regional Transport Authority, Lucknow, Appellant v. Mohammad Usman Ali, Lucknow, Respondent.

Special Appeal No. 89 of 1965, D/- 20-5-1968 against judgment of N. U. Beg, J.; in W. P. No. 274 of 1963, D/- 22-7-1965.

(A) Motor Vehicles Act (1939), Ss. 44 (5), 68 and 68-G — U. P. State Road Transport Services (Development) Rules (1958), R. 10 — U. P. Motor Vehicles Rules (1940), R. 44A—Powers of Regional Transport Authority under S. 44 (5) — Delegation of to Secretary Member — Validity — W. P. No. 296 of 1963, D/- 7-8-1964 (All), Overruled.

Both as a matter of plain language of S. 44(5) and as one of the intentment of the legislature, what S. 44(5) provides for is delegation of any of its powers and functions, by the Transport Authority concerned to a person or authority specified by an appropriate rule framed by the State Government under S. 68 of the Act. That being so, in the matter of delegation neither the State Transport Authority nor the Regional Transport Authority can act in a manner otherwise than that provided by S. 44(5). Rule No. 10 of the U. P. State Road Transport Services (Development) Rules, 1958 and Rule 44-A of the U. P. Motor Vehicles Rules 1940, do not authorise the Regional Transport Authority to delegate its functions under S. 68-G(2) in respect of a stage carriage permit.

Where therefore the R. T. A. by its resolution, decided that the Secretary member should dispose of the matter with respect to an alternative permit on a route,

Held that there was no valid delegation in favour of the Secretary member so as to entitle him to make an offer to the respondent within section 68-G(2). W. P. No. 296 of 1963, D/- 7-8-1964 (All) Overruled; AIR 1957 Mad 387, Rel. on; AIR 1956 SC 285 & AIR 1961 SC 1556 & AIR 1962 SC 1183, Expl. (Para 11)

(B) Motor Vehicles Act (1939), S. 68-G — Interpretation of.

Quaere: Whether, having regard to the scheme of the Act and the provision contained in S. 68-G(1) regarding compensation payable to a displaced operator, a Court can import notions of a contract in interpreting S. 68-G(2)? (Para 12)

Cases Referred: Chronological Paras (1964) WP No. 296 of 1963, D/- 7-8-1964 (All), Jugal Kishore Agarwal v. Regional Transport Authority

2A, 5, 11

(1962) AIR 1962 SC 1183 (V 49)=ILR (1962) 1 All 906, Kalyan Singh v. State of Uttar Pradesh 7, 10
(1962) AIR 1962 All 551 (V 49)=ILR (1961) 1 All 52, Regional Transport Authority, Gorakhpur v. Kashi Prasad Gupta 11
(1961) AIR 1961 SC 1556 (V 48)= (1962) 1 SCR 909, Abdul Gafoor v. State of Mysore 3, 7, 9, 11
(1957) AIR 1957 Mad 387 (V 44)=ILR (1957) Mad 461, Dhanmull Sowcar v. Secy., Regional Transport Authority 11
(1956) AIR 1956 SC 285 (V 43)= 1955-2 SCR 1331, Pradyat Kumar Bose v. Chief Justice of Calcutta High Court 7, 8

Standing Counsel (Sri Umesh Chandra), for Appellants; R. N. Trivedi, for Respondent.

LAKSHMI PRASAD, J. :— Regional Transport Authority, Lucknow Region, Lucknow prefers this appeal from the decision of a learned Single Judge allowing the respondent's petition under Article 226 of the Constitution.

2. On 9th August, 1962 the respondent held a stage carriage permit on Barabanki-Kotwa route. It was valid up to 8th August, 1965. The said route was notified on 1st December, 1962 stating that the U. P. Government Road-ways would start plying buses with effect from 16th December, 1962. The respondent applied on 13th December, 1962 for an alternative route as a displaced operator. A true copy of that application is annexure 1 to the petition. In this application he indicated that he may be given an alternative permit on one of the three routes, namely Lucknow-Hardoi, Barabanki-Faizabad and Sitapur-Hardoi. On 15th December, 1962 Regional Transport Authority, Lucknow Region, Lucknow raised strength on Hardoi-Sitapur route from 6 to 14 and invited applications to fill the vacancies thus arising. A number of persons applied. Khushal Chand Mehrotra was one of them.

On 19th January, 1963 the application of the respondent dated 13th December, 1962 came up for consideration before the Regional Transport Authority. By its resolution the Regional Transport Authority decided that the Secretary Member should dispose of the matter. A copy of that resolution is Annexure 3 to the petition. On 16th February, 1963 the Secretary offered an alternative permit to the respondent on Hardoi-Sitapur route. Annexure 4 to the petition is a true copy of that offer. It is on page 24 of the paper book. As appears from annexure 5 (Copy on page 26 of the paper book) which is a true copy of the respondent's acceptance, the respondent accepted the aforesaid offer on the same date,

namely, 16th February, 1963 On 18th February, 1963 Khushal Chand Mehrotra filed an objection before the Chairman, Regional Transport Authority against the proposal to grant a permit to the respondent on Hardoi-Sitapur route. A true copy of that objection is annexure 6 to the petition.

On the same date the Chairman called upon the Regional Transport Officer to submit his report and directed that the issue of permit be stayed. A true copy of that order is annexure 7 to the petition. On 25th February, 1963 Ganga Dhar Mehrotra, an existing operator of that route, moved another objection before the Chairman, Regional Transport Authority taking exception to the move to bring some displaced operators on Hardoi-Sitapur route. The matter thus remained pending before the Regional Transport Authority till 2nd May, 1963, when the said authority decided to grant an alternative permit to the respondent on Hardoi-Shahjahanpur route instead of Hardoi-Sitapur route which was one of the routes desired by the respondent and had been actually accepted by him on the offer made in that behalf by the Secretary-Member of the Regional Transport Authority. Aggrieved by this order of the Regional Transport Authority, the respondent moved a petition under Article 226 of the Constitution praying that the same be quashed and the Regional Transport Authority be directed to issue a permit to the respondent on Hardoi-Sitapur route.

2A. In identical circumstances a Division Bench of this Court in writ petition No 296 of 1963, D/- 7-8-1964 (AII), Jugal Kishore Agarwal v. Regional Transport Authority, quashed a similar order passed by the Regional Transport Authority and directed the Authority to issue a permit to Jugal Kishore Agarwal on Hardoi-Sitapur route on which he had been offered an alternative permit and which permit he had already accepted. As appears from the judgment of the Division Bench in that writ petition, two contentions were raised on behalf of the Regional Transport Authority against the prayer made by the petitioner in that case. The first contention was that the Regional Transport Authority had every jurisdiction to vary the offer once made under Section 68-G (2) of the Motor Vehicles Act notwithstanding its acceptance by the displaced operator. The other contention was that the offer having been made by the Secretary-Member of the Regional Transport Authority was not a valid offer at all within the ambit of sub-section (2) of Section 68-G of the Motor Vehicles Act notwithstanding a resolution of the Regional Transport Authority delegating power to the Secretary-Member in that behalf since it was

a matter in respect of which there could be no valid delegation.

3. Relying on the case of *Abdul Gafoor v State of Mysore*, AIR 1961 SC 1556 the Division Bench repelled the contention that there could be no valid delegation. The material observations made by the Division Bench in that case run as below—

"It is true that judicial or quasi-judicial function cannot be delegated by one authority to another without specific authority to that effect in the legislation but where an authority exercises merely administrative powers it can delegate its powers to another authority. When the action to be taken is mechanical or ministerial in nature power can be delegated without any specific authority having been conferred in that behalf by the Statute or the rules made thereunder. Thus the Regional Transport Authority could, as it did by its resolution, delegate its powers to its Secretary to dispose of the application of the petitioner. Therefore, when the Regional Transport Officer made an offer to the petitioner for permit on the Hardoi-Sitapur route he was doing so validly and in exercise of the powers conferred on him by the Regional Transport Authority."

As regards the other contention, the Division Bench observes:—

"The offer was duly made and it was accepted. The agreement was thus complete and it was no more open to the Regional Transport Authority to revoke the offer and make offer for another route. Sub-section (2) of Section 68-G lays down that notwithstanding anything contained in sub-section (1), no compensation would be payable on account of the cancellation of any existing permit or any modification of the terms thereof, when a permit for an alternative route or area in lieu thereof has been offered by the Regional Transport Authority accepted by the holder of the permit. The intention of the Legislature in enacting this provision was that an offer for permit of another route should be made to a displaced operator and once he accepts it the agreement is complete and it is no more open to him to claim compensation. Likewise it is not open to the Regional Transport Authority as well to resile from its offer once it has been made and duly accepted."

4. It was on the basis of the aforesaid reasoning that the contentions raised by the Regional Transport Authority were repelled and Jugal Kishore Agarwal, petitioner in that case, was granted the relief already indicated above. Learned Single Judge, who disposed of the case under appeal, felt himself bound by the decision of the Division Bench and accordingly allowed the petition of the res-

pendent quashing the impugned order giving an alternative permit to the respondent on Hardoi-Shahjahanpur route and directing the Regional Transport Authority to grant him an alternative permit on Hardoi-Sitapur route as already agreed to between the parties.

5. When this special appeal came up before a Division Bench of which one of us was a member, it was ordered that the appeal be listed before a larger Bench as it appeared that the decision of the Division Bench in the case of WP No. 296 of 1963, D/- 7-8-1964 (All) required reconsideration. It is in these circumstances that this special appeal has come up before us.

6. We have heard the learned counsel for the parties at some length. We have been addressed on those very two points which the Division Bench decided in the manner indicated above. The first and the foremost contention of the learned Standing Counsel appearing for the appellant is that having regard to the provisions of the Act and the rules made thereunder, there could be no valid delegation of the power exercisable by the Regional Transport Authority under section 68-G (2) in favour of another authority. In this connection he places reliance on sub-section (5) of Section 44 of the Motor Vehicles Act and on the relevant rules framed under Sections 68 and 68-I of the said Act, namely, rule no. 10 of the U. P. State Road Transport Services (Development) Rules, 1958 and Rule 44-A of the U. P. Motor Vehicles Rules, 1940. As against that the contention of the learned counsel for the respondent is that in so far as the act to be performed by the Regional Transport Authority under sub-section (2) of Section 68-G is a purely administrative act, it can very well be delegated to another authority. He argues, as has been laid down by the Division Bench, that in a matter purely administrative the authority empowered to act can validly delegate its functions even in the absence of any express provision in that behalf.

7. The cases that have been cited on the point are Pradyat Kumar Bose v. Hon'ble Chief Justice of Calcutta High Court, AIR 1956 SC 285, AIR 1961 SC 1556 and Kalyan Singh v. State of Uttar Pradesh, AIR 1962 SC 1183.

8. In the case of AIR 1956 SC 285 (supra) the material observations which occur in paragraph 11 of the report are:—

"It is well recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What

cannot be delegated except where the law specifically so provides is the ultimate responsibility for the exercise of such power."

9. In AIR 1961 SC 1556 (supra) the material observations which occur in paragraph 11 of the report are:—

"In our opinion, the Regional Transport Authority acts wholly in a ministerial capacity while dealing with an application of the State Transport Undertaking under Sec. 68-F(1). The fact that on other occasions and in other matters the Regional Transport Authority has quasi-judicial functions to perform cannot make its functions under S. 68-F(1) a quasi-judicial function."

In paragraph 9 of the same case it is observed:—

"It appears to us that when deciding what action to take under S. 68-F(2) the authority is tied down by the terms and conditions of the approved scheme and his duty is merely to do what is necessary to give effect to the provisions of the scheme. The refusal to entertain applications for renewal of permits or cancellation of permits or modification of terms if existing permits really flow from the scheme. The duty is, therefore, merely mechanical; and it will be incorrect to say that there is in these matters any lis between the existing operators and the State Transport Undertaking which is to be decided by the Regional Transport Authority."

10. In AIR 1962 SC 1183 (Supra) the material observations which occur in paragraph 18 of the report are:—

"Nor is there any substance in the last contention. The orders passed under S. 68-F(2) (a) and (b) flow from the publication of the scheme duly approved and the issue of an order, which is not quasi-judicial but administrative, by the Secretary on behalf of the Regional Transport Authority is not open to challenge. It is not the case of the petitioner in W. P. 205/61 in which alone this contention is raised that the order is unauthorised. What is contended is that the order being quasi-judicial power to make it cannot be delegated. But for reasons already set out the order is not quasi-judicial; it is purely administrative."

Sub-section (5) of Section 44 of the Motor Vehicles Act provides:—

"The State Transport Authority and any Regional Transport Authority, if authorised in this behalf by rules made under Section 68, may delegate such of its powers and functions to such authority or person and subject to such restrictions, limitations and conditions as may be prescribed by the said rules."

Rule 10 of the U. P. State Road Transport Services (Development) Rules, 1958 provides:—

"The Regional Transport Authority concerned may, by notification in the official Gazette, delegate all or any of its functions, duties and powers specified in sub-sections (1) and (2) of Section 68F of the Act to the Regional Transport Officer or such other officer as may be specified in the notification."

11. It is unnecessary to reproduce the whole of Rule 44-A of the U. P. Motor Vehicles Rules, 1940. It is sufficient to say that it pertains to delegation of power by a State or Regional Transport Authority. Even though among other powers it refers to the power to grant private stage carriage permits, it does not refer to the power to grant stage carriage permits. The expression "private stage carriage" is defined in Clause (U) of Rule 2 of the U P Motor Vehicles Rules, 1940 to mean any motor vehicle constructed or adopted to carry more than 9 persons excluding the driver and used by or on behalf of the owner exclusively in connection with his trade or business or private purposes but not for hire or reward. It is thus obvious that neither of the two rules authorises the Regional Transport Authority to delegate its functions under Section 68-G(2) in respect of a stage carriage permit. Section 44(5) of the Act came up for interpretation in the case of V. Dhanmull Sowcar v. Secretary Regional Transport Authority at Vellore North Arcot, AIR 1957 Mad 387. The Division Bench deciding the case ruled, vide page 391:

"The ambit of Sec. 44(5) is the entirety of the powers and functions, the statutory powers and functions of the State Transport Authority and those of the Regional Transport Authority as well as the functions of the State Transport Authority founded ultimately on Section 44 (3) (d). Both as a matter of plain language of Section 44(5) and as one of the intendment of the legislature, it seems clear to us that what S. 44(5) provides for is delegation of any of its powers and functions, by the Transport Authority concerned to a person or authority specified by an appropriate rule framed by the State Government under Section 68 of the Act."

We are in respectful agreement with the observations made in the abovesaid Madras case with reference to the scope of section 44(5). That being so, it necessarily follows that in the matter of delegation neither the State Transport Authority nor the Regional Transport Authority can act in a manner otherwise than that provided by Section 44(5). In other words, none of these authorities is empowered to delegate any of its powers or functions under the Act otherwise than in accordance with the rules to be framed under Section 68 of the Act. Judged in the background of the statutory provi-

sions referred to above, there is no escape from the conclusion that the Regional Transport Authority was incompetent to delegate to its Secretary-Member, as it did by its resolution dated 19th January, 1963 in the instant case, to exercise powers under Section 68-G(2) with reference to the application of the respondent moved on 13th December, 1962. It thus follows that the view expressed by the Division Bench to the contrary in the case of WP No. 296 of 1963, D/-7-8-1964 (All) cannot be upheld.

It is also difficult to agree with the view of the Division Bench that the act of Regional Transport Authority under Sec. 68-G(2) is only a ministerial or mechanical act. Observations made by the Supreme Court in the case of Abdul Gafoor, AIR 1961 SC 1556 relied on by the Division Bench with reference to the provisions of Section 68F do not appear to have application to the power exercisable under section 68-G(2). As is pointed by the Supreme Court in paragraph 9 of the report, the entire action under Section 68-F is taken in accordance with the terms of the approved scheme. That being so, no discretion is left with the authority required to take action under section 68F in respect of the various matters enumerated therein. On the other hand, each of such matters stands governed by the terms of the scheme which has already been approved and finalised. It is in such circumstances that the Supreme Court held that the actions to be taken under Section 68-F are more or less mechanical.

It is rarely, if ever, that any direction is given in the approved scheme with regard to an alternative route being provided to a displaced operator. What normally happens is that after the approved scheme had been given effect to by taking action under section 68-G(2) there arises an obligation to determine the compensation admissible to displaced operators and it is then that the Regional Transport Authority is called upon to offer an alternative permit in exercise of its discretion, if available, to a displaced operator in accordance with the facts and circumstances of each case. It shall thus be seen that the action to be taken under Section 68-G(2), though no doubt an occasion for it arises only when an approved scheme has been given effect to, is not one to be taken in accordance with the directions contained in the approved scheme.

So in any view of the matter, there can be no delegation of the power exercisable under Section 68-G(2) by the Regional Transport Authority either because it is not a purely mechanical or ministerial act or because of the specific provision in section 44(5) of the Act in

issued any notification constituting anyone of the District Courts in the State of Andhra Pradesh as a Company Court within the meaning of Section 3. I will therefore, take it that it is the High Court of Andhra Pradesh which is the Company Court under S. 3 of the Act.

7. The three Ss. 199 to 201 relate to the enforcement of the order passed by the Company Court. Section 200 states that an order passed by one Company Court can be enforced by any other Company Court in India in the same manner in all respects as if such order had been made by the Company Court that is required to enforce the same. This provision therefore, empowers the High Court of Andhra Pradesh to enforce any order passed in pursuance of liquidation proceedings by the Madras High Court, which is a Company Court in so far as that State is concerned. It also lays down that such an order shall be enforced in the same manner in all respects as if that order was made by this Court. Section 199 states that all orders made by a Company Court under the Act may be enforced in the same manner in which a decree of a Civil Court made in any suit pending therein may be enforced. When these two sections are read together, the inevitable result is that while under Section 200 the High Court of Andhra Pradesh can execute an order passed by the Madras High Court, Section 199 empowers this Court to enforce the order in the same manner in which the decrees of this Court passed in suits can be enforced.

8. Section 201 merely lays down the mode of dealing with orders to be enforced by other Courts. It says that where any order made by a Company Court is to be enforced by another Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same. It further says that the production of such certified copy shall be sufficient evidence of such order having been made. It directs that upon the production of such certified copy, the Court shall take the requisite steps for enforcing the order in the same manner as if it were the order of the Court enforcing the same. The last limb of Section 201 reiterates what has already been laid down in Sec. 199. When a certified copy of the order passed by the Madras High Court is produced before this Court, this Court shall take suitable steps to enforce it. It may not be necessary that it must be produced to the proper officer of this Court by only the liquidator. I cannot find any objection if the certified copy is produced or sent by the Madras High Court to this Court for the purpose of enforcement. What all Section 201 requires is that the certified copy of the order sought to be

enforced is produced before the Court. Once such a copy is before the Court, the statute raises a presumption that it is sufficient evidence that such an order was made by the Madras High Court. It is up to this Court then to take the requisite steps in the matter of enforcing the said order.

9. Now, it cannot be in doubt that the necessary steps which can be taken for enforcement of the order would be almost the same as are usually taken by this Court in execution of the decree when it passes the same in a civil suit. It is here that Ss. 38 and 39, C. P. C. come in for consideration. Section 38 enacts that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Section 39 authorises the Court to send the decree for execution to another Court in cases where the person against whom a decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of the transferee Court. Section 39 (2) undoubtedly requires that the Court, which passed a decree, may of its own motion send it for execution to any subordinate Court of competent jurisdiction. The question of competency of jurisdiction of the transferee Court has to be determined in reference to the execution of the order as if it is a decree passed in the civil suit and not in reference to S. 3 of the Companies Act as is urged by the learned Advocate for the appellant before me. I have already stated that Section 199 of the Act lays down that the order can be executed in the same manner as if it was a decree passed by Court on the civil side. When that order is transferred for execution to the District Court, what has to be seen is whether the amount involved in the order for the realisation of which the order is transferred for execution to the transferee Court falls within the pecuniary jurisdiction of the transferee Court. The District Court has unlimited pecuniary jurisdiction. In this case, the amount sought to be recovered is only Rs. 1000. It can hardly be doubted that the District Court, to which this Court has transferred the order for the purpose of enforcement, is a competent Court within the meaning of S. 39 (2), Civil P. C. I therefore, fail to see how a District Court can have no jurisdiction to enforce the said order. This Court in exercise of the powers under Section 39, Civil P. C. read with S. 199 of the Act rightly transferred the order for the purpose of execution to the District Court which, as stated earlier, is a competent Court to execute that order.

10. What was, however, urged was that it is the Company Court which alone is competent to execute the order and

since the District Court is not a Company Court, it cannot execute the order sent to it by this Court. It is not possible to accept this contention. It is true that the District Court has not been made a Company Court by any notification under Section 3. Section 164 is not quite relevant for this purpose. What S 164 concerns itself is with the subsequent winding up proceedings and not enforcement of any order passed by a Company Court. The language of Section 164 is plain enough to indicate that the Company Court, which has passed orders of winding up, can direct any District Court to conduct the subsequent proceedings. The order, which is under my consideration and which has come from the Madras High Court for enforcement, cannot be an order which falls within the ambit of S 164. That section therefore, is inapplicable to such a case. It is only under Section 200 that this Court, which also is a Company Court, gets jurisdiction to enforce the orders in cases where certified copies of such orders are produced before it under Section 201. While enforcing that order, Section 199 expressly empowers this Court to enforce that order in the same manner as if it was a decree in a civil suit passed by this Court and it is under this provision that Sections 38 and 39, Civil P. C. get attracted under which this Court would be competent to transfer the order for execution to a competent subordinate Court. It will thus be plain that while initially the certified copy must be produced before a Court within the meaning of Section 3, i.e., to say a Company Court, when once the certified copy is received by the Company Court, the Company Court has jurisdiction to either directly execute it itself or send it for execution to a subordinate Court in the same manner as it sends its decrees for execution passed in civil suits to the subordinate Court. It is not, therefore, necessary that the transferee Court also should be a Company Court. Any such contention would practically amount to flying in the face of S. 199. It is difficult to accept the contention that the expression "in the same manner" relates only to the procedure and does not authorise the District Court to execute the order. Section 199 does not indicate any such distinction. It clearly states that it "may be enforced in the same manner" in which decrees of Civil Courts made in any suits pending therein may be enforced. The word "manner" in my opinion is comprehensive enough to include a subordinate Court which can execute the order if such an order is transferred for enforcement by this Court in its jurisdiction as Company Court.

11. I am fortified in my view by a decision of the Madras High Court in In

the Matter of British Banking and Industrial Corporation Ltd. Bombay, 25 Mad LW 113 = (AIR 1927 Mad 271). That is an identical case. In that case, applications were made to the High Court of Madras for directing the respective District Courts to enforce the payment orders made by the Bombay High Court in the matter of the winding up of the Company. Negating the contention similarly raised therein, Srinivasa Aiyangar, J. held:

"I rather think that the proper procedure as indicated by the conjoint effect of Sections 199 and 200 of the Companies Act is that the order now filed in this Court should be treated in the same manner as a decree passed by this Court and transferred for execution to the respective District Courts.

"There will therefore be an order in all these applications directing the transfer of the order to the District Court concerned for execution by that Court against the contributory. In the same manner and to the same extent as if the order was a decree passed by this Court."

12. It is true that in AIR 1927 Patna 162, a Bench of the Patna High Court held—

"Reading Sections 199 and 200 together the Court mentioned in Sections 200 and 201, as the Court entitled to take requisite steps is not a District Court but a High Court. Hence a decree of the Allahabad High Court in liquidation proceedings cannot be sent direct for execution to the District Court of Gaya (within Patna High Court's jurisdiction)".

It will be clear from the judgment that an order passed by the High Court of Allahabad in liquidation proceedings was transferred by the Allahabad High Court to the District Court, Gaya directly. The District Judge held that under S. 200 read with Section 3 of the Act, he was not competent to deal with such a case and struck off execution. The contention was that as a result of Section 199, Sections 38, 39 and 40 of the Civil P. C. would apply and as a decree in a suit by the Allahabad High Court can be transferred for execution to the District Court at Gaya, the same procedure was correctly followed in these liquidation proceedings. It is this contention which was negatived. It is in this context that the following observation made in the judgment has to be understood.—

"Now the Court described in these two sections is not the Court of the District Judge as he has rightly pointed out, but it would be this Court, Sections 199 and 200 must be read so as to be consistent with each other. If the interpretation placed upon Section 199 by the learned advocate for the appellant is correct, then Section 200 would be swept away altogether".

13. It will thus be plain that in that case the certified copy was not produced before the Patna High Court, which was the Company Court so far as that State was concerned. If the procedure followed in this case had been followed in that case there could not have been any objection. The sending of the certified copy directly by the Allahabad High Court to the District Court, Gaya was not permissible because the District Court of Gaya was not a company Court although it could execute the order transferred by the High Court of Patna. It could not directly receive the certified copy and enforce the same as that will be quite contrary to Section 200 of the Act. That decision, therefore, does not lay down anything contrary to what I have stated earlier.

14. In *Natarajan v. Narasimha*, AIR 1930 Mad 74 this question was left open by the Bench. It observed:

"We do not propose to decide the question, in what manner, in the event of an application being made to the High Court, is the order to be enforced, by direct action or by itself being transmitted to the Tanjore Court? That is a point which does not arise at present." That decision, therefore, is not helpful.

Since I am in respectful agreement with the Madras decision in 25 Mad LW 113 = (AIR 1927 Mad 271) and no decision contra has been brought to my notice, I would hold that the learned District Judge was right in holding that the District Court had the necessary jurisdiction to enforce the order transferred to it by this Court. I can find, therefore, no valid reason to interfere.

15. The appeal, therefore, fails and is dismissed. No order as to costs.
HGP/D.V.C. Appeal dismissed.

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(V 56 C 64)

SHARFUDDIN AHMED, J.

Konda Anthiah, Petitioner v. Madan Rao and another, Respondents.

Civil Revn. Petn. No. 1745 of 1965, D/-8-9-1967, from order of First Addl. J., City Civil Court, Hyderabad, D/-6-8-1965.

Contract Act (1872), Ss. 186, 188 — General power of attorney in Urdu — Use of word "sulah" does not include reference to arbitration — Expression means only "compromise" — Difference between compromise and reference to arbitration explained. AIR 1947 Nag 17, Not foll. — (Power of Attorney Act (1882), S. 2) — (Civil P. C. (1908), O. 3, R. 4, O. 23, R. 3) — (Words and Phrases — "Sulah" and "Supurd Salisi", meaning of).

Powers of attorney must be strictly construed as giving only such authority as they confer expressly or by necessary implication.

Where in a general power of attorney drafted in Urdu the agent was permitted to compromise ("Sulah") a suit on behalf of the principal, such power does not entitle the agent to refer a case to arbitration ("supurd salisi"). No doubt the English equivalent of "Sulah" is compromise, but even compromise does not normally mean reference to arbitration though by a stretch of language, it might be said that reference to arbitration is mode of compromise.

In a compromise it is the discretion of the person to whom power has been delegated that has to be exercised one way or the other. But a reference to arbitration involves the delegation of power of that discretion to a third party. AIR 1952 Mad 559 and AIR 1940 Mad 650, Rel. on; AIR 1947 Nag 17, Not foll. (Paras 5, 6)

| Cases | Referred: | Chronological | Paras |
|--|-----------|---------------|-------|
| (1952) AIR 1952 Mad 559 (V 39) = | | | |
| 1951-2 Mad LJ 43, Desappa Nayanim v. Ramabhaktula Ramiah | | | 5 |
| (1947) AIR 1947, Nag 17 (V 34) = | | | |
| ILR (1946) Nag 824, Jiwibai v. Ramkumar | | | 8 |
| (1940) AIR 1940 Mad 650 (V 27) = | | | |
| 1940 Mad WN 191, Ramanathan v. Kumarappa | | | 7 |

M. Seetha Ram Rao, for Petitioner;
Govinda Rao, S. Menthil, for 1st Respondents.

JUDGMENT: The short question that falls for determination in this C. R. P. is with regard to the construction to be placed on the powers of General Power of Attorney stated to have been appointed by Konda Aruna (the second respondent) in O. P. No. 19 of 1962. The General Power of Attorney, Fateh Mohammad, is the first respondent and the petitioner in the original petition. Madan Lal is the person in whose favour the agreement has been drawn. Madan Rao filed the petition under Ss. 9 (1) and 8 (2) of the Arbitration Act, 1940 praying that the dispute between the parties regarding failure to supply fire wood as agreed to may be referred to a named arbitrator for settlement. His case was that he had entered into an agreement with first respondent who holds the power of attorney on behalf of the second respondent whereunder the agent undertook to supply firewood for Rs. 6,400 within a specified time. The contention is that the respondent failed to supply the fire wood and refund the amount in spite of the notice on behalf of the petitioner. A condition was imposed in the terms of the agreement that in case of dispute, the matter would be referred to arbitration and it was this condition that was sought to be enforced by the petitioner. The first respondent petitioner did not contest the petition. The second respondent, however, urged that the petition was not maintainable as the first respondent, the

power of attorney holder was not competent to refer the matter to arbitration. The question, therefore, before the Court was whether the reference to an arbitration was within the competency of the General Power of Attorney. The lower Court on a consideration of the terms of the General Power of Attorney held that the first respondent was competent to entertain an agreement of the nature referred to above. In other words, it held that the reference to arbitrator was within the powers delegated to the General Power of Attorney. The revision petition is filed by the second respondent in the lower Court against the decision of the lower Court.

2. The learned Counsel for the petitioner (second respondent) contends that the original document contains the word 'compromise' and reference to arbitration is not specifically mentioned thereunder. It may be useful to reproduce the relevant portion of the General Power of Attorney.

"Therefore, we on our behalf appoint Sri Fateh Mohammed son of Shaik Ahmed, caste Muslim, aged 53 years, occupation business, resident of Kachiguda, Hyderabad as our General Power of Attorney to the extent of the above said lease and agree to the effect that the said gentleman on our behalf is entitled to do paravai and submit replies in all the Departments of Forests, Revenue, Civil Court, Criminal Court, etc., in the State of Andhra Pradesh, admit or deny documents, compromise or withdraw, settle the accounts, file documents, deposit or draw money, file petitions, suits, appeal or revision in any Court of law, obtain possession of above-said lease or obtain par-chittaht (permt books) and issue permits, cut the jungle wood and sell it, sell away or transfer the above lease, appoint on his own accord any Advocate or Barrister or appoint a special power of attorney or cancel their power".

The General Power of Attorney in his turn seemed to have entered into an agreement with the respondent-petitioner in the lower Court agreeing to supply fire wood within the specified time and received an amount of Rs. 6,400. In clause 2 of the agreement, he stated as hereunder:

"In default, the said bargain would be deemed as cancelled and the executant shall be bound to pay back the advance of Rs. 6,400 to the purchaser; and if the executant fails to pay back the said advance to the said purchaser, the matter would be referred to the Arbitrator, Sri Prabhakar Rao Apsingkar, B.A. LL. B., Advocate, Hyderabad as wished by the said purchaser for the settlement of the repayment of the said advance plus the costs and damages".

3. It is this part of the condition which was sought to be enforced by the petitioner herein.

4. The lower Court on a consideration of the argument advanced held that the General Power of Attorney Holder was com-

petent to refer the matter to arbitration and in that view allowed the petition. The C. R. P. is directed against this order.

5. The learned counsel for the petitioner contends with reference to the terms that under the powers delegated Fateh Mohammed was only competent to admit or deny the documents, compromise or withdraw. Reference to arbitration was not specifically mentioned therein. As such, the agreement entered into by the said person viz., Fateh Mohammed to refer the matter to arbitration was beyond his competence. With reference to the decision in Desappa Nayanam v Rama Bhaktula Ramaiah, AIR 1952 Mad 559, it has been urged that the Deed of General Power of Attorney has to be strictly construed and adjustment or compromise did not include arbitration. In Para 3 of the said judgment it has been observed with reference to Bowstead on Agency that:

"Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication".

6. Some important rules of construction have been reproduced in the above ruling. It is conceded, in the instant case, that in the deed conferring general power of attorney on Fateh Mohammed which is in Urdu, the words 'reference to arbitrator' (Supard Salasi) are not found but from the trend of the document it is urged that this power also would be deemed to be included in the said deed, for the deed authorises Fateh Mohammed 'to compromise or withdraw, settle the accounts . . . file petitions, suits, appeals or revisions in a Court of law etc'. The Urdu word 'Sulah' in the deed has a different connotation from the words 'Supard Salasi'. No doubt the English equivalent of 'Sulah' is compromise, but even compromise does not normally mean reference to arbitration though by a stretch of language, it might be said that reference to arbitration is mode of compromise. It is to be noted that in a compromise it is the discretion of the person to whom the power has been delegated that has to be exercised one way or the other, but a reference to arbitration involves the delegation of power of that discretion to a third party. It is this delegation which is not contemplated by the deed under reference.

7. This is the view taken by a Bench of the Madras High Court in Ramanathan v. Kumarappa, AIR 1940 Mad 650, wherein it has been held that:

"A power of attorney authorising the agent to adjust a matter does not include a power to refer the matter to arbitration on the principle underlying the maxim delegata potestas non potest delegari".

8. The learned counsel for the respondent has relied on a decision of Nagpur High Court in Jiwibai v. Ramkumar, AIR 1947 Nag 17, to substantiate his contention that the word 'compromise' is comprehensive

enough to include the word 'arbitration'. I am not inclined to accept this interpretation as the said judgment is based on the interpretation of a particular deed. It appears that in the said case it was held that:

"Compromise included the power to refer the suit to arbitration because the deed set out in separate phrases the two aspects of compromise which the single English word normally connoted".

It is not possible to spell out the same interpretation by reference to the word 'Sulah' in the present deed. I am, therefore, of the opinion that the lower Court was not justified in holding that Fateh Mohammed was competent to refer the matter to arbitration. The C. R. P. is accordingly allowed with costs.

BDB/D.V.C.

Revision allowed.

AIR 1969 ANDHRA PRADESH 213
(V 56 C 65)

P. JAGANMOHAN REDDY C. J., AND
KRISHNA RAO, J.

Chimalakonda Ambayamma (died) and another, Appellants v. Chimalakonda Ganapathi, Respondent.

Second Appeal No. 1021 of 1962, D/-17-7-1967, against order of Basi Reddy J., D/-27-12-1966.

Hindu Adoptions and Maintenance Act (1956), Sec. 25 — Decree or agreement fixing amount of widow's maintenance — Section 25 is no bar to widow claiming increased maintenance due to change of circumstances irrespective of whether decree or agreement was prior to or subsequent to Act.

A decree or agreement fixing maintenance will not bar a widow from claiming increased maintenance if the circumstances justify such alteration in view of the plain provisions of Sec. 25. It is immaterial whether the decree or agreement was before or after the Act; nor is there anything in the section to justify the conclusion that the initial right of maintenance to a widow must have accrued to her only after the commencement of the Act i.e., that the death of the husband should have taken place after the commencement of the Act. AIR 1965 SC 1970 and AIR 1964 Mys 265 and AIR 1959 Andh Pra 269 and AIR 1964 Mad 217, Foll. (Para 3)

Even where the widow had agreed under the terms of a compromise decree passed in 1927, not to ask for increased maintenance she was held entitled to ask for the increase under Sec. 25 of Act.

Broad observations made in AIR 1959 Andh Pra 269 with regard to Ss. 21 and 22 of the Act held obiter and not correct in view of AIR 1965 SC 1970 and AIR 1961 Andh Pra 131 (FB). (Paras 4, 5)

LK/HL/D986/67

| Cases Referred: | Chronological | Para |
|--|---------------|------------|
| (1965) AIR 1965 SC 1970 (V 52) = | | |
| (1965) 3 SCR 123, Gopal Rao v. Sitarama | | 5 |
| (1964) AIR 1964 Mad 217 (V 51) = | | |
| (1963) 2 Mad LJ 403, Seshi Ammal v. Thaiyu Ammal | | 6 |
| (1964) AIR 1964 Mys 265 (V 51), Vedavathi Williams v. Rama Bai | | 6 |
| (1961) AIR 1961 Andh Pra 131 (V 48) = (1960) 2 Andh WR 352 (FB), Ramamoorthy v. Sitarama | | 1, 4, 5 |
| (1959) AIR 1959 Andh Pra 269 (V 46) = (1959) 1 Andh WR 12, Kameswaramma v. Subrahmanyam | | 1, 4, 5, 6 |
| (1939) AIR 1939 Mad 798 (V 26) = (1939) 2 Mad LJ 460, Kameswaramma v. Thammanna | | 3, 5 |
| (1924) AIR 1924 Mad 687 (V 11) = ILR 47, Mad 308, Mouleswar Rao v. Durgamba | | 3 |
| V. Jogayya Sarma, for Appellants; Veerabhadraiah, for Respondent. | | T. |

JAGANMOHAN REDDY, C. J.: This second appeal has been referred to this Bench by our learned brother Basi Reddy J., as raising an important question under S. 25 of the Hindu Adoptions and Maintenance Act in respect of which it is said there is a conflict of authority. There are two decisions of this Court: one of a Bench consisting of Subba Rao, C. J., and Mohd. Ahmad Ansari, J. (as they then were) in Kameswaramma v. Subrahmanyam, (1959) 1 Andh WR 12 = (AIR 1959 Andh Pra 269) and the second of a Full Bench consisting of Chandra Reddy, C. J., Srinivasachari and one of us (the present Chief Justice) in Ramamoorthy v. Sitarama, (1960) 2 Andh WR 352 = (AIR 1961 Andh Pra 131) (FB), which bear upon the question. Before we examine these cases, it is necessary to state briefly the facts which give rise to the question posed before us, viz., whether the death of the deceased whose widow is claiming enhanced maintenance should have been after the commencement of the Act in order to get the benefit of Section 25 of the said Act? There were two brothers Venkateswarlu and Padmanabham. Venkateswarlu died in 1906 or 1907 leaving a widow, the plaintiff-appellant, and a will Ext. B-3 dated 22-9-1906. Padmanabham had two sons, Sambamurthy and Ganapati. Under the terms of the will Venkateswarlu left all his properties to Sambamurthy burdened with a liability to maintain his widow at the rate of Rs. 20 per year. In 1927, the widow filed O.S. No. 542 of 1927 for enhancement of maintenance. In that suit there was a compromise and a decree was passed on 14-9-1928 enhancing the maintenance from Rs. 20 to Rs. 35 per year. The decree further stated that the widow will not ask for any increase in the maintenance. It may also be stated that there is a charge created on the pro-

party of the deceased in respect of this enhanced maintenance under the compromise decree. On 10-7-1933 Sambamurthy executed a settlement in favour of his brother, Ganapati by a registered document Ext A-3. Thereafter he died though it is not relevant for the purpose of this second appeal as to the date when he died, and the property was in his possession and enjoyment both under the settlement deed as also as the heir of Sambamurthy. In 1960 the widow filed a suit against Ganapati for enhancement of maintenance from Rs 35 to Rs 600 per year on the ground that the income of the property had increased and the cost of living also had gone up. The trial Court awarded her ten bags per year which at the prevailing rate amounted to Rs 240 and decreed the suit. The District Judge, while agreeing with the finding that the maintenance ten bags awarded by the trial Court is reasonable, nonetheless held having regard to Ramamoorthy v. Sitaramma, (1960) 2 Andh WR 352 = (AIR 1961 Andh Pra 131) (FB) that an abode was under no personal obligation to pay the maintenance. In this view he allowed the appeal and dismissed the suit.

2. The question which arises for consideration is whether the widow is entitled under Section 25 to claim increased maintenance having regard to the change in circumstances, notwithstanding the fact that under a prior decree she had been awarded maintenance and that she had agreed under the terms not to ask for increased maintenance.

3. Prior to the Hindu Adoptions and Maintenance Act, 1956, under the Hindu Law it has been held by the Madras High Court in *Mouleswar Rao v. Durgamba*, ILR 47 Mad 303 = (AIR 1924 Mad 687) and *Kameswaramma v. Thammanna*, (1939) 2 Mad LJ 460 = (AIR 1939 Mad 798), that a contract by a Hindu widow with her husband's coparceners to receive a fixed maintenance per annum and not to claim increase in future, even in case of changed circumstances, is a valid agreement. Section 25 of the Act, however, altered this position. It reads:

"The amount of maintenance, whether fixed by a decree of Court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration."

A plain reading of the section would leave no doubt that a decree or agreement fixing maintenance will not bar a widow from claiming increased maintenance if the circumstances justify such alteration. It is immaterial whether the decree or agreement was before or after the Act, nor is there anything in the section to justify the conclusion that the initial right of maintenance to a widow must have accrued to her only after the commencement of the Act, i.e., that the death of the husband should

have taken place after the commencement of the Act.

4. Section 25 was considered in (1959) 11 Andh WR 12 = (AIR 1959 Andh Pra 269) (supra) by a Bench. Subba Rao, C. J. (as he then was), examining the position of Hindu Law as existed prior to the enactment and after citing the provisions of Section 25 dealt with the contention that the section did not enlarge the pre-existing right of a widow for maintenance but only gave a statutory recognition to it. He observed at p. 14 (of Andh WR) = (at p. 270 of AIR) thus:-

"The Act both amended and codified the law relating to maintenance among Hindus. The word 'agreement' is admittedly comprehensive enough to take in an agreement of either description. The Legislature does not expressly or by necessary implication exclude any category of agreements fixing maintenance from the operation of the section. If there was a valid reason for binding the parties to the terms agreed upon between them, there would also be equal justification for protecting the widow from being bound by an unjust agreement precluding her from claiming enhanced maintenance in changed circumstances. We do not, therefore, see any justification not to give the widest meaning to the word 'agreement' which it can bear. We hold that notwithstanding the agreement by the widow not to claim higher rate of maintenance in the changed circumstances, she would be entitled to enhanced maintenance under the provisions of the Act if there was a material change in the circumstances."

In that case, the husband died in 1916 and after his death, his widow filed a suit in which a compromise decree was passed on 29-7-1924 awarding her maintenance at Rs. 240 a year. It was also agreed between the parties that the plaintiff should not raise any dispute claiming enhanced rate of maintenance and that the defendants should not raise any dispute for reducing that rate. In the view of the law, which was discussed, it was held that the widow was entitled to maintenance at Rs 2,400 per year as determined by the trial Court. In that case it was argued, as in this case, that Sec. 25 applied only to a widow whose husband died after the Act came into force. But that argument was repelled, holding that Section 25 does not impose any such restrictions or limitations. The Act is an amending and codifying Act and under Section 4 thereof, save as otherwise expressly provided in the Act, the pre-existing law ceases to have effect with respect to any matter for which provision is made in the Act or if it is inconsistent with any of the provisions of the Act. In dealing with this aspect of the matter, reference seems to have been made to Sections 21 and 22 of the Act and the learned Chief Justice observed that even in respect of those two provisions, the same rule will apply and that it made no

difference whether the husband died before or after the commencement of the Act. These observations in relation to Sections 21 and 22 came up for consideration by the Full Bench in (1960) 2 Andh WR 352 = (AIR 1961 Andh Pra 131 FB) (supra), to which one of us (the present Chief Justice) was a party. The Full Bench did not accept the view taken by the Bench inasmuch as the considerations that are relevant for an interpretation of Section 25 do not bear on Section 22. Chandra Reddy, C. J., speaking for the Full Bench, said at p. 356 (of Andh WR) = (at p. 134 of AIR):

".....On the other hand, the language of this section contrasted with that of Section 22 also lends some countenance to the theory that Section 22 is restricted to persons claiming maintenance from the estate of a Hindu dying after the commencement of the Act."

A perusal of Section 22 (2) would show that there is a specific reference to the date of the death occurring after the commencement of the Act. Be that as it may, we are not considering the effect of Section 22 in this case as the defendant is not sought to be made liable under that provision.

5. In an appeal against the Full Bench decision in (1960) 2 Andh WR 352 = (AIR 1961 Andh Pra 131 FB) (supra), their Lordships of the Supreme Court in Gopal Rao v. Sitharama, AIR 1965 SC 1970, referred to (1959) 1 Andh WR 12 = (AIR 1959 Andh Pra 269) (supra) and approved of the decision therein. Bachawat, J., speaking for the Court after setting out the facts in (1959) 1 Andh WR 12 = (AIR 1959 Andh Pra 269) (supra) observed at p. 1974:

"The question arose whether in spite of this agreement the plaintiff could claim increased maintenance in view of the Sec. 25 of the Hindu Adoptions and Maintenance Act, 1956. It was held that in spite of the aforesaid terms of the compromise she was entitled to claim increased maintenance under Section 25. This conclusion follows from the plain words of Section 25 under which the amount of maintenance, whether fixed by decree or agreement either before or after the commencement of the Act, may be altered subsequently. The decision was, therefore, plainly right. No doubt there are broad observations in that case to the effect that the right to maintenance is a recurring right and the liability to maintenance after the Act came into force is imposed by Section 22 and there is no reason to exclude widows of persons who died before the Act from the operation of Section 22. Those observations were not necessary for the purpose of that case, because the widow in that case was clearly entitled to maintenance from the estate of her deceased husband dying in 1916 under the Hindu Law as it stood then, independently of Ss. 21 and 22 of the Act, and in spite of the compromise fixing the maintenance before the commencement

of the Act, the widow could, in view of Section 25, claim alteration of the amount of the maintenance."

6. This decision clearly affirms the view taken by the Bench in Kameswaramma's case, (1959) 1 Andh WR 12 = (AIR 1959 Andh Pra 269) (supra), and in so far as this case is concerned, does not leave the applicability of S. 25 in any doubt. Two recent judgments, one of the Madras High Court in Seshi Ammal v. Thaiyu Ammal, (1963) 2 Mad LJ 403 = (AIR 1964 Mad 217) and the other of the Mysore High Court in Vedavathi Williams v. Rama Bai, AIR 1964 Mys 265, have also taken a similar view.

7. Before we part with this case, it has been brought to our notice that the plaintiff-widow died on 24-9-1964 a fact which Mr. Veerabhadrayya does not contest. In view of this, her heirs will be entitled to claim the maintenance at the enhanced rate which both the Courts have found to be reasonable, namely, 10 bags of paddy a year only up to the said date, namely, 24-9-1964.

8. In the result, the appeal is allowed, the judgment and decree of the District Judge reversed and those of the trial Court restored with costs throughout. The legal representatives of the appellant will pay from out of her estate the court-fee payable on the second appeal to the Government.
KSB Appeal allowed.

AIR 1969 ANDHRA PRADESH 215
(V 56 C 66)

CHINNAPPA REDDY, J.

Madhavarapu Sriramamurthy, Petitioner v. Mamidala Subbamma, Respondent.

Civil Revn. Petn. No. 1468 of 1966, D/-12-9-1967, against order of Dist. J., East Godavari, Rajahmundry, D/-23-6-1966.

Civil P. C. (1908), O. 33, R. 1 — Suit on pro-note by endorsee for collection—Endorsee cannot apply for permission to sue in forma pauperis.

It would indeed be most dangerous and it would throw the door open to all sorts of speculative litigation if a mere endorsee for collection or an agent suing on behalf of a principal is permitted to sue as a pauper on the ground of his poverty notwithstanding the fact that the original payee or the principal can well afford to pay court-fee. The object of the provisions of O. 33 is to help bona fide litigants who, stricken by poverty, are unable to pay the requisite court-fee. The object is certainly not to help persons set up by others for the purpose of avoiding the payment of court-fee. It may be that an endorsee for collection is entitled to bring a suit in his own name, but since he possesses no beneficial interest in the subject-matter of the suit and the fruits of any decree which he may obtain are intended to benefit someone

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else, he should not be permitted to sue as a pauper. Held, that the endorsement for collection in the case was a mere ruse for avoiding payment of court-fee (Para 3)

N C V. Ramanujachari, for Petitioner;
C Pooranaiah, for Respondent.

JUDGMENT. The respondent in this Civil Revision Petition filed an application under O 33, R. 1, for leave to sue in forma pauperis. She claimed that two promissory notes executed by the defendant in favour of her husband for Rs 4,400 and Rs 4,000 on 21-9-1959 and 22-7-1960, respectively, were endorsed in her favour for collection. After giving credit for part payments made on 21-1-1960 and 20-2-1961 in respect of the first promissory note and on 15-5-1962 and 2-1-1963 in respect of the second promissory note, an amount of Rs 6,813 89 was still due on the two promissory notes. She claimed that she was not possessed of any property and that therefore leave should be granted to file the suit as a pauper. The defendant opposed the application on various grounds. So far as the first promissory note dated 21-9-1959 is concerned, it was stated that the last part payment pleaded being on 20-2-1961, the suit was clearly barred by limitation. The defendant further pleaded that the endorsement for collection did not vest any cause of action in the endorsee and that the suit was not competent at her instance.

2. The learned District Judge held that, so far as the promissory note dated 21-9-1959 is concerned, the suit is clearly barred by limitation and leave could not, therefore, be granted in respect of that part of the suit which related to that promissory note. Excluding the amount claimed on the first promissory note, the balance was only Rs 2,055.20 and as a suit for recovering that amount was within the competence of the District Munsif's Court, the learned District Judge directed that the plaint should be returned for presentation to the Munsif's Court. He allowed the petition for permission to sue in forma pauperis in so far as it related to the promissory note of 29-7-1960 and that is why he directed the return of the plaint instead of the petition for leave to sue in forma pauperis.

3 Mr. Ramanujachari for the defendant-petitioner contends that the learned District Judge should not have granted permission to the plaintiff to sue in forma pauperis as she was a mere endorsee for collection and therefore, had no beneficial interest whatever in the subject-matter of the suit. He relied upon Order 33, Rule 5 (e) of the Code of Civil Procedure which runs as follows—

"5 The Court shall reject an application for permission to sue as a pauper—

(a) to (d-1) x x x x x
(c) Where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other

person has obtained an interest in such subject-matter."

Mr. Ramanujachari contends that, when the whole of the interest in the subject-matter of the suit belongs to someone else a fortiori, leave should not be granted to the plaintiff to sue as a pauper. I entirely agree with Mr. Ramanujachari. It would indeed be most dangerous and it would throw the door open to all sorts of speculative litigation if a mere endorsee for collection or an agent suing on behalf of a principal is permitted to sue as a pauper on the ground of his poverty notwithstanding the fact that the original payee or the principal can well afford to pay court-fee. The object of the provisions of Order 33 is to help bona fide litigants who, stricken by poverty, are unable to pay the requisite court-fee. The object is certainly not to help persons set up by others for the purpose of avoiding the payment of court-fee. It may be that an endorsee for collection is entitled to bring a suit in his own name, but since he possesses no beneficial interest in the subject-matter of the suit and the fruits of any decree which he may obtain are intended to benefit someone else, he should not be permitted to sue as a pauper. It is obvious that the endorsement for collection is a mere ruse for avoiding payment of court-fee. The order of the learned District Judge permitting the respondent to sue as a pauper is set aside. I am told that pursuant to the order of the learned District Judge, the plaintiff has been presented to the Court of the District Munsif of Rajahmundry and is now pending before the Third Additional District Munsif as O.S. No 441 of 1966. The learned District Munsif will dispauper the plaintiff and direct her to pay the requisite court-fee within the time fixed by him. The petition is allowed. No costs.

BDB/D.V.C.

Petition allowed.

AIR 1969 ANDHRA PRADESH 216
(V 58 C 67)

KONDAIAH, J.

Purapabutchi Rama Rao, Appellant v.
Purapa Vimalakumari, Respondent

A.A.O No. 469 of 1964, D/-17-10-1967,
against order of Addl Dist. J., Krishna at
Machilipatnam D/-1-10-1964.

(A) Civil P. C (1908), O. 41, R. 23 (as amended by Madras Amendment of 1930) and S. 151 — Order of remand by lower appellate Court — Non-mention of provision under which it was passed — Presumption is that it is passed under O. 41, R. 23, and not under S 151 — Objection as to maintainability of appeal against such order — Respondent must rebut presumption — Omission regarding refund of court-fee in

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order of remand — Not conclusive. AIR 1956 Raj 43 and AIR 1937 Sind 279, Dissented from.

When the remand order is silent as to the provisions of law under which it was passed, it must be presumed to be referable to the specific provisions of the Code, that is, Order 41, Rule 23, Civil P. C., unless the contrary intention is established from the facts of the case. (Para 16)

It is just and reasonable to presume unless and until the contrary intention is to be gathered on the facts and in the circumstances, that the orders were deemed to have been passed by the Court in the exercise of such provisions of law, against which a valuable right of appeal to the aggrieved litigant is provided under the Code. (Para 15)

It is for the respondent, who raises the preliminary objection that the appeal against the order of remand is incompetent on the assumption that the order was passed under Section 151, Civil P. C., that has to prove that such order was passed only under Section 151 but not under Order 41, Rule 23, Civil P. C. (Para 16)

The omission to order refund of the court-fee is neither conclusive nor a relevant and material factor to hold that the order was passed only under Section 151, Civil P. C., but not under Order 41, Rule 23, because Section 64 of the Andhra Pradesh Court-Fees and Suits Valuation Act (1956) gives ample discretion exercisable fairly reasonably and judiciously in each case by appellate Court while remanding the appeal to direct the refund of the court-fee to the appellant of the full amount paid on the memorandum of appeal. AIR 1956 Raj 43 and AIR 1937 Sind 279, Dissented from. Case-law Discussed. (Para 16)

(B) Civil P. C. (1908) (as amended by Madras Amendment of 1930), O. 41, Rr. 23 and 27 — Provision of R. 23 is mandatory — Power of remand — Not to be exercised to give undue advantage to aggrieved party to fill in lacuna in evidence on record.

The powers of remand under the amended Rule 23 of Order 41 applicable to the Madras and Andhra Pradesh, are wide enough to take in not only the cases, where the trial Court had decided the cases on the preliminary point but also the case where the trial Court had decided all the issues after considering the entire evidence on record and when the appellate Court in the interests of justice feels that a remand was just and proper. The conditions prescribed for the exercise of the power of remand under Rule 23, Order 41, Civil P. C., are mandatory but not a mere formality. To arrive at a finding on the material on record that the judgment of the trial Court is erroneous and is liable to be reversed or set aside, is a condition precedent for the appellate Court to clutch at the jurisdiction to pass an order of remand under O. 41, R. 23, Civil P. C. (Para 16)

Where the trial Court, after considering the entire evidence on record, had given specific finding on each issue framed by it and the lower appellate Court, without considering the evidence or arriving at a conclusion that the material findings of the trial Court were erroneous, set aside the decree and judgment of the trial Court and remanded the suit for disposal according to law affording an opportunity to one of the party to examine certain witnesses, the order of remand was illegal. 1955 Andh LT 695 (Civil), Rel. on. (Paras 17, 18, 21)

The discretion vested in the Court must be exercised reasonably and fairly and the appellate Court should not exercise the power of remand to give an undue advantage to the aggrieved party to fill in gaps or lacuna in the evidence on record. This would in effect amount to circumvent the provisions of Rule 27, Order 41 and cross-cutting the specific provisions of the Code. (Para 21)

(C) Civil P. C. (1908), S. 151 — Power under, cannot override express provisions of law — Power should be sparingly exercised.

The inherent powers of the Court are very wide and residuary in nature and not controlled by any other provisions in the Code; but they cannot override the express provisions of the law.

The inherent powers under Section 151, Civil P. C., have to be sparingly exercised and that too, only to meet the ends of justice, in appropriate cases, where there are no specific express provisions in the Code to meet such a contingency. AIR 1961 SC 218 and AIR 1962 SC 527 and AIR 1964 SC 993 and AIR 1965 SC 364 and AIR 1931 Mad 791 and AIR 1928 Mad 991, Rel. on. (Para 16)

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(1927) AIR 1927 Mad 835 (V 14) =
52 Mad LJ 90, Mallayya v.
Veerayya 6
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(1922) AIR 1922 All 226 (V 9) =
ILR 44 All 492, Bibi Kulsoom-
unissa v. Ram Prasad 15

M B Rama Sarma, for Appellant; M.
Bhujanga Rao, for Respondent.

JUDGMENT: This appeal by the plain-
tiff-appellant is directed against the judg-
ment and decree of the Additional District
Judge, Krishna, Machilipatnam, dated Octo-
ber 1, 1964, in A.S. No. 47 of 1961, order-
ing the remand of the suit to the Court of
the Subordinate Judge, Gudivada, for fresh
disposal according to law, in the light of
the observations contained therein.

2. It is necessary to narrate the brief
and material facts that led to this appeal.
The appellant, who owns 402 acres of
land and a house, married the defendant,
in the year 1957, when he was studying
B.A. class at Gudivada. He was forced
and threatened by his father-in-law, in
March, 1958, when he was unwell and was
studying for his ensuing April examination,
either to consummate the marriage or to
agree to divorce his wife. On March 3,
1958, Venkataramiah and the defendant's
father came to him and took him to the
office of an Advocate Sri D. S. N. Achar-
yulu of Masulipatnam and got a registered
notice prepared with false recitals to the
effect that the plaintiff was impotent even
at the time of the marriage and continued
to be impotent after marriage and he was
prepared to have the marriage cancelled.
The plaintiff was compelled to write a docu-
ment (Ext. B-1) to the dictation of Venkata-
ramaiah and got it registered on March 3,
1958, which is sought to be cancelled in
O.S. No. 41 of 1958, Sub-Court, Gudivada,
on the grounds of fraud, coercion, undue in-
fluence and fraudulent misrepresentation.
The defendant filed written statement con-
tending inter alia that she married the plain-
tiff on June 6, 1957, her mother had settled
Ac. 2.2½ cents on her and her father
had given a cash gift of Rs 1,000 besides
some other customary presents, that the im-
pugned deed was executed voluntarily and
out of love and affection and the same is
not liable to be cancelled.

3. The trial Court on a consideration of
the evidence on record cancelled the gift
deed (Ext. B-1) as vitiated by fraud, undue
influence, coercion and as such invalid and
decreeed the suit as prayed for. Aggrieved
by the judgment and decree of the trial
Court, the defendant preferred A.S. No. 47
of 1961 to the District Court, Krishna.
Thinking that the entire case revolves on
the voluntary nature or otherwise of the

notice Ext. B-2 and the circumstances under
which Ext. A-1 was issued by the doctor
and admitted into evidence, the lower ap-
pellate Court thought it fit to remand the
case to the trial Court to afford an oppor-
tunity to the parties to examine Sri D. S. N.
Achari, Advocate, Dr. T. V. S. Chalapati
Rao and Narasimha Rao. In the result, the
decree and judgment of the trial Court was
set aside and the suit remanded for dispo-
sal according to law. Hence, this appeal
by the plaintiffs.

4. Mr. Rama Sarma, the learned coun-
sel, urged that the order of remand is un-
sustainable, as the prerequisites of the
Rule 23 of Order 41, Civil P. C., have not
been satisfied in this case and this remand
has afforded an opportunity to fill the
lacunae in the defendant's evidence.

5. Mr. Bhujanga Rao, the learned coun-
sel for the respondent, contended inter alia
that the impugned order of remand is pass-
ed under Section 151, Civil P. C., but not
under Order 41, Rule 23, Civil P. C., and
hence the present appeal is incompetent
and in any event the remand order is just
and proper and is liable to be affirmed.

6. A number of conflicting decisions
have been cited by the counsel in support
of their respective stands taken by them.
It is necessary, firstly, to deal with the
preliminary objection relating to the main-
tainability of the appeal raised by the re-
spondent in this appeal. Sri Bhujanga Rao
cited the following decisions of the Madras
High Court in *Mallayya v. Veerayya*,
AIR 1927 Mad 335, *Venkata Radha-
krishna Rao v. V. Venkata Rao*, 47 Mad LJ
552 = (AIR 1925 Mad 229) and
Kakamma v. Chandrasekhara, AIR 1929
Mad 205, in support of his plea.

7. For a proper appreciation of the
points that arise for determination, it is use-
ful and necessary to consider the scope and
interpretation of Section 151 and Order 41,
Rule 23, Civil P. C., applicable to Andhra
Pradesh which reads thus:

Section 151, Civil P. C.:

"151. Nothing in this Code shall be
deemed to limit or otherwise affect the in-
herent power of the Court to make such
orders as may be necessary for the ends of
justice or to prevent abuse of the process
of the Court."

Prior to the Amendment, Order 41, R. 23:

"O. 41, R. 23.—Where the Court from
whose decree an appeal is preferred has dis-
posed of the suit upon a preliminary point
and the decree is reversed in appeal, the
Appellate Court may, if it thinks fit, by
order remand the case, and may further
direct what issue or issues shall be tried in the
case so remanded, and shall send a copy of its
judgment and order to the Court from whose
decree the appeal is preferred, with directions
to readmit the suit under its original number
in the register of civil suits, and proceed to
determine the suit; and the evidence (if any)

recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand".

Subsequent to the Madras amendment in 1930.

"O. 41, R. 23.—Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the Appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the appellate Court may by order remand the case and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand".

8. The earlier view expressed by the decisions of the Madras High Court referred to above, will have no application to the facts of the present case, which arise subsequent to the amendment of R. 23, O. 41, Civil P. C. in 1930.

9. The scope and application of the provisions of Section 151, Civil P. C., have been considered by the Supreme Court in *Padam Sen v. State of Uttar Pradesh*, AIR 1961 SC 218, *Manohar Lal Chopra v. Hiralal*, AIR 1962 SC 527, *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 and *Mahendra Manilal v. Sushila Mahendra*, AIR 1965 SC 364. In AIR 1961 SC 218, the Supreme Court observed at p. 219 thus:

"The inherent powers of the Court are in addition to the powers specially conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Sec. 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature".

10. In AIR 1962 SC 527, *Raghubar Dayal*, J. ruled thus:

"The inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in Sec. 152 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice".

11. In AIR 1964 SC 993, *Rajagopala Ayyangar*, J. speaking on behalf of the Bench ruled thus:

"It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates".

12. In AIR 1965 SC 364, the Supreme Court ruled that:

"Inherent powers can be availed of *Ex Debitio Justitiae*, only in the absence of express provisions in the Code" and further observed that though the appellate Court has power under Section 107 Civil P. C. to remand a case or to frame an issue and refer the same for trial to the Court below, if need be by taking additional evidence, the exercise of those powers are regulated by the provisions of Rules 23, 25 and 27 of Order 41 Civil P. C.

13. The same view was also taken by *Jackson*, J. in *Mallappa Chettiar v. Alagiri Naicker*, AIR 1931 Mad 791 and *Ananthakrishna Aiyer*, J. in *D. Venkamma v. Goparaju Perraju*, AIR 1928 Mad 991.

14. It is next contended by Mr. Bhujanga Rao that, as no specific mention of the provisions of Rule 23, Order 41 is being made by the appellate Court, it should be construed that the order was passed by that Court under Section 151 Civil P. C. in exercise of the inherent powers but not under Order 41, Rule 23 Civil P. C. At the out set, I may say there is no such presumption but the facts of each case should be taken into consideration to arrive at a correct view, whether the remand was made under O. 41, Rule 23 or under Section 151 Civil P. C. that apart, if an order is made under S. 151 Civil P. C. remanding the case to the trial Court there was no right of appeal. But if it was passed under Order 41, Rule 23, it is an appealable order. Untrammelled by the decided cases, let me examine the point on first principles. It is settled law that provisions of Section 151 Civil P. C. cannot override any specific provisions of law, applicable to the facts of a given case.

15. When there are specific provisions under the Civil P. C., which could be referable from the facts of the case, it is just and proper to construe that the orders were passed under that provision. That apart, applying the principle of beneficial construction, it is just and reasonable to presume unless and until the contrary intention is

to be gathered on the facts and in the circumstances, the orders were deemed to have been passed by the Court in the exercise of such provisions of law, against which a valuable right of appeal to the aggrieved litigant is provided under the Code. Hence in the circumstances, the orders of remand passed by the Court below, can rightly be referable to the provisions of Order 41, Rule 23 which are specifically applicable instead of trying to attract the residuary powers under Section 151 Civil P. C. I am fortified in this view of mine with the decisions of the High Courts of Allahabad and Pepsu. In *Bibi Kulsoomunnisa v. Ram Prasad*, AIR 1922 All 226, Walsh J. observed that:

"In my view in the case of an order of remand, it must be presumed, unless the contrary is shown at the time when it is made, to be made under O 41, R 23. The litigant has to make up his mind whether he has a right of appeal and if so what, and if he finds an order against him of remand, that he objects to, like the order before us and there is nothing to contrary, the only inference that he can draw is that it is made under the statutory provisions contained in O 41, R 23".

I am unable, with respect to the learned Judges to agree with the contrary opinion expressed in *Punja v. Ram Lal*, AIR 1958 Raj 43, and in *Sultan-ul-Malak Ali v. Sultan Ahmed Ali Gohar*, AIR 1937 Sind 279. In the above case it is held that:-

"It is an erroneous view of law to presume that, where an order of remand has not been passed under Order 41, Rule 23 it should be presumed to have been so passed, for if the Courts raise such a presumption, they would be legislating by conferring a right of appeal where it does not exist".

16. To summarise:

(1) The inherent powers of the Court are very wide and residuary in nature and not controlled by any other provisions in the Code, but they cannot override the express provisions of the law.

(2) The inherent powers under Sec. 151, Civil P. C. have to be sparingly exercised and that too, only to meet the ends of justice, in appropriate cases, where there are no specific express provisions in the Code of Civil Procedure to meet such a contingency.

(3) The powers of remand under the amended Rule 23 of Order 41 applicable to the Madras and Andhra Pradesh, are wide enough to take in not only the cases, where the trial Court had decided the cases on the preliminary point but also the case where the trial Court had decided, all the issues after considering the entire evidence on record and when the appellate Court in the interests of justice feels that a remand was just and proper.

(4) The conditions prescribed for the exercise of the power of remand under Rule 23, Order 41 Civil P. C. are mandatory but not

a mere formality. To arrive at a finding, on the material on record that the judgment of the trial Court is erroneous and is liable to be reversed or set aside, is a condition precedent for the appellate Court to clutch at the jurisdiction to pass an order of remand under Order 41, Rule 23 Civil P. C.

(5) When the remand order is silent as to the provisions of law under which it was passed, it must be presumed to be referable to the specific provisions of the Civil Procedure Code, that is, Order 41, Rule 23 Civil P. C., unless the contrary intention is established from the facts of the case.

(6) It is for the respondent who raises the preliminary objection that the appeal is incompetent on the assumption that the order was passed under Section 151 Civil P. C. that has to prove that such order was passed only under Section 151 but not under Order 41, Rule 23, Civil P. C.

(7) The omission to order refund of the court-fee, is neither conclusive nor a relevant and material factor to hold that the order was passed only under Section 151, Civil P. C., but not under Order 41, R 23.

(8) Section 84 of the Andhra Pradesh Court Fees and Suits Valuation Act, 1956 gives ample discretion exercisable fairly, reasonably and judiciously in each case by appellate Court while remanding the appeal to direct the refund of the court-fee to the appellant of the full amount paid on the memorandum of appeal.

(9) If the order of remand is passed under Section 151 Civil P. C., no appeal but only a civil revision petition under Section 115, Civil P. C., lies against such order. Applying the aforesaid principles and in the circumstances and for the reasons stated above, I overrule the preliminary objection raised by the respondent that the order in question is not an appealable order.

17. Even on merits the contention of Mr. Bhujanga Rao that there are no justifiable grounds for interference by this Court in this appeal to set aside the order of remand passed by the appellate Court is without substance. The trial Court had considered the entire evidence on record and given specific findings on each issue framed by it. The appellate Court before exercising the power of remand to the trial Court, has got a statutory duty and obligation to follow the mandatory provisions of O 41, Rule 23. The appellate Court may, in appropriate cases, remand a case under R 23, frame issues and refer the same to the trial Court under Rule 25, call for findings from trial Court receive additional evidence under Rule 27 and determine the case finally under Rule 24 of Order 41, Civil P. C., if the requisite conditions of the respective provisions of the Code are satisfied.

18. Let me now examine what the lower appellate Court in this case had done. The lower appellate Court, without arriving at a conclusion that the material findings of the trial Court, are erroneous, set aside the

decree and judgment of the trial Court and remanded the suit for disposal according to law, affording an opportunity to adduce the evidence of three persons. The lower Court failed to follow the mandatory procedure laid down under Order 41, Rule 23, Civil P. C. The requisite conditions to pass an order of remand have not been satisfied. No evidence on record has been considered nor any finding given to the effect that the judgment of the lower Court is erroneous and liable to be set aside.

19. In Appadu v. Poddi Ramu, 1955 Andh LT 695 (Civil), Satyanarayana Raju J., as his Lordship then was, ruled that:

"An order of remand made without coming to a conclusion that the decision of the trial Court is wrong and that it is necessary to set aside or reverse the decision of the trial Court is illegal".

20. The discretion vested in the Court under Order 41, Rule 23 is unfettered. It has to be exercised reasonably and fairly, guided by judicial principles and capable of correction by an appellate Court.

21. That apart, the appellate Court should not exercise the power of remand to give an undue advantage to the aggrieved party to fill in gaps or lacuna in the evidence on record. This would in effect amount to circumvent the provisions of R. 27, O. 41 and crosscutting the specific provisions of the Civil Procedure Code. In the result, I set aside the order of remand and allow the appeal and remand the case to lower appellate Court for disposal in accordance with law and with costs.

CWM/D.V.C.

Appeal allowed.

AIR 1969 ANDHRA PRADESH 221 (V 56 C 68).

SATYANARAYANA RAO, J.

State of Andhra Pradesh Rep. by the District Collector, Chittoor, Appellant v. A. Munuswami Reddy, Respondent.

Second Appeal No. 267 of 1965, D/-27-1-1968, against decree of Dist. Court, Chittoor in A. S. No. 259 of 1962.

Limitation Act (1908), Article 120 — "When right to sue accrued" — Government servant claiming benefits of Art. 487-B of Civil Service Regulations after retirement — Benefits refused on account of certain reversions in the past — Suit by servant to declare order of reversion as illegal — Starting point — (Civil Service Regulations, Art. 487-B).

A Government servant on retiring from service on superannuation applied for the benefits of Article 487-B of the Civil Service Regulations. But he was informed that he had reversions within the last two years of

his retirement and therefore he was not entitled to the benefits of the said Article. The order being dated 6-6-1951 and the uncalled for termination of probation as Inspector of Police from 1-11-1951 and 2-9-1952, the plaintiff filed a suit for declaration, that those Government orders were illegal and ultra vires.

Held, that the relief in the suit was based not on the previous orders which dealt with the charges against the plaintiff but the complaint that the suspension should not be allowed to operate as break in his service. From this date the suit was within time.

(Para 2)

Also in view of G. O. (G. O. No. 2413), Home — (Service-A) Department, Government of Andhra Pradesh dated 19-11-1954, the cause of action for such a suit would arise only after termination of the proceedings in the various departments and the cause of action for such a suit would arise only after such termination of the proceedings.

(Para 3)

Cases Referred: Chronological Paras
(1967) SA No. 873 of 1964, D/-12-12-1967 (AP), Deputy Inspector General of Police Waltair v. Gopal-das

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V. S. L. Narasimha Rao, 2nd Govt. Pleader, for Appellant; O. Adinarayanana Reddy, for Respondent.

JUDGMENT: This second appeal is by the Government against the decision of the District Judge, Chittoor in A. S. No. 259 of 1962. Munuswami Reddy was the plaintiff. He filed the suit for declaration that the orders passed by the Government dated 6-6-1951 and 11-9-1951 (by the Special Officer and the Deputy Inspector-General of Police) are illegal and ultra vires. He is a permanent employee as Sub-Inspector of Police and was promoted duly as Inspector of Police on 2-5-1950. He was also declared as in the rank of Inspector of Police on 29-10-55. He served as officiating Inspector of Police from 2-5-50 to 30-6-1955 and retired from service on superannuation on 1-7-1955. He then applied for the benefits of Article 487-B of the Civil Service Regulations. But he was informed that he had reversions as Inspector of Police within the last two years of his retirement and therefore he is not entitled to the benefits of the said Article. The plaintiff, therefore, questioned the orders as being illegal and void. The reversions were due to the unwarranted suspension, according to the plaintiff, the order being dated 6-6-1951 and the uncalled for termination of probation as Inspector of Police from 1-11-1951 and 2-9-1952. The plaintiff appealed to the various authorities for whom the appeal lies. But he was unsuccessful and so he filed the suit for declaration.

2. It is unnecessary for me to go into all the other details regarding the suit. Eight issues were framed and in the trial

Court the decision was against the plaintiff. This decision was reversed by the appellate Court. Hence this second appeal by the Government. In this second appeal the only outstanding question that deserves consideration is the question of limitation. The learned appellate Judge held that the suit was not barred by limitation. According to him the article of the limitation Act that is applicable is Art. 120 which gives a period of 6 years for institution of the suit computed from the date when the right to sue accrued. He was of the view that the starting point for limitation is afforded by Ex A-15 dated 21-1-55. That is the final order of the Government refusing to treat the suspension as not affecting any break in service by reason of suspension. The relief in the suit is therefore based not on the previous orders which dealt with the charges against the plaintiff but his complaint is limited in scope as he contends that the suspension should not be allowed to operate as break in his service. From this date the suit is within time, time being computed under Article 120 from the date when the right to sue accrued. The cause of action, therefore, is totally different from the cause of action which relates to other matters with which we are not concerned. In this view of the matter, the suit is not barred. It is unnecessary to go into the decisions cited by the learned counsel for the Government as in those decisions the cause of action is different. The latest decision which deals with the question of limitation where the cause of action is different is the unreported judgment of Sri Justice Krishna Rao in S. A. No 873 of 1964 D/-12-12-1967 (AP). It is unnecessary for me to go into details of that decision.

3 I must also point out one other matter which escaped the attention of both the Courts below. The Government have issued a G. O. (G. O. No 2413, Home — Service-A) Department, Government of Andhra Pradesh dated 19-11-1954. The substance of the G. O. is that whenever a Government servant threatens to seek redress in a Court of law in respect of any matter connected with his employment or conditions of service, he may simply be informed that the threatened suit is awaited and that if he goes to Court before exhausting the normal official channels of redress, disciplinary action can be taken against him. The Government of India have expressed the view that the Government servants in the matter of grievances arising out of their employment or conditions of service should first exhaust the normal official channels or redress before they take the issue to a Court of law and where permission to sue Government in a Court of law is asked for by any Government servant either before exhausting the normal official channels or redress or after exhausting them, he may be informed that such permission is not necessary and if he decides to have recourse to a Court of

law he may do so on his own responsibility. The Government of Andhra Pradesh agree with the Government of India and direct as follows:

"(a) Government servants seeking redress of their grievances arising out of their employment or conditions of service should, in their own interest and also consulting with official propriety and discipline, first exhaust the normal official channels of redress before they take the issue to a Court of law

(b) Whenever a Government servant asks for permission to sue Government in a Court of law for the redress of his grievances either before exhausting the normal official channels or redress or after exhausting them, he may be informed that such permission is not necessary and that if he decides to have recourse to a Court of law he may do so on his own responsibility". In view of this G. O., it is impossible for an officer of the Government to get redress in a Court of law unless he first follows the procedure enacted by the Government which means that he must first exhaust all the departmental avenues and if he fails even in that then only he should approach a Court of law. Therefore the cause of action for such a suit would arise only after termination of the proceedings in the various departments and the cause of action for such a suit would arise only after such termination of the proceedings. Therefore this case stands on a different footing from the one covered by the decision of Mr. Justice Krishna Rao. The other questions argued are questions of fact and cannot be interfered with. The second appeal is dismissed with costs. No leave.

HGP/D.V.C.

Appeal dismissed.

AIR 1969 ANDHRA PRADESH 223
(V 58 C 69)

MOHAMAD MIRZA AND
VENKATESWARA RAO, JJ.

P. Thimmappa, Appellant v P. Chinnu Thimmappa and others, Respondents.

Criminal Appeal No 57 of 1968, D/-23-2-1968, from order of Venkatesam, J., D/-19-1-1968.

(A) Criminal P. C. (1893), S. 247 — Word "day" does not mean whole working day — Absence of complainant at time when case is called on — Court is justified in acquitting accused without waiting for whole day to see whether complainant appears — AIR 1926 Mad 1009, Rel. on; AIR 1960 Andh Pra 193, Explained.

(Para 3)

(B) Criminal P. C. (1893), Ss. 247, 417 (3), 423 — Acquittal of accused under Section 247 — Appeal under Sec. 417 — High Court can decide sufficiency of cause of

EL/GL/C494/68

non-appearance of accused — On satisfaction it can set aside the acquittal — 1958 Andh LT 295, Rel. on.

Cases Referred: Chronological Paras

(1967) 1967-1 Andh WR 374 = 1967

Mad LJ (Cri) 397, Punnaiah v. Subbaiah

(1960) AIR 1960 Andh Pra 193

(V 47) = 1960 Cri LJ 457, Public

Prosecutor v. T. S. Prasad

(1958) 1958 Andh LT 295, C.

Lakshamma v. Venkataswami

Reddi

(1926) AIR 1926 Mad 1009 (V 13) =

27 Cri LJ 988, Nagarampilli Tonkya

v. M. Jagannatha

J. K. Sarma, for Appellant; K. V. Nara-

singa Rao, for Respondents.

VENKATESWARA RAO, J.: This Criminal Appeal, which is preferred by the complainant in C.C. 375/65 on the file of the Judicial Second Class Magistrate, Uravakonda, against the acquittal of the respondents (accused) under Sec. 247, Cr.P.C., has been referred to the Bench for a decision by our learned brother Venkatesam, J., having regard to the "importance" of the questions involved viz., whether the word 'day' in Section 247 Criminal P. C., means the whole working day of the Court or only the time when the case is called for hearing and whether even if the Magistrate has jurisdiction to set aside the acquittal made by him under Section 247 Criminal P. C., the High Court is not entitled to go into the sufficiency of the cause of the absence of the complainant and set aside the acquittal if satisfied about it.

2. The appellant filed C. C. 375/65 against the respondents under Sections 323 and 352 I. P. C. After the examination of the complainant and his witnesses was concluded, the case was adjourned to 25/9/65 to enable the respondents to examine the Town Inspector as a defence witness on their behalf. When the case was called on for hearing that day, neither the complainant nor his pleader was present with the result that the learned Magistrate passed an order acquitting the respondents under Sec. 247, Criminal P. C. in the following terms:

"The case was called on for hearing today to which it had been posted/adjourned. The complainant not being present either in person or by Pleader, accused is acquitted under Sec. 247, Criminal P. C."

Aggrieved by this order, the complainant preferred this appeal which, as already stated, has been referred to the Bench having regard to the contentions raised before our learned brother.

Section 247, Criminal P. C. reads thus:

"If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstand-

ing anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day".

The section is thus mandatory in its terms and makes it obligatory on the Magistrate in all summons cases in which the complainant fails to make his appearance on the appointed day, to acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day. This is precisely what the learned Magistrate did in the instant case.

3. The complainant swore to an affidavit in this case stating that he did attend the Court on 25-9-65 but could reach it only at 11-45 A. M. on account of late running of the bus that day and that he was informed by his advocate, who too happened to attend the Court late that day, that his case was called and the accused were acquitted at 11-40 A. M. The learned counsel for the appellant argued that the word 'day' occurring in Section 247, Criminal P. C., means the whole working day of the Court and not merely the point of time when the case is called on for hearing and that the Court below should therefore have waited till 5-00 P. M., when alone the working hours of the Court came to a close, before exercising its jurisdiction to acquit the accused under Sec. 247, Criminal P. C. In support of this contention, he relied upon a decision of this Court in Public Prosecutor v. T. S. Prasad, AIR 1960 Andh Pra 193, wherein Sanjeeva Row Naidu, J., as he then was, observed as follows:

"In all cases, where the complainant appears in the Court on the day of the hearing, this Section does not apply at all. It is when the complainant does not appear at all during the Court hours, on the day of hearing, that the Magistrate could take upon himself the responsibility of throwing out a case and acquitting the accused. The section does not justify the acquittal of an accused merely because the complainant happens to be absent when the case is called. Such temporary absence from Court after the complainant had appeared gives no jurisdiction for the Magistrate to take action under Sec. 247, Criminal P. C."

This decision cannot however be interpreted to lay down a general principle that no order under Sec. 247, Criminal P. C., can be passed in any case of absence of complainant till the end of the working hours of the Court or that such an order could be passed if only the complainant does not appear at all during the Court hours on the day of hearing. The learned judge was dealing in that case with only a case of temporary absence of the complainant who happened to be present in the Court except for a short space of time when he went out to have his lunch. If, on the other hand, the contention urged for the appellant were to be accepted it would lead in many cases

to the unenviable consequence of avoidable waste of public time and unnecessary accumulation of work in criminal Courts. The working hours of the Court as prescribed by the Rules of Practice in this State are 11-00 A. M. to 5-00 P. M. with a short recess. If the word 'day' occurring in Section 247, Criminal P. C. is to be understood as meaning the whole day and not merely the point of time when the particular case is called on for hearing, the Magistrate will be helpless and will have no jurisdiction to deal with any summons case under Section 247, Criminal P. C., even if the complainant should deliberately refrain from making his appearance till the last moment. Instances of unscrupulous persons resorting to criminal Courts with private complaints against innocent persons with the avowed object of harassing them and managing to keep those cases pending for a long time by adopting dilatory tactics are not uncommon. There can therefore be no greater encouragement than to interpret the word 'day' in Sec 247, Criminal P. C., in the manner suggested by the learned counsel for the appellant. There may undoubtedly be many genuine cases in which the complainants find themselves unable to reach the Court in time for reasons beyond their control but the section itself gives discretion to the Magistrate to adjourn the hearing of such cases to some other day if he has reason to think it proper to do so. It cannot therefore be contended that acting under Section 247, Criminal P. C., without waiting till the Courts' hours come to a close will cause hardship to complainants. In fact, a Division Bench of the composite Madras High Court consisting of Devadoss and Waller, JJ., held in *Nagarampilli Tonkya v. Jagannatha*, AIR 1926 Mad 1009, that:

"there is nothing in the section which would justify the construction that the words 'upon any day appointed for the appearance of the accused', etc. mean any time before the close of the working day and that the absence of the complainant at the time when the case is taken up for hearing is sufficient to justify the Magistrate in dealing with the case under Section 247, Criminal P. C., and acquit the accused, and the Court is not bound to wait till the close of the day to see, before proceeding under Section 247, Criminal P. C. whether the complainant appears".

It was also observed that "the object of Section 247, Criminal P. C., is to prevent the complainant from being dilatory in the prosecution of the case and if he does not care to be present when the case is called on, the accused is entitled to an acquittal unless the Magistrate chooses for reasons he thinks proper to adjourn the case".

We do not see any reason to take a view different from the one expressed in the aforesaid Division Bench Decision of the Madras High Court which is binding on us. This decision was evidently not brought to the notice of the learned Judge who

decided AIR 1960 Andh Pra 193. The principle enunciated in AIR 1926 Mad 1009, has been followed in the recent decision of our High Court in *Punnaiah v. Subbaiah*, 1967-1 Andh WR 374. We must therefore find that the word "day" in Section 247, Criminal P. C., means only the time when the case is called on for hearing. It then follows that the Magistrate was justified in acquitting the respondents under Sec 247, Criminal P. C., as the complainant was admittedly not present in his Court when the case was called for hearing.

4. Our attention has not been invited to any provision in the Code which empowers the Magistrate to set aside the acquittal made by him under Section 247, Criminal P. C. To the other question raised by the learned Single Judge who referred the matter to Bench viz., as to whether the High Court is not entitled to go into the sufficiency of the cause for the absence of the complainant and set aside the acquittal of the respondent, our answer is in the affirmative as the High Court can exercise this power while dealing with an appeal preferred under Section 417 (3) Cr. P. C. by the aggrieved complainant against the order of acquittal. Section 417 (3) Cr. P. C. provides for an appeal by special leave from an order of acquittal passed in any case instituted upon a complaint. *C. Lakshminamma v. M. Venkataswami Reddi*, 1958 Andh LT 295 is an authority for the proposition that the High Court is entitled to go into the sufficiency of the cause for the absence of the complainant and set aside the acquittal if satisfied about it in an appeal under Section 417 (3), Cr.P.C.

5. The only other question that remains to be considered in this appeal is as to whether the appellant was prevented by sufficient cause from attending the court of the Magistrate on the appointed day. The appellant belongs to Amidala village lying at distance of about ten miles from Uravakonda where the court of the Magistrate is situate. As already stated, he swore to an affidavit explaining that he could not reach the court before 11-45 a. m. on 25-9-65, the day fixed for examination of D. W. 1 in the case, on account of late running of the bus by which he travelled from his village to Uravakonda that day and that by the time he reached the Court, he was told by his advocate that the case was called at 11-40 A. M. and an order acquitting the accused was also passed then. The appellant was represented by an advocate in that case but unfortunately, he too could not be present in the Court when the matter was called due to personal inconvenience as can be gathered from his affidavit. We are convinced that the late attendance of the appellant in the Court on the appointed day and the failure of his advocate to make any representation on his behalf when the matter was called on that day were due to reasons

beyond their control and not on account of any laches on their part. In this view the appeal deserves to be allowed.

6. In the result, we set aside the acquittal of the respondents and direct the Court below to restore the case to its file in its original number and dispose of it according to law. The appeal is accordingly allowed. BNP/D.V.C. Appeal allowed.

AIR 1969 ANDHRA PRADESH 225
(V 56 C 70)

CHINNAPPA REDDY, J.

Andhavarapu Sreeramamurthy and others, Petitioners v. Government of Andhra Pradesh, Home Department, Hyderabad and others, Respondents.

Writ Petns. Nos. 1089, 1283 and 1857 of 1965 D/-4-3-1968.

Motor Vehicles Act (1939), S. 47 (1) (a)—Madras Motor Vehicles Rules (1940), R. 153-D — Sub-rules (A) (i) (b) and (A) (ii) introduced by G.O. Ms. No. 2455, Home (Transport-I) dated 25-11-1960 — Rule is imperative — Grant of stage carriage permits on medium route — Preference has to be given to applicants holding 1 to 4 stage carriages.

In considering the question of grant of stage carriage permits on the medium route as defined by Rule 153D (A) (i) (b) introduced by G.O. Ms. No. 2455, Home (Transport-I) dated 25-11-1960, it is not open to the Government to ignore Rule 153-D (A) (ii) in appropriate cases. (Para 6)

Section 47 (1) (a) of the Motor Vehicles Act provides that the Transport authorities, in considering applications for a stage carriage permit, shall have regard to 'the interests of the public generally'. The words 'interests of the public generally' afford no guidance in weighing competing considerations of public interest on which rival claims may be based. In deciding questions of priority of such considerations, in the absence of proper guidance, a certain amount of arbitrariness is likely to creep in. In order to eliminate the element of arbitrariness to the extent possible, the Government, in exercise of its powers under S. 68 of the Act, have made Rule 153-D stating 'the guiding principles' to be followed. (Para 6)

The argument that the principles mentioned in Rule 153-D may be ignored whenever the Transport authorities think it desirable will defeat the very object of the rule and will once more throw the door open for all manner of arbitrariness. The word 'may' is used in Rule 153-D not to give any discretion but to confer a power on the Transport Authorities to decide the questions before them in a particular manner. In the context of the word 'may' cannot be construed as a mere permissive expression since matters mentioned in the sub-

rule can always be considered by Transport Authorities even without the aid of that Rule. Therefore, the Rule must be construed as being imperative. (Para 6)

P. Babulu Reddy and F. P. K. Sidhamani, for Petitioner (in W. P. No. 1089 of 1965); Smt. K. Amareswari, for Petitioners (in W.P. No. 1283 of 1965); K. Srinivasamurthy and Harnath Rao, for Petitioners (in W. P. No. 1857 of 1965) and 6th Respondent (in W.P. No. 1283 of 1965) and 4th Govt. Pleader, for Respondents 1 to 3 (in W.P. Nos. 1089 and 1283 of 1965) and for Respondent No. 3 (in W.P. No. 1857 of 1965); K. Mangachary, for Respondents Nos. 4 and 5 (in W.P. Nos. 1089 and 1283 of 1965) and Respondents 1 and 2 (in W.P. No. 1857 of 1965).

ORDER: On 1-8-1963, the Regional Transport Authority, Visakhapatnam, took up for consideration the question of grant of two stage carriage permits on the route Visakhapatnam to Srikakulam. The route is a medium route as defined by R. 212 (1) (i) (b) of the Motor Vehicles Rules of 1964 corresponding to Rule 153-D (A) (i) (b) of the old rules. There were as many as 75 applicants. After eliminating all the applicants who got less than five marks the Regional Transport Authority considered the applications of those who got five marks and amongst them preferred the Ramdas Motor Transport Limited, Visakhapatnam and M. V. Ramdas for the two permits. The Ramdas Motor Transport Limited was preferred on the ground that the company was located at Visakhapatnam where it had a good workshop and that its history-sheet was clean. M. V. Ramdas was preferred on the ground that, though he resided at Vizianagaram, he had a branch office at Visakhapatnam and that he also owned a workshop, his history-sheet was clean and he had only four permits and the grant of one permit would enable him to have a viable unit of five buses.

The applications of D. B. Seetharama Raju, first petitioner in W.P. No. 1283, A. Srirama Murthi, petitioner in W.P. No. 1089 and P. Suryanarayana Raju, petitioner in W.P. No. 1857 were rejected on the ground that they had punishments in their history-sheets. The application of P. Sanyasi Raju, second petitioner in W.P. No. 1283 was rejected on the ground that he resided at Vizianagaram which is not on the route. Thirteen of the applicants whose applications were rejected preferred appeals to the Appellate Authority. The Appellate Authority was of the view that under R. 153-D of the Motor Vehicles Rules preference had to be given to applicants holding 1 to 4 permits. The Appellate Authority found that both Ramdas Motor Transport Limited and M. V. Ramdas were fleet owners possessing five permits and more (the statement of the Regional Transport Authority that M. V. Ramdas had only four permits being incorrect) and therefore they were not en-

titled to preference. The appellate Authority also pointed out that there was a major adverse entry in the history-sheet of Ramdas Motor Transport Limited (the statement of Regional Transport Authority that its history-sheet was clean once again being found to be incorrect). It was also pointed out that the company had been granted a permit in January, 1963 and there was no need to grant permits in quick succession to the same person. Regarding M. V. Ramdas, the Appellate Authority further pointed out apart from being a fleet owner he was guilty of a serious charge that he had stopped his services for some time. The grant of permits to these two persons was, therefore, set aside. The claim of Sanyasi Raju was rejected on the ground that he was already a fleet owner and, therefore, not entitled to preference for grant of permit on a medium route.

Of the remaining applicants Suryanarayana Raju and Srima Murthi were preferred on the ground that their history-sheets were better than those of others. Nine persons preferred revision petitions to the Government. The Government was of the view that Suryanarayana Raju ought not to have been granted a permit by the Appellate Authority as he already had two permits on the same route and the grant of more permits on that route to him will give him a virtual monopoly. The Government also held that Srima Murthi ought not to have been granted a permit since it was found that when permits were granted to him on two other routes he was unable to put vehicles on the routes for a long time and, therefore, those permits had to be cancelled. The Government also pointed out that he did not possess workshop facilities.

The revision petition of Seetharama Raju was rejected on the ground that he did not have workshop facilities and had bad history-sheet. The revision petition of Sanyasi Raju was rejected on the ground that he was residing at Vizianagaram away from the route Ramdas Motor Transport Ltd., and M. V. Ramdas were preferred on the ground that they had good history-sheets and workshop facilities. The Government observed that the solitary adverse entries against them may be ignored.

2. It is this order of the Government that is under challenge in these three writ petitions. D. V. Seetharama Raju and P. Sanyasi Raju are the petitioners in W.P. No. 1283 of 1965, P. Satyanarayana Raju is the petitioner in W.P. No. 1857 of 1965 and A. Srima Murthi is the petitioner in W.P. No. 1089 of 1965.

3. Smt. Amareswari, learned Counsel for the petitioners in W.P. No. 1283 has raised the following contentions before me:—

(1) The grant of permits on a medium route to fleet owners like the respondents is contrary to Rule 153-D of the old rules under which preference has to be given to applicants with 1 to 4 permits. So long as

such applicants are available and are not disqualified by reason of the provisions of Rule 153-D (A) (ii), they have to be preferred to fleet owners.

(2) The Government has not adverted to the reasons given by the Appellate Authority for rejecting the claims of the two respondents, namely, that Ramdas Motor Transport Limited has a major adverse entry in its history-sheet and has also been granted a permit recently and that M. V. Ramdas is guilty of a serious charge of stoppage of service.

(3) The order of the Government is also discriminatory because the claim of Sanyasi Raju who has a clean history-sheet with no adverse entry at all has been rejected on the ground that he resides at Vizianagaram which is not on the route, whereas M. V. Ramdas who also resides at Vizianagaram has been granted a permit in spite of the fact that he is guilty of a serious charge of stoppage of services.

4. Sri Sikhmani, learned counsel in W.P. No. 1089 of 1965 and Sri Srinivasamurthi, learned counsel for the petitioner in W.P. No. 1857 of 1965 adopt the arguments of Smt. Amareswari and contend that the order of the Government must be set aside. Sri Sikhmani also points out that the allegation made against his client was not mentioned in the representations made to the Regional Transport Authority, under Section 57 (3) of the Motor Vehicles Act.

5. Sri Manga Chari, learned counsel for the respondent argues that under Rule 153-D the Transport authorities are not bound to give preference to persons holding 1 to 4 permits for medium routes though it is open to them to show preference on that ground. He contrasts Rule 153-D with the present Rule 212 and points out that while R. 212 (1) (ii) uses the words 'preference shall be given', Rule 153-D (A) (ii) uses the words 'preference may be given'. According to him this shows that authorities acting under Rule 153 have a discretion to give or not to give preference to operators possessing 1 to 4 permits for grant of permits on medium routes. Regarding other submissions he argues that the Government has given adequate reasons for preferring the respondents and the discretion of the Government cannot be interfered with in an application under Art. 226 of the Constitution.

6. Section 47 (1) (a) of the Motor Vehicles Act provides that the Transport authorities, in considering applications for a stage carriage permit, shall have regard to 'the interests of the public generally'. The words 'interests of the public generally' afford no guidance in weighing competing considerations of public interest on which rival claims may be based. In deciding questions of priority of such considerations, in the absence of proper guidance, a certain amount of arbitrariness is likely to creep in. In order to eliminate the element of

arbitrariness to the extent possible, the Government in exercise of its powers under Section 68 of the Act, appears to have made Rule 153-D stating 'the guiding principles' to be followed. The argument that the principles mentioned in Rule 153-D may be ignored whenever the Transport authorities think it desirable will defeat the very object of the rule and will once more throw the door open for all manner of arbitrariness. The word 'may' is used in R. 153-D not to give any discretion but to confer a power on the Transport authorities to decide the questions before them in a particular manner. In the context the word 'may' cannot be construed as a mere permissive expression since matters mentioned in the sub-rule can always be considered by Transport authorities even without the aid of that rule. Therefore, if the rule is to have any meaning, it must be construed as being imperative.

In the present case the Government has proceeded on the basis that it is open to it to ignore Rule 153-D (A) (ii) in appropriate cases. In my view it cannot do so, and the order of the Government has to be quashed on this ground. In this view it is not necessary for me to consider the other questions raised in the writ petitions. The Government will consider the matter afresh after giving notice to the parties concerned. There will be no order as to costs.

GDR/D.V.C. Petitions allowed.

AIR 1969 ANDHRA PRADESH 227.
(V 56 C 71)

CHINNAPPA REDDY, J.

Basti Ram Narain Das, Petitioner v. State of Andhra Pradesh and another, Respondents.

Writ Petns. Nos. 1562, 1707, 1708, 1810, 1813 and 1852 of 1966, D/-28-2-1968.

(A) Minimum Wages Act (1948), S. 3 (1) (a) Proviso and S. 3 (3) (iv) — Scope of proviso — In case of employment specified in Part I of Schedule minimum rates of wages must be for entire State — Such rates need not, however, be uniform — Different rates can be fixed for different zones or localities.

What the proviso to Sec. 3 (1) (a) means is that in the case of employments specified in Part II of the Schedule the minimum rates of wages need not be fixed for the entire State. Parts of the State may be left out altogether. In the case of employments specified in Part I, the minimum rates of wages must be fixed for the entire State, no part of the State being omitted. This does not mean that the rates to be fixed should be uniform. What is necessary is that minimum rates of wages should be fixed for every part of the State without any omission. Section 3 (3) (a) (iv) expressly provides for the fixation of different minimum rates of

wages for different localities. The contention that the words 'different localities' do not authorise the Government to divide the State into Zones is without substances. AIR 1963 SC 806, Ref. (Para 4)

(B) Minimum Wages Act (1948), Sec. 5 — Actual rate of wages finally fixed found to be more than what was given in draft proposals — Contention that there should have been another notification and another opportunity given to employers to make representation against variation — Held, contention was without substance — Draft proposals are only tentative and representations are received from both employers and employees — Any representations made by parties must contemplate and take into account possible enhancement or reduction. (Para 5)

(C) Minimum Wages Act (1948), Sec. 5 — Revision of minimum rates of wages of workers employed in Bidi manufactory — Contention that Advisory Board ought to have made independent enquiries of its own by visiting centres of Bidi industry — Held, as full information was made available to Board by the Government, who had gathered statistics from its various District Officers, it was wholly unnecessary for Board to go from place to place for making enquiries. (Para 6)

| | | |
|-------------------------------------|---------------|-------|
| Cases Referred: | Chronological | Paras |
| (1965) AIR 1965 Andh Pra 128 | | |
| (V 52) = (1964) 2 Andh WR 284, | | |
| Bansilal v. State of Andhra Pradesh | | 1 |
| (1963) AIR 1963 SC 806 (V 50) = | | |
| (1963) Supp 1 SCR 524, Bhikusa | | |
| Yamasa Kshatriya v. Sangamner | | 4 |
| Akola Taluka Bidi Kamgar Union | | |
| (1962) AIR 1962 SC 12 (V 49) = | | |
| (1962) 1 SCR 946, V. Unichoyi v. | | 7 |
| State of Kerala | | |
| (1958) AIR 1958 SC 578 (V 45) = | | |
| 1959 SCR 12, Express Newspaper | | |
| Ltd. v. Union of India | | 7 |

S. Krishna, for Petitioners (in all Petitions); 3rd Govt. Pleader, for Respondents (in all Petitions); B. P. Jeevan Reddy, for Respondent No. 2 (in W.P. No. 1562/66).

ORDER: The petitioners in the several Writ Petitions are Bidi Manufacturers in the Telangana area of the State of Andhra Pradesh. All of them question the validity of G. O. Ms. No. 1617 Home (Labour II) dated 23-7-1966 by which the Government of Andhra Pradesh revised the minimum rates of wages of workers engaged in Bidi Manufactory. The facts necessary for the disposal of these writ petitions are as hereunder:

G. O. Ms. No. 659 dated 22-3-1965 containing a draft proposal to revise, minimum rates of wages of workers, employed in Tobacco (including Bidi making) Manufactory in the manner mentioned in the Schedule was published in the Andhra Pradesh Gazette on 24-3-1965 and by the same notification the Government invited all persons

affected to make their representations before Minimum Wages Act. The Schedule in so far as it is relevant was as follows:

"SCHEDULE.

| Sl. No. | Category of Workers | All inclusive minimum rates. | |
|---------|--|------------------------------|---------|
| | | Daily | Monthly |
| 1. | 2. | 3. | |
| | | Rs. P. | Rs. P. |
| | | * | * |
| II. | Bidi Manufacture (Including Gharkatha) | | |
| 1. | For rolling 1,000 bidis in Urban areas | 2-00 | |
| 2. | For rolling 1,000 bidis in Rural areas | 1-85 | |
| | | * | * |

Note: (1) For the purpose of this Notification, urban areas shall consist of Corporations, all District Head Quarters' Towns, Municipalities under the District Municipalities Act, City and Town Municipalities in the Telangana Region, and the rural areas consist of the rest of the State".

Some time after the publication of this notification the Government of Andhra Pradesh constituted an Advisory Board in accordance with the provisions of Sec. 7 of the Act. The Board consisted of six independent members (independent meaning non-official and not belonging to the category of employers or employees, Vide AIR 1965 Andh Pra 128), six representatives of employers and six representatives of employees. Among the representatives of the employers was Sri Bansilal S Patel, President of the Bidi Manufac-

turers and Tobacco Merchants Association Nizamabad. After consulting the Advisory Board and considering the objections received from the employers and the organizations of employees the Government was of the view that the adoption of a uniform rate not commensurate with labour and time involved, would adversely affect the Bidi industry in Andhra area, and therefore the rates notified by G. O. Ms. No 659 required to be altered. The Government was advised that a fresh notification was necessary under Section 5 (1) (b) of the Act. Accordingly, the Government published fresh draft proposals (G. O. Ms No 331 dated 26-2-1966) in the Andhra Pradesh Gazette and invited representations from all persons before 5-5-1966. The Schedule to the notification was as follows.

"THE SCHEDULE

| Sl. No. | Category of Workers | All inclusive minimum rates. | |
|---------|--|------------------------------|---------|
| | | Daily | Monthly |
| 1. | 2. | 3. | |
| | Bidi Manufactory (Including Gharkatha) | Rs. P. | Rs. P. |
| 1. | Rolling bidis | | |
| (a) | Andhra area: | | |
| | (i) For rolling 1,000 big size Zadi Bidis in Urban areas | 2-00 | |
| | (ii) For rolling 1,000 big size Zadi Bidis in Rural areas | 1-85 | |
| | (iii) For rolling 1,000 medium size Zadi Bidis in Urban areas | 1-92 | |
| | (iv) For rolling 1,000 medium size Zadi Bidis in Rural areas | 1-77 | |
| | (v) For rolling 1,000 sada bidis in Urban areas | 1-62 | |
| | (vi) For rolling 1,000 sada bidis in Rural areas | 1-48 | |
| (b) | Telangana area: | | |
| | (i) For rolling 1,000 bidis in Urban areas (including Gharkatha) | 2-00 | |
| | (ii) For rolling 1,000 bidis in Rural areas. | 1-85 | |
| | | * | * |

Note: (1) For the purpose of this notification urban areas shall consist of Corporations, all Municipalities under the Andhra Pradesh Municipalities Act, 1965 and Taluk Headquarters not being Municipalities and rural areas consist of the rest of the State".

Thereafter, after considering the representations received and after consulting the Advisory Board the Government published the final Minimum Rates of Wages in accordance with the provisions of Section 5 (2) of the Minimum Wages Act. The Schedule to the notification is as follows:

"SCHEDULE"

| Sl. No. | Category of Workers | All inclusive minimum rates | |
|---------|--|-----------------------------|---------|
| | | Daily | Monthly |
| 1. | 2. | 8. | |
| | | Rs. P. | Rs. P |
| | Bidi Manufactory. (Including Gharkatha) | | |
| 1. | Rolling Bidiies | | |
| | (a) Andhra Area: | | |
| | (i) For rolling 1000 big size Zadi Bidiies in Urban areas. | 2—04 | |
| | (ii) For rolling 1000 big size Zadi Bidiies in Rural areas. | 1—80 | |
| | (iii) For rolling 1000 medium size Zadi Bidiies in Urban areas. | 1—96 | |
| | (iv) For rolling 1000 medium size Zadi Bidiies in Rural areas. | 1—82 | |
| | (v) For rolling 1000 Sada Bidiies in Urban Areas. | 1—66 | |
| | (vi) For rolling 1000 Sada Bidiies in Rural areas. | 1—51 | |
| | (b) Telangana Area: | | |
| | (i) For rolling 1000 bidiies in Urban areas (including Gharkatha). | 2—04 | |
| | (ii) For rolling 1000 bidiies in Rural areas | 1—89 | |

Note: For the purpose of this notification, Urban areas shall consist of Corporations, all Municipalities under the Andhra Pradesh Municipalities Act, 1965 and Taluk Headquarters not being Municipalities and rural areas consist of the rest of the State". It is this notification that is now impugned by various Bidi Manufacturers, in these Writ Petitions.

2. Sri S. Krishna, learned Counsel for the petitioners has raised several contentions before me and I will deal with them one by one.

3. The first submission of the learned Counsel is that the notification is void because it purports to divide the State into two zones, 'Andhra Area' and 'Telangana Area'. According to the learned Counsel such division into zones is not authorised by Section 3 of the Minimum Wages Act. Section 3 in so far as it is material for the disposal of these petitions is as follows:

"3. (1) The appropriate Government shall, in the manner here-in-after provided,

(a) fix the minimum rates of wages payable to employees employed in an employment specified in Part I or Part II of the Schedule and in an employment added to either part by notification under Section 27:

Provided that the appropriate Government may, in respect of employees employed in an employment specified in Part II of the Schedule, instead of fixing minimum rates of wages under this clause for the whole State,

fix such rates for a part of any specified class or classes of such employment in the whole State or part thereof:

x x x x x x x

(b) review at such intervals as it may think fit, such intervals not exceeding five years, the minimum rates of wages so fixed and revise the minimum rates, if necessary:

Provided that where for any reasons the appropriate Government has not reviewed the minimum rates of wages fixed by it in respect of any scheduled employment within an interval of five years, nothing contained in this clause shall be deemed to prevent it from reviewing the minimum rates after the expiry of the said period of five years and revising them, if necessary, and until they are so revised the minimum rates in force immediately before the expiry of the said period of five years shall continue in force.

x x x x x x x

(3) In fixing or revising minimum rates of wages under this section,

(a) different minimum rates of wages may be fixed for

(i) different scheduled employment;

(ii) different classes of work in the same scheduled employment.

(iii) Adults, adolescents, children and apprentices;

(iv) different localities."

4. Relying upon the proviso to S. 3 (1)

(a) Sri Krishna submits that rates of mini-

minimum wages can be fixed for parts of the State only if the employment is of the kind specified in Part II of the Schedule. But in the case of employments specified in Part I of the Schedule, like bidi making, uniform rates of minimum wages must be for the entire State or not at all. That, however, does not appear to be the meaning of the proviso. What the proviso means is that in the case of employments specified in Part II of the Schedule the minimum rates of wages need not be fixed for the entire State. Parts of the State may be left out altogether. In the case of employments specified in Part I, the minimum rates of wages must be fixed for the entire State, no part of the State being omitted. This does not mean that the rates to be fixed should be uniform. What is necessary is that minimum rates of wages should be fixed for every part of the State without any omission. Sec 3 (3) (a) (iv) expressly provides for the fixation of different minimum rates of wages for different localities. According to the learned Counsel the words 'different localities' do not authorise the Government to divide the State into zones but authorise the Government to divide the State into Urban and Rural areas and other such divisions. There is no warrant for this argument. The Supreme Court in *Bhikusa Yamasa Kshatriya v. Sangamner Akola Taluka Bidi Kamgar Union*, AIR 1963 SC 806 upheld the validity of a similar notification dividing the State of Maharashtra into various zones and rejected the plea that Section 8 (3) (iv) under which the notification was made violated the fundamental right under Art. 19 (1) (f). *Shah, J.*, observed:

"But it is urged that in enacting Sec. 3 (3) (iv) which conferred upon the State authority to fix varying minimum rates of wages for different localities, the Legislature gave no indication of the matters to be taken into account for that purpose, and entrusted the State with arbitrary and uncontrolled power, exercise whereof was likely to result in discriminatory treatment between different employers carrying on the same business in contiguous localities. The Act undoubtedly confers authority upon the appropriate Government to issue notifications fixing and revising rates of minimum wages in respect of diverse industries for the whole or part of the State. Having regard to the diversity of conditions prevailing and the number of industries covered by the Act the Legislature could obviously not fix uniform minimum rates of wages for all scheduled industries, or for all localities in respect of individual industries. Working out of detailed provisions relating to the minimum rates the advisability of fixing rates for different industries, ascertainment of localities in which they were to be applied and the time when they were to be effective, and fixation of time rate, piece rate, or guaranteed time rate had from the very nature of the legislation to be delegated to some auth-

ority. In considering the minimum rates of wages for a locality diverse factors such as basic rates of wage, special allowance, economic climate of the locality, necessity to prevent exploitation having regard to the absence of organisation amongst the workers, general economic condition of the industrial development in the area, adequacy of wages paid, and earnings in other comparable employments and similar other matters would have to be taken into account. Manifestly the Legislature could not ascertain, whether it was expedient to fix minimum wages in respect of each scheduled industry for the entire territory or for a part thereof and whether uniform or varying rates should be fixed having regard to the conditions prevailing in different localities. Again of necessity, different rates had to be fixed in respect of the work performed by adults, adolescents, children and apprentices."

There is no force in the first contention of *Sri Krishna*.

5. It is next submitted that having proposed in the draft proposals dated 26-2-1968 that the minimum wages would be fixed at Rs. 2 and Rs. 1-85 for Urban and Rural areas in Telangana area the Government was not justified in fixing the minimum rates of wages finally as Rs. 2-09 and Rs. 1-88 respectively for Urban and Rural areas of Telangana area. According to the petitioners if the Government wanted to enhance the rates mentioned in the draft proposals there must be another notification and another opportunity given to the petitioners to make representations against the variation. I am unable to agree with this contention either. Draft proposals are only tentative and representations are received not merely from the employers but also from the employees. In the ordinary course of events the employer must expect the employees to make representations for enhanced minimum wages just as the employees may expect that the employers would make representations for reduced minimum wages. Any representations made by the parties must contemplate and take into account possible enhancement or reduction. It may be mentioned here that the minimum rates which were finally fixed were the rates unanimously approved by the Advisory Board which included the representatives of the employers among whom was the President of the Bidi Manufacturers and Tobacco Merchants' Association, Nizamabad.

6 The next submission on behalf of the petitioners is that the Advisory Board which made its recommendations to the Government never made any independent enquires of its own by visiting centres of Bidi Industry or by issuing questionnaires. The Advisory Board consisted of representatives of both employers and employees who may be presumed to know the general condition of industry and labour in the State. It also consisted of experts like the Head of the Eco-

nomics Department of the Osmania University and the Head of the Social Studies Department of the Andhra University. Full information was made available to the Board by the Government who had gathered statistics from its various District Officers. It was wholly unnecessary for the Advisory Board to go about from place to place making enquiries when in fact all necessary information was readily available from the Government. There is no force in the submission that the Board should have made its own independent enquiries.

7. Another submission of the petitioner is that the Advisory Board and the Government did not take into account relevant considerations like the cost of living index and the capacity of the employer to pay. The increase of the minimum rates of wages is solely due to the increase in the cost of living. There is no substance in the statement that the cost of living index has not been taken into account. What the petitioner submits is that though the cost of living indices in towns in Andhra area are nearly double the indices in towns in the Telangana area same rates have been fixed for rolling big size Zadi bidis in Urban areas in Andhra region and for rolling bidis in Urban areas in the Telangana region. It is explained by the Government that taking into account the rise in the cost of living the Government has enhanced the minimum rates of wages uniformly by 21 per cent over the previous minimum rates of wages. It is possible for the workers in Andhra area to make a grievance of the fact that a uniform rate of wages has been fixed. But I do not see how the employers of Telangana Area can have a grievance. There is no substance either in the contention that the Government and the Board have not taken into account the capacity of the employers to pay minimum rates of wages. Though in *Express Newspaper Ltd. v. Union of India*, AIR 1958 SC 578, there is an observation in the judgment of Bhagwati J., that the minimum wage thus contemplated postulates the capacity of the industry to pay and no fixation of wages which ignores this essential factor of the capacity of the industry to pay could ever be supported, in *U. Unichoyi v. State of Kerala*, AIR 1962 SC 12, the Supreme Court has explained this observation as referring to a statutory wage structure of the kind contemplated by Sec. 9 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act of 1955. Gajendragadkar J. who delivered the unanimous judgment of the Supreme Court held:

"We feel no hesitation in rejecting the argument that because the Act prescribes minimum wage rates it is necessary that the capacity of the employer to bear the burden of the said wage structure must be considered. The attack against the validity of the notification made on this ground must therefore fail".

8. The last submission of Sri Krishna is that there was a settlement between employers and employees which had the force of an award and therefore the Government had no jurisdiction to fix minimum wages. But the very settlement relied upon by the petitioners states that it is to be in force till minimum rates of wages are fixed under the Act. This argument is therefore wholly without substance.

9. In view of the above discussion all the Writ Petitions are dismissed with costs. Advocate's fee Rs. 100 in each.

JHS/D.V.C.

Petitions dismissed.

AIR 1969 ANDHRA PRADESH 231

(V 56 C 72)

CHINNAPPA REDDY, J.

K. Ankaiah and others, Petitioners v. Government of Andhra Pradesh and others, Respondents.

Writ Petns. Nos. 699, 700, 1833 to 1838, 1561 to 1563, 2040, 2046 to 2049 of 1967 D/-18-6-1968.

(A) Land Acquisition Act (1894), S. 4—Public purpose — Acquisition of land to provide amenities and conveniences to pilgrims visiting renowned Devasthanam — Acquisition is for public purpose.

Widening of streets leading to a renowned temple surrounding the temple, construction of public urinals and lavatories for the benefit of the pilgrims visiting the temple and extension of Vahana Mandapam viewed in the context of multitudes of pilgrims likely to gather at the Mandapam, are public purpose and an acquisition of land for providing such benefits to the pilgrims must be held to be for a public purpose. AIR 1954 Mys 171 and AIR 1921 Cal 159, Distinguished. (Para 2)

(B) Land Acquisition Act (1894), S. 16—Requirements — Existence of local authority for the area in question not necessary.

It is not necessary under Section 16 that there should be any authority other than the Government in whom the property should vest after acquisition. In fact, under Section 16, on the making of an award and on taking possession, the property vests in the Government. Non-existence of Panchayat for the area in question cannot invalidate the notification issued under Sec. 4.

(Para 4)

(C) Constitution of India, Preamble, Article 31 — Acquisition of land to provide amenities and conveniences to pilgrims visiting temple — Compensation paid by Government — Acquisition cannot be challenged as violative of concept of secular State.

It is the duty of the State, whenever and wherever people congregate in large numbers, to provide basic amenities to prevent

disease and epidemic and to promote orderliness. The State cannot refuse to perform its ordinary duty merely because people have gathered for the purpose of offering worship in a temple. What is important, so far as State is concerned, is the presence of multitude and not the reason for its presence. The argument that the payment of compensation for acquisition of land to provide amenities to the pilgrims visiting a temple for worship, by the Government would cut at the very concept of secular State, proceeds on a confusion which is the result of identifying temple with the pilgrims (Para 3)

Cases Referred Chronological Paras

(1954) AIR 1954 Mys 171 (V 41) =

ILR (1954) Mys 344, Bangalore City Municipality v Rangappa

(1921) AIR 1921 Cal 159 (V 8) =

ILR 48 Cal 916, Mamick Chand Mahata v Corporation of Calcutta

In W P Nos 699 and 700 of 1967

P Babulu Reddy and M. Ramachandra Reddy, for Petitioners.

In W P Nos 1333 and 1333 of 1967;

M Ramachandra Reddy, for Petitioners.

In W P Nos 1561 to 1563 of 1967, 2040, 2048 to 2049 of 1967.

I V Rangacharyulu, for Petitioners, 3rd Govt. Pleader on behalf of the 1st and 2nd Respondents (in all petitions).

P. Ramachandra Reddy and E. Kalyanaram, for third respondent (in all petitions)

ORDER. The temple of Sri Venkateswara on Tirumalai Hills is one of the most renowned and ancient Vaishnavite temples of our country. Every day devotees by thousands flock to the temple to have 'darshan' of the Lord and to offer worship. On festival days, which are numerous, the number of devotees thronging the temple and its precincts increases ten-fold and twenty-fold. In recent years, with the facility of easy and convenient methods of transport, there is a daily increase of the number of pilgrims. These are matters of common knowledge in this State. With the great increase of the daily influx of pilgrims it appears to have been thought desirable that more amenities should be provided to them and care should be taken to eliminate insanitary conditions so as to prevent disease and epidemic. It was also thought necessary that the Samidhi Street leading to the temple and the Mada Streets surrounding the temple should be widened. The Director of Town-Planning accordingly prepared a Town-Planning Scheme for the Tirumalai Hill Panchayat area and proceedings for acquiring the private property situated in the area for the purposes of the Scheme were started under Sections 33(b), 34 and 35 of the Andhra Pradesh Town-Planning Act. These proceedings were, however, quashed by a judgment of this Court in W.P. Nos. 653, 667, etc., of 1968 on the ground that the proceedings were instituted more than three

years after the date of notification of the Scheme under the Town-Planning Act. This, however, did not preclude the Government from proceeding under the Land Acquisition Act. Accordingly, the Government issued notifications under Section 4(1) of the Land Acquisition Act in respect of several items of property. The notifications invariably stated that the lands specified in the notifications were needed for public purposes, namely, widening the Samidhi street, Copuram Street and East Mada Street, construction of Police Station, Co-operative Stores, urinals and lavatories and providing for marketing centre and canteen for pilgrims. In one notification which is the subject-matter of W.P. No 700 of 1967, the purpose is stated to be widening of East Mada Street and extension of Vahana Mandapam. The several petitioners in these writ petitions object to the proceedings under the Land Acquisition Act and have filed these writ petitions under Art. 226 of the Constitution to quash the several notifications under S 4(1) of the Land Acquisition Act. They have done so without availing themselves of the opportunity afforded by Section 5-A of the Land Acquisition Act of objecting to the acquisition and without awaiting the declaration under Section 6 of the Act.

2. Sri Babulu Reddy, learned Counsel for petitioners in W.P. Nos 699 and 700 of 1967, urges that the proposed acquisition is not for a public purpose and that the acquisition is merely meant to acquire private property and vest it in the temple. There is no force whatever in this contention. Where immovable property is acquired for the purposes of a Town-Planning Scheme, whether the machinery provided by the Land Acquisition Act as contemplated by Section 33(a) of the Town-Planning Act is employed or whether the machinery provided by the Town-Planning Act as contemplated by Section 33(b) of the Act is employed, in either case, Section 33 provides that immovable property required for the purposes of a town-planning scheme shall be deemed to be land needed for a public purpose, within the meaning of the Land Acquisition Act. Even apart from Sec 33 of the Town-Planning Act, there can be little doubt that widening of the streets leading to the temple and surrounding the temple, construction of public urinals and lavatories and provision for marketing centres and canteens for the benefit of the pilgrims are certainly public purposes. This is not also seriously disputed, though Mr Babulu Reddy contends that at any rate extension of Vahana Mandapam which is one of the purposes mentioned in the notification which is the subject-matter of W.P. No 700 of 1967 is not a public purpose. I do not agree with this contention either. The extension of Vahana Mandapam must be viewed in the context of the multitudes of pilgrims likely to gather at the Mandapam and in the context of the scheme prepared

by the Town-Planning authorities. Viewed in that context, I have no doubt that the acquisition of land for extension of Vahana Mandapam is also a public purpose.

3. The next submission of Sri Babul Reddy is that the compensation payable under the Land Acquisition Act is proposed to be paid by the Tirumalai-Tirupati Devasthanam and not 'wholly or partly out of public revenues or some fund controlled or managed by local authority'. This, Mr. Babul Reddy submits, is sufficient to invalidate the proceedings for acquiring the lands of the petitioners. The simple and straight answer to this argument is that the stage has not yet arrived for the Government to state whether the compensation is to be paid 'wholly or partly out of the public revenues or some fund controlled or managed by local authority'. All that has happened so far is the issue of notification under S. 4(1) of the Land Acquisition Act. The Land Acquisition Officer has yet to hear the objections of the aggrieved persons under Section 5-A of the Act before finally issuing a notification under Section 6 of the Act. The decision as to who should pay the whole or part of the compensation must be taken before a declaration under Section 6 is made. There is, therefore, yet time for the Government to decide whether the compensation is to be paid 'wholly or partly out of public revenues or some fund controlled or managed by local authority' or even to drop the land acquisition proceedings altogether. My attention is drawn to the following statement in the counter-affidavit filed on behalf of the Government:—

"It is true that the third respondent (T.T.D. Board) has made necessary arrangements to pay the compensation amount in full since entire compensation has to be met from the funds of the Panchayat."

It may be that the Devasthanam Board is ready and willing to pay the entire amount of compensation and has communicated its willingness to do so to the Government. But that does not mean that the Government will not contribute a part of the compensation. I am of the view that the complaint of the petitioners in this regard is premature. Sri Babul Reddy contends that even at a later stage the Government cannot contribute any part of the compensation as, according to him, that will cut at the very concept of a secular State and the Government will, in such a case, be acting directly in contravention of the provisions of the Constitution. The basis of this argument is that the acquisition is for the benefit of the temple. This is an ill-founded assumption. It is the duty of the State, whenever and wherever people congregate in large numbers, to provide for basic amenities, to prevent disease and epidemic and to promote orderliness, etc. The State cannot refuse to perform its ordinary duty merely because crowds have gathered there

for the purpose of offering worship in a temple. What is important, so far as the State is concerned, is the presence of the multitude and not the reason for its presence. The argument of the petitioner proceeds on a confusion which is the result of identifying the temple with the pilgrims that attend the temple. I am firmly of the view that by contributing a part of the amount of compensation, the Government, in the present cases, will not be contravening any provisions of the Constitution. It is unnecessary to consider another argument of Sri Babul Reddy that Tirumalai Panchayat through which the Devasthanam proposes to pay the amount of compensation is not in fact a panchayat constituted in accordance with the provisions of the Village Panchayats Act and cannot, therefore, be considered to be a local authority for the purposes of Section 6 of the Land Acquisition Act. As I have stated earlier, this argument is premature as the stage for taking a decision as to who should pay the compensation has not yet arrived.

4. Mr. I. V. Rangacharya, learned Counsel for Sri Digyadarshan Rajendra Rama Dassjee Varu, Mahant of Sri Swami Hathiramjee Mutt and others, petitioners in W.P. Nos. 2040, 2048, etc., of 1967, advanced a further argument based on the statement in the counter-affidavit that the acquisition is sought on behalf of the Tirumalai Panchayat. Mr. Rangacharya submits that the Madras Hindu Religious and Charitable Endowments Act inclusive of Section 84, which declared that the Tirumalai Hill area shall be deemed to be a village for the purpose of the Madras Village Panchayats Act of 1950, has been repealed and Section 90 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966, provides for the constitution of a Civic Committee for the Tirumalai Hills Area and does not provide for the constitution of any Gram Panchayat under the Gram Panchayats Act. Mr. Rangacharya submits that the Tirumalai Panchayat being non-existent, there is no one in whom the acquired property can vest and none to carry out the purposes for which the acquisition is being made. I am unable to accept this contention. It is not necessary that there should be any authority other than the Government in whom the property should vest after acquisition for carrying out the purposes of acquisition. In fact, under Section 16 of the Land Acquisition Act, on the making of an award by the Collector and on his taking possession, the property will vest absolutely in the Government. Thereafter, it is for the Government to carry out the purposes of acquisition in such manner as it thinks best. It may entrust the task to a local authority and vest the acquired property in it. Again, it may not. It may decide upon some other course to achieve the object. The statement in the counter-

affidavit that the acquisition is sought on behalf of the Tirumalai Panchayat must be read with reference to the point of time when the proposals for acquisition were first made. At that time there was a Panchayat in existence and the Town-Planning Scheme was prepared for the Panchayat Area. But because the Panchayat has ceased to exist, it does not mean that the public purposes have ceased. The purposes for which the acquisition was originally proposed continue to exist and the need is certainly greater now. If there is no Gram Panchayat in existence, the Government may entrust the work to a Civic Committee to be constituted under Section 90 of the Andhra Pradesh Chantable and Hindu Religious Institutions and Endowments Act, 1960, or to the Township Committee which may be constituted under Section 5 of the Andhra Pradesh Gram Panchayats Act or it may undertake the work itself. I do not see how the non-existence of a Panchayat can invalidate notifications under Section 4 of the Land Acquisition Act for avowedly public purposes.

5. The learned Counsel for the petitioners relied upon Bangalore City Municipality v. Rangappa, AIR 1954 Mys 171 and Manick Chand Mahata v. Corporation of Calcutta, AIR 1921 Cal 159, in support of their argument. In the Calcutta case, the Chairman of the Corporation of Calcutta sought to acquire certain property for the Calcutta Improvement Trust. Under Section 357 of the Calcutta Municipal Act, the Corporation was empowered to acquire land for the purpose of widening, extending or otherwise improving any public street. Greaves, J., held that S. 357 did not enable the Corporation to acquire land for the benefit of the Calcutta Improvement Trust. That case has no application to the facts of the present case. In the Mysore case similarly the Government started proceedings at the instance of the Bangalore City Municipality to acquire certain land for the benefit of Siddaroodaswami Mandali, the Mandali itself undertaking to pay the cost of acquisition. Under Section 43 of the City Municipalities Act, land could be acquired at the request of the Municipal Council for the purposes of the Municipalities Act. A Bench of the Mysore High Court held that acquisition for the purpose of adding to the premises to Siddaroodaswami Mandali could hardly be said to be any purpose under the Municipalities Act and that the Municipality was incompetent to acquire land for the Mandali. The learned Judges also held that it could not be said that the Municipality was paying the compensation as contemplated by the Section. This case also is not of any assistance to the petitioners. The acquisition in the present case is not for the purpose of adding to the properties of the Tirumalai Devasthanam, nor is it for the purpose of conferring any benefit on the Devasthanam. The purpose of acquisition

is to provide amenities and conveniences to the pilgrims congregating there by establishing marketing centre, canteen, unnaals, lavatories and by widening the streets leading to the temple and surrounding the temple.

6. In the result all the writ petitions are dismissed with costs.

NR/VBB

Petitions dismissed.

AIR 1969 ANDHRA PRADESH 234

(V 56 C 73)

GOPALRAO EKBOTE, J.

M. Chinmappa Reddy, Petitioner v. Stato of Andhra Pradesh and others, Respondents.
Writ Petn. No 1874 of 1965 D/-28-3-1968.

Constitution of India, Art. 311 — Misconduct — Domestic inquiry — Indication of proposed punishment in the memo of charges — Amounts to gross violation of procedure and offends Art. 311 (2).

At the initial stage when charges are framed and served upon the delinquent officer, the punishing authority or the inquiring officer should not propose what punishment ultimately he is to be given. That is not the stage when any opinion as to the punishment can either be formed or expressed. Expression of such opinion amounts to prejudging the issue, which is likely to create misapprehension in the mind of the delinquent officer. At the initial stage if the charge framed indicates the proposed punishment, it vitiates the entire proceedings. AIR 1964 Mad 375, 1967-1 Andh WR 156, 1967-2 Andh WR 121, Foll. AIR 1962 SC 1130, Distng. (Para 4)

Cases Referred: Chronological Paras
(1967) 1967-1 Andh WR 156=14

Fac LR 232, Mohan Das v. Supdt. of Police, Khammameth 4

(1967) 1967-2 Andh WR 121 =
1967-2 Andh LT 198, State of Andhra Pra v. K. H. Khan 4

(1964) AIR 1964 Mad 375 (V 51)=
(1963) 2 Lab LJ 62, S. Manickam v. Supdt. of Police, Nilgiris 3

(1962) AIR 1962 SC 1130 (V 49) =
1962 Supp I SCR 968, A. N. D'Silva v. Union of India 5

P. Chennakesava Reddy and K. Parvateesam, for Petitioners, V. V. L. Narasimha Rao for 3rd Govt. Pleader, for Respondents.

ORDER.
The issue of a writ of certiorari to quash the order of the Sub-Collector, Rajampet, dated 7-3-1965, as confirmed by the District Collector, Cuddapah, and the Board of Revenue.

2. The petitioner is the hereditary village munsif of Utukur village, Rajampet Taluk, Cuddapah District. He was performing his duties accordingly. While so, on 6-5-1964, charges were framed against him

by the Sub-Collector, Rajampet, for misappropriation of a sum of Rs. 274-12 p. from 1956 up to 1959. Temporary misappropriation of Rs. 120 collected on 18-8-1961 was deposited on 2-11-1961. And thirdly, he remained absent without obtaining leave. The petitioner was directed to submit his explanation. After some dilly-dallying on his part, finally he submitted the explanation. In his explanation, he said that the amount of Rs. 274-12 p. was deposited by him on 12-9-1963 under challan No. 684/5 in the Sub-Treasury. In regard to the temporary misappropriation, he stated that he had given a receipt in advance and not actually collected the amount. In regard to the third charge, he stated that he never remained absent without any leave. He wanted the witnesses to be cross-examined and their evidence recorded in his presence. The Sub-Collector finding himself unable to make the enquiry directed the Tahsildar to conduct the enquiry. The Tahsildar, without information to the petitioner, conducted confidential enquiry and submitted a confidential report to the Sub-Collector. On the basis of this report, a copy of which was not given to the petitioner, the petitioner was removed from service by the order of the Sub-Collector dated 7-3-1965. He found the petitioner guilty of all the charges.

3. On appeal to the Collector, the Collector dismissed the appeal on 24-5-1965 concurring with the opinion of the Sub-Collector. A further appeal to the Board of Revenue, therefore, was carried by the petitioner. The Board of Revenue, by its order dated 23-9-1965, thought that while charges 2 and 3 were trivial, in its opinion, the first charge was proved. In that view, the Board of Revenue concurred with the opinions of the two authorities below. It is this concurrent view of all the officers that is now challenged in this writ petition.

4. The only contention raised by Sri P. Chennakesava Reddy, the learned counsel for the petitioner, is that the charge memo. served upon the petitioner indicates the proposed punishment of dismissal from service. It is a gross violation of the procedure contemplated under the rules and is contrary to the provisions of Article 311 of the Constitution. The Sub-Collector had prejudged the issue and consequently, the whole proceeding is vitiated. In support of this contention, he relied upon the following decisions: S. Manickam v. Supdt. of Police, Nilgiris, AIR 1964 Mad 375; Mohan Das v. Supdt. of Police, Khammameth, 1967-1 Andh WR 156; and State of Andhra Pradesh v. K. H. Khan, 1967-2 Andh WR 121. Although this contention has not been raised anywhere before any of the tribunals, nor was it raised specifically in the petition, even then I allowed the learned advocate to raise that point because, in my opinion, that goes to the very root of the question. It is now fairly settled that at the

initial stage when charges are framed and served upon the delinquent officer, the punishing authority or the inquiring officer should not propose what punishment ultimately he is to be given. That is not the stage when any opinion can either be formed or expressed. It amounts to prejudging the issue, which is always likely to create misapprehension in the mind of the delinquent officer. It is only at the stage when after a proper enquiry the punishing authority forms an opinion that the accused officer has committed the offence that he could propose the punishment and ask the delinquent officer to explain as to why that punishment should not be imposed. At the initial stage, if the charge framed indicates the proposed punishment, it vitiates the proceedings. The abovesaid decisions clearly decide that point, and with respect, I follow those decisions.

5. The learned Advocate for the Government, however, invited my attention to A. N. D'Silva v. Union of India, AIR 1962 SC 1180 and argued that since this decision was not brought to the notice of the learned Judges who decided those cases, I should hold that the said decisions have not correctly laid down the proposition of law. I do not think that these decisions are in any way inconsistent with the Supreme Court decision. What had happened in that case was that the appellant therein was an employee of the Government of India in the Posts and Telegraphs Department and held the post of Divisional Engineer, Telegraphs, at Agra. On September 18, 1948, he was suspended from service and a charge-sheet was delivered to him. The appellant was called upon to submit his defence to the charges to the inquiring officer named therein. The appellant was further asked to show cause why in the event of charge (i) being proved, he should not be dismissed from Govt. service, and in the event of charge (ii) being proved, he should not be permanently degraded to the rank of Electrical Supervisor or awarded any other lesser penalty. An objection was taken before the Supreme Court that the punishment proposed in the charge-sheet was not removal for the charge for which he had in truth been found guilty and therefore the order of punishment amounted to imposing a punishment different from the one which it was originally contemplated to pass against him. While deciding this point, Shah J., who wrote the opinion, observed as follows:

"In the communication addressed by the Enquiry Officer the punishment proposed to be imposed upon the appellant if he was found guilty of the charges could not properly be set out. The question of imposing punishment can only arise after the enquiry is made and the report of the Enquiry Officer is received. It is for the punishing authority to propose the punish-

ment and not for the Enquiry Authority. The latter has, when so required, to appraise the evidence, to record its conclusion and if it thinks proper to suggest the appropriate punishment. But neither the conclusion on the evidence nor the punishment which the enquiring authority may regard as appropriate is binding upon the punishing authority. In the present case, after the report of the Enquiry Officer was received, the appellant was called upon to show cause against his proposed dismissal from service. After considering the representation made by the appellant, the President came to the conclusion that not dismissal but removal from service was the appropriate punishment. In imposing punishment of removal, the President did not violate the guarantee of reasonable opportunity to show cause against the action proposed to be taken against the appellant. The appellant was told about the action proposed to be taken and he was afforded an opportunity to make his defence. Thereafter a lighter punishment was imposed. There is nothing on the record to show that the President found the appellant guilty of the second charge and imposed punishment proposed by the Enquiry Officer for the first charge."

6. It would be clear that the Supreme Court was not concerned with the argument as to whether the inquiring officer or the punishing authority can at the first stage when charge-sheet is delivered to the delinquent officer propose punishment, and if he so proposes, what is the effect of it on the enquiry conducted thereafter? The argument on the other hand before the Supreme Court was that the punishment given was not the same as was originally proposed by the Enquiry Officer. That is not the point urged before me here. The learned Judges took the view that it is not for the inquiring officer to propose any punishment, and even if he had proposed the punishment in his report, it is for the punishing authority to take a proper view and then propose the punishment to the delinquent officer. That is his bounden duty at the second stage. I do not, therefore, consider that the Supreme Court in any manner has decided anything contrary to the decisions relied upon by the learned Advocate for the petitioner. Following the abovesaid decisions of this Court, I would, therefore, hold that the proceedings in this case are vitiated and cannot be upheld. It is open to the Sub-Collector to conduct a fresh enquiry, if he desires to so conduct, and pass necessary order after following the procedure laid down by law.

7. The writ petition, therefore, is allowed and the impugned order quashed. In the circumstances, however, I make no order as to costs.

NR/VBB

Petition allowed.

AIR 1969 ANDHRA PRADESH 236
(V 56 C 74)

SAMBASIVA RAO, J

Smt. Kurella Ratnam, Petitioner v. Mokhamta Bhadraraj and another, Respondents.

Civil Revn. Petn. No. 1439 of 1967, D/-14-8-1968, from order of Dist. Munsif, Tadepalligudem, D/-20-9-1967.

(A) Civil P. C. (1908), Ss. 151, 6, 15, O. 21, R. 60, O. 41, R. 5 — Claim-suit against execution of decree for costs — Court, competent to entertain suit under S. 15 read with S. 6, can stay execution of decree—Decree whether passed by Superior Court is immaterial.

If the Court has jurisdiction to entertain the suit, it has also the necessary power or jurisdiction to pass all necessary and appropriate orders in it. Where the Court has power to entertain a claim suit for staying the execution of a decree for costs, it has power to stay the execution of the decree, even if the decree sought to be stayed is that of a Superior Court. AIR 1951 Mad 321, Rel. on. (Paras 3, 4)

(B) Civil P. C. (1908), Sec. 115, O. 21, R. 60, O. 41, R. 5 — Execution of decree for costs — Proper remedy against — High Court, whether can convert stay application in application for injunction.

Application for stay of execution of a decree for costs in another suit is not the proper remedy. The remedy lies in filing application for injunction under O. 21, R. 60. Where an application for stay of execution is filed, the High Court can convert the same into application for injunction, provided no prejudice is caused to the decree-holder. (Para 5)

Cases Referred; Chronological Paras (1951) AIR 1951 Mad 321 (V 38) = 1950-2 Mad LJ 492, H. S. Vodayar v. Vijaya Bank Ltd. 4

K. B. Krishnamurthy and P. Sri Rama Murthy, for Petitioners; T. Veerabhadrayya, for Respondents.

JUDGMENT: The revision petitioner was the petitioner in the lower court. She filed a suit under Order 21, Rule 63, Civil P. C. for setting aside an order dismissing her claim petition in E. A. No. 153 of 1967. She came to file the claim petition and the suit in the following manner:

2. The respondent in the revision petition filed O. S. No. 49 of 1961 on the file of the Subordinate Judge's Court, Eluru for possession against two defendants. That suit was decreed with costs in execution of the decree for costs in O. S. No. 49 of 1961, the respondent attached certain properties as if they belonged to the second judgment-debtor. Thereupon the petitioner, who is the daughter of the second judgment-debtor filed E. A. No. 153 of 1967 claiming that the two items of the properties so attached,

belonged to her and were in her possession, as they had been conveyed to her under a gift deed dated 20th September, 1963 by the second judgment-debtor: The claim petition was, however, dismissed. It appears a revision petition was filed in this Court in C. R. P. No. 1039 of 1967 against the dismissal of the claim petition and that the revision petition was dismissed in limine. Thereupon, the petitioner filed the suit O. S. No. 329 of 1967 on the file of the District Munsif's Court, Tadepalligudem under Order 21 Rule 63 C. P. C. for setting aside the dismissal order on her claim petition. Along with the suit she also filed L. A. No. 537 of 1967 for stay of the sale of the properties that was pending in E.P. No. 109 of 1966 in O. S. No. 49 of 1961 on the file of the Subordinate Judge's Court, Eluru. The lower Court dismissed the application for stay on the ground that it had no jurisdiction to stay the sale of the properties which were going on in a superior Court, viz., the Subordinate Judge's Court Eluru. In that view it did not go into the merits of the application. Aggrieved by that order of dismissal, the petitioner came up to this Court by way of this revision petition.

3. It does not appear from the order of the lower Court that any objection was taken by the respondent that the lower Court had no jurisdiction to entertain the suit as such. Evidently the objection that was taken, was only in respect of the power of the lower Court to stay the execution of the decree by the Subordinate Judge's Court, Eluru. It must be noticed that the execution was going on only to recover costs which amount is admittedly within the pecuniary jurisdiction of the lower Court. It, therefore, follows that the lower Court had jurisdiction to entertain the suit and it cannot be said that the suit should have been laid in the Subordinate Judge's Court, with this limited pecuniary value of the suit. Therefore, if the lower Court has jurisdiction to entertain the suit, it must have the necessary power or jurisdiction to pass all necessary and appropriate orders in it.

4. That the Court has power in a claim suit to stay the execution of the decree in the course of execution of which the claim application is filed, is held by the Madras High Court in H. S. Vodayar v. Vijaya Bank Ltd., 1950-2 Mad LJ 492 = (AIR 1951 Mad 321), with which I respectfully agree. If the Court has power in a claim suit to stay the execution of the decree, the same principle should apply even if the decree, the execution of which is sought to be stayed, is that of a superior Court. If it is not so, undesirable results and grave hardship would ensue. Because of the limited value of the claim in the suit it could not have been filed in the superior Court, viz., in the Subordinate Judge's Court. The suit could have been only filed in the District Munsif's Court, which had the necessary pecuniary

jurisdiction and if that Court cannot pass any interim orders, its final decision in the suit also could have no force. Neither substantive law nor procedural law ever envisages such a helpless situation. Justice must be meted out to the parties, wherever they are found to be in need of it. The Court has inherent power to do so under Sec. 151, Civil P. C. I cannot, therefore, agree with the trial Court that it has no jurisdiction to grant interim relief pending the claim suit. I am of the view that the lower Court has jurisdiction to issue the necessary directions, if it is otherwise satisfied about the merits of the application.

5. However, an application for stay of execution of a decree in another suit is not the proper remedy. Realising this, Sri K. B. Krishna Murthy, the learned counsel for the petitioner has filed an application for converting the application for stay into an application for injunction. I do not see any objection in granting the application and converting the stay petition into an injunction petition. There is no prejudice caused to the decree-holder-respondent by such conversion. I, therefore, grant the application and direct that the application be converted into one for injunction.

6. Since the lower Court dismissed the petition on the ground that it had no jurisdiction to grant interim relief, whether it be a stay application or an injunction application and did not go into its merits and consider them, I remit the converted application to the lower Court for its disposal on merits. The lower Court will deal with the application on merits in accordance with law. The revision petition is accordingly allowed. But, in the circumstances, I make no order as to costs. The conversion application is allowed.

DVT/D.V.C.

Petition allowed.

AIR 1969 ANDHRA PRADESH 237
(V 56 C 75)

VENKATESAM, J.

Satyam, Appellant v. Krishna Murthy and others, Respondents.

Appeal No. 194 of 1962, D/-20-2-1968, against decree of Sub-J., Visakhapatnam, D/-31-8-1961.

Income-tax Act (1922), Sec. 46 (2) — Revenue sale for recovery of arrears of income-tax subsequent to mortgage — Cannot prevail over the mortgage — Case law, Ref. (Para 19)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1061 (V 52) =
(1965) 2 SCR 289, Builders Supply Corporation v. Union of India 12, 15
(1963) 1963-49 ITR 824 = 1963-2
Mad LJ 256, Kaka Mohamad Ghose
Sahib and Co. v. United Commercial Syndicate

12

- (1955) AIR 1955 Bom 305 (V 42) =
ILR (1955) Bom 654, Bank of India
v. John Bowman 12
- (1942) AIR 1942 Mad 244 (V 29) =
1941-2 Mad LJ 993, Secy. of State
v. Jodaraj Dhupajee 17
- (1938) AIR 1938 Mad 360 (V 25) =
1938-6 ITR 180 (FB), Manickam
Chettiar v. Income-Tax, Officer,
Madura 12, 15
- (1935) AIR 1935 Mad 882 (V 22) =
42 Mad LW 663, Chinnammal Achi
v. Saithakkathi Rowther 16
- (1902) ILR 26 Mad 230 = 12 Mad
LJ 368, Kadir Mohideen Marakkayar
v. N V Muthukrishna Ayyar 16, 18
- (1884) ILR 7 Mad 434, Ramachandra
v. Pitschakanni 12, 16, 18

G. Balarameswari Rao and P. Kameswara Rao, for Appellants, Advocate General and Venkateswarlu, for the Respondents

JUDGMENT: This is an appeal preferred by Mattapalli Satyam, the 11th defendant against the decree and judgment of the learned Subordinate Judge, Visakhapatnam in O. S. No 60/61 on his file.

2. The point in controversy is very simple and it is not necessary to state the facts in any detail. The 1st defendant is the father of defendants 2 and 5. Defendants 3 and 4 are the sons of the 2nd defendant. The 1st defendant for himself and as guardian for the 5th Defendant, and the 2nd defendant executed a registered simple mortgage bond dated 23-6-1952 in favour of the plaintiffs agreeing to repay the same with interest at 5 1/3 per cent per annum. Defendants 3 and 4 were the sons born subsequently to the 2nd defendant. The 1st defendant belongs to a family of traders. For arrears of income-tax and sales-tax due from the members of that family, the suit properties were brought to sale by the Revenue Authorities on 22-10-1953. They were purchased by one Dasari Ayodhya Ramayya, and his legal representatives are defendants 6 to 9. Defendants 6 to 9 in their turn alienated the portions of the suit properties to defendants 11 to 17. The 11th defendant who is the appellant in this appeal purchased Item 1 of the suit property from defendants 6 to 9 under a registered sale deed dated 29-3-1953 for Rs. 19,500. As the mortgagors committed default in discharging the mortgage debt the present suit was filed by the mortgagees.

3. Defendants 1 to 6, 9, 13, 15 and 16 remained ex parte and the suit was resisted by the other defendants. The 11th defendant contended that he was not aware of the suit mortgage bond, or the consideration thereunder. It is averred that the plaintiffs were aware of the sale of the suit properties for recovery of the sales-tax as well as income-tax, and that the said sale is not subject to the liability under suit mortgage. He alleged that the 1st defendant Suryanara-

yanamurthy, Kamaraju, Paparao, Satyanarayana-murthy, and Anjaneyamurthy were five brothers who became indebted to the Government in large sums of money towards income-tax and sales-tax. For the recovery of those amounts proceedings were taken under the Revenue Recovery Act and Item 1 of the plant schedule an upstairs house at Visakhapatnam was sold at a Revenue sale. It was purchased by one Dasari Ayodhya Ramayya on 22-10-1953 and a sale certificate was issued by the District Collector to him, and the house was also delivered to him. The 11th defendant purchased that house from defendants 6 to 9 and 10 under the registered sale deed dated 29-3-58 for Rs. 19,500 and has been in possession and enjoyment of the same in his own right. He would have it that his title is free of all charges and encumbrances including the suit mortgage. The plaintiffs are therefore not entitled to bring to sell that property for discharging the mortgage debt.

4. The learned Subordinate Judge framed appropriate issues and found all of them against the defendants and in favour of the plaintiff, and granted decree for sale of all the mortgaged properties including Item 1 as prayed for.

5. The issues relevant to the contention of the 11th defendant are Issues No 2 and the additional Issue No 1. On those issues, the Subordinate Judge held that the revenue sale was admittedly subsequent to the suit mortgage, and that the doctrine of Priority of Crown Debts as against unsecured creditors would not apply to a case where property is sold for moneys other than the land revenue due to the Government. Inasmuch as the revenue sale in the instant case was for recovery of income-tax and sales-tax he held that the sale would not have priority over the mortgage debt. Accordingly it was found that the title of the 11th defendant was not free of the suit mortgage debt.

6. Aggrieved by this decision, the 11th defendant has preferred this appeal. Sri Balarameswara Rao, the learned counsel for the appellant made two submissions. Firstly that no reasonable opportunity had been given to the 11th defendant to establish the Revenue Sale and secondly that inasmuch as this revenue sale was for recovery of arrears of income-tax which accrued prior to the date of the mortgage, the revenue sale should have priority over the mortgage.

7. I will now consider the validity of these contentions. The suit was filed on 19-6-1961. The 11th defendant as well as other defendants were all served on 28-7-61. The Court declared the 11th defendant ex parte as he did not appear in person or by counsel. The other contesting defendants filed written statements on 4-8-1961. Issues were framed on 8-8-1961, and time was granted for one week to file documents and it was posted for trial to 19-8-1961. Meanwhile the 11th defendant appears to have

filed a petition for setting aside the order declaring him ex parte, and that was ordered. He filed the written statement on 19-8-1961. At his instance additional issues were framed on 21-8-61 and it was posted for trial to 29-8-1961. He wanted an adjournment on that day, and the suit was adjourned to 30-8-1961. On that day the evidence was recorded and arguments were heard and judgment was pronounced on 31-9-1961. The argument of the learned counsel is that the written statement having been filed on 19-8-1961, the posting of the suit for trial on 29-8-1961 hardly gave his client sufficient opportunity to adduce the necessary evidence. It can hardly be denied that litigants should be given every reasonable opportunity to present their case and adduce all available oral and documentary evidence. But in deciding this question, one should have regard to the contentions put forward in the written statement and also the grounds on which an adjournment was prayed for, and if by reason of the refusal of adjournment, he was really prevented from placing before the Court any tenable plea. That is not the case here. Even though the suit was disposed of more than six years ago even now no material has been placed before this Court to satisfy it that if an opportunity was given any evidence would have been placed before the Court in support of his defence.

8. As already stated in the written statement the only contention raised was that the Revenue sale conferred an absolute title free from all prior encumbrances. It was not suggested that the arrears of income-tax and sales-tax for recovery of which the sale was held, accrued prior to the date of the mortgage, or that an attachment was made of Item 1 prior to the execution of the mortgage bond. It is not known on what ground the adjournment was asked for on 29-8-1961. The written statement raised only a question of law, and the learned Subordinate Judge considered it. As the record stands it cannot be said that the Subordinate Judge when he proceeded to trial on 30-8-1961, denied any opportunity to the 11th defendant to adduce oral or documentary evidence. It is very significant to note that the 11th defendant had not even examined himself. The learned Subordinate Judge therefore decided the suit after hearing the legal contentions advanced on behalf of the 11th defendant.

9. In this Court the appellant has filed C.M.P. No. 9392/67 for receiving a certified copy of a letter dated 7-12-1951 by the Income-tax Officer, Vizianagaram to the Collector, Visakhapatnam under Section 46 (2) of the Indian Income-tax Act, 1922. In this letter the income-tax officer certified that a sum of Rs. 4,885-9-0 due from Motumari Suryanarayana, the 1st defendant mortgagor was in arrears, and that the same may be recovered as if they were arrears of land revenue under Section 46 (2) of that Act.

In the affidavit filed for receiving this document, it is alleged that he wanted the subordinate Judge to grant reasonable time to substantiate his contention by producing the necessary documents from the Income-tax Officer, Visakhapatnam and the District Collector, Visakhapatnam but it was refused and the suit was disposed of on 1-8-1961. He had not alleged for what documents he wanted the adjournment. That is not all. In paragraph 6 of the affidavit he stated that after the suit was disposed of, he made an enquiry in the concerned departments of income-tax and revenue departments regarding the availability of the letter dated 7-12-1951 now filed as additional evidence. He stated he was diligent but succeeded in getting it only in January 1967. He also averred that he had a mild heart attack in 1966 and was advised to take rest, evidently to explain the delay in filing this petition for receiving it as additional evidence. He stated that the said document is very important and relevant to substantiate his contention and may be received.

10. It is thus clear that even in this petition now filed it is not his case, that besides this letter dated 7-12-1951 there were other documents to establish his case, which he would have produced if the suit was adjourned or that even after it was disposed of, he applied for any or all of those documents or that the concerned officials had refused to supply certified copies of the same, or how they would substantiate his contentions.

11. Thus the only grievance of the appellant is that this letter dated 7-12-51 could not be filed by reason of an adjournment not being granted and I will presently consider how this letter even if received would not advance his case further. According to the 11th defendant, even now there is no other evidence which he was precluded from placing before the Court then or now. To call for a revised finding after giving an opportunity to adduce additional evidence in these circumstances, would serve no useful purpose. I cannot therefore hold that the refusal of the Subordinate Judge to adjourn the suit beyond 30-8-1961 resulted in any prejudice to the appellant or prevented him from adducing any useful evidence.

12. I shall now advert to the main contention. The argument of the learned counsel is that if income-tax fall into arrears or accrued prior to the date of a mortgage and a sale is held for the recovery of such arrears of income-tax though it be after the mortgage that sale should prevail over the mortgage. In other words, the priority given to Crown debts over other unsecured debts will prevail even against a secured debt if the arrears of income-tax accrued prior to the mortgage. For this argument the learned counsel relied on Builders Supply Corporation v. Union of India, AIR 1965 SC 1081.

In that case as would appear from the facts extracted in the judgment, the only question for consideration was whether a simple money decree-holder could claim priority over the arrears of income-tax because he obtained an attachment of certain moneys due to the judgment debtor before the income-tax department took any steps. The subordinate Judge's Court held that there was no priority in favour of the department but that was set aside by the High Court; the decision of the High Court was confirmed by the Supreme Court. Gajendragadkar, C J, speaking for the Court held that the provisions of Section 46 of the Income-tax Act were construed frequently in our country and the consensus of judicial opinion was that the arrears of tax due to the State can claim priority over private debts. It was also held that Section 46 (2) of the Income-tax Act did not deal with the doctrine of the priority of Crown debts at all but merely provided for recovery of arrears of tax due from an assessee as if it were arrears of land revenue and that that provision could not be said to convert arrears of tax into arrears of land revenue either and that all that it purports to do was to indicate that after receiving the certificate from the income-tax officer, the Collector has to proceed to recover the arrears as if they were arrears of land revenue. It may be noted that before the Supreme Court the question now for decision before me did not at all arise viz., whether and, if so, in what circumstances a revenue sale for recovery of arrears of income-tax held subsequent to a mortgage could claim priority over the mortgage? The learned Chief Justice in that case approved of the decisions of the Madras High Court in Manickam Chettiar v. Income-Tax Officer, Madras, AIR 1938 Mad 360, Bank of India v. John Bowman, AIR 1955 Bom 305, Kaka Mohamed Ghouse Sahib and Co v. United Commercial Syndicate, 1963-49 ITR 824 (Mad), for the general proposition that in India Courts have consistently recognised that arrears of tax due to a State can claim priority over private debts. His Lordship expressly disapproved that a note of dissent struck in Ramachandra v. Pitchaikann, (1884) 7 Mad 434, that the doctrine that Crown debts would have priority, would not universally be applicable. In AIR 1938 Mad 360 the Full Bench held that the Crown has the right of priority in payment of debts due to it over all unsecured creditors and that where in execution of a money decree against a debtor his property is sold and arrears of income-tax are due by the debtor, the Crown has priority in respect of this debt and the Court has inherent power under S 151, Civil P. C., to order the payment of the Crown debt to the Government, on the mere application of the Income-tax Officer without having to file a suit. It was also held that an attachment by an unsecured creditor does not confer title nor make him a secured creditor.

13. The argument which was considered and rejected by Leach, C J, in the Full Bench decision is expressed at p 363 thus

"The learned Advocate for the petitioner then contends that as a private person cannot enforce payment without first obtaining a decree, the Crown is in the same position. The argument is that a private person is governed by the provisions of the C. P. C., and as there is nothing in the Code which places the Crown in a different position, the procedure there contemplated must be followed. I am unable to agree. This argument ignores the special position of the Crown, the special circumstances and the Court's inherent powers. It cannot be denied that the Crown had the right of priority in payment of debts due to it. It is a right which has always existed and has been repeatedly recognised in India. If the Crown is entitled as it is, to prior payment over all unsecured, the position of secured creditors does not arise. I see no reason why the Crown should not be allowed to apply to the Court for an order directing its debt to be paid out of moneys in Court belonging to the debtor, without having to file a suit. Of course it must be a debt which is not disputed or is undisputable. In this case the debt represents money due to the Crown under the Income-tax Act and the demand of the Income-tax Officer is not open to question....."

The right to payment being indisputable, justice requires that it should be paid out to the Crown and formal application for payment has been made. It seems to me that both right and convenience demand that the Court should exercise its inherent powers."

14. It may, therefore, be noted that the Full Bench expressly stated that they were considering only the question of priority of the Crown debts over unsecured creditors but not secured creditors.

15. Gajendragadkar, C J, summed up the effect of this decision in AIR 1965 SC 1061 at p 1066 thus

"In (1938) 6 ITR 180 = AIR 1938 Mad 360, a Full Bench of the Madras High Court has held that the income-tax debt has priority over private debts and that the Court had inherent power to make an order on the application for payment of moneys due to the Crown. In that connection, the Court held that Section 46 of the Income-tax Act is not exhaustive of the remedies of the Crown to cover arrears of income-tax and does not preclude an application of this nature. The Court further held that it was also not necessary for the Crown to obtain a decree against the assessee or to effect an attachment before making such an application. The application in question had been made under S 151 of the Code."

The learned counsel for the appellant presses this passage in support of his contention

that if it is established that the arrears of income-tax were in fact due prior to the date of the mortgage the Crown debt would have priority, even if the sale for the recovery of the Crown debt was held after the mortgage. But there is a big jump in the argument as in AIR 1938 Mad 360 the priority of Crown debt over a secured creditor was not considered. I am unable to accept the effect which the learned counsel attributes to the aforesaid passage in the judgment of Gajendragadkar, C. J.

16. On the other hand, that a secured creditor would have priority over a purchaser at a revenue sale held subsequently for recovery of arrears of income-tax has been well established. In Kadir Mohideen Marak-kayar v. N. V. Muthukrishna Ayyar, (1902) ILR 26 Mad 230, it was held that the effect of Section 30 of the Income-tax Act of 1886 corresponding to Section 46 (2) of the Income-tax Act, 1922, is not to convert income-tax into an arrear of land revenue, but merely to extend the procedure prescribed by the Revenue Recovery Act to the recovery of arrears of income-tax their Lordships followed the decision reported in (1884) ILR 7 Mad 434 relating to a sale under the Revenue Recovery Act for recovery of arrears of abkari revenue and the reasoning on which the decision proceeded. In that case the question for consideration was whether under the revenue sale, the share of the assessee would pass to the purchaser free of the mortgage encumbrances as if the income-tax due from him was revenue which accrued due in respect of the land forming his share in the mortgaged property, in which case under Section 2 of Act II of 1864 (Revenue Recovery Act) it forms the security for the public revenue and that question was answered in the negative holding that the arrears of income-tax had not the effect of converting the income-tax into arrears of land revenue. In Chinnammal Achi v. Saithakkathi, AIR 1935 Mad 882, certain land was attached and sold under the provisions of the Revenue Recovery Act for arrears of income-tax but prior to it the property was sold by the official receiver and it was purchased by the other person. It was held that the revenue sale for the recovery of arrears of income-tax would not give a higher title to the purchaser than the owner of the land himself would have given if he had alienated the property privately when the sale was for the enforcement of other dues such as the income-tax. His Lordship Madhavan Nair J. held at p. 883 thus:

"It is only if the sale is for land revenue that the purchaser gets a preferential title free from all incumbrances. Such a priority does not attach itself to a sale for the enforcement of other dues even if the sale is held under the provisions of the Revenue Recovery Act."

It was accordingly held that since the title to the property so far as the appellant (de-

fendant) was concerned accrued only on 9th November, 1928, i.e., subsequent to the sale by the official receiver, the title which the plaintiff obtained from the official receiver should have priority to the claims of the defendant, though the property was attached as early as in 1924.

17. In Secretary of State v. Jodraj Dhupajee, 1941-2 Mad LJ 993 = (AIR 1942 Mad 244), Somayya, J. had to consider the effect of a sale for recovery of penal assessment under Madras Land Encroachment Act 3 of 1905. His Lordship held that Sec. 9 of the Act equates the penal assessment levied under it to land revenue and provides that it may be recovered as land revenue and that the sale of the defaulter's property for recovery of such assessment passed the property free of all encumbrances as Sec. 42 of the Madras Revenue Recovery Act 2 of 1864 applied to the sale.

18. The distinction, therefore, to be borne in mind is whether the revenue sale is for recovery of land revenue itself, or for recovery of a sum of money which by any particular statute is equated to land revenue. When that is not the case but a statute simply enables sums due to the Government to be recovered as if they are arrears of land revenue, i.e., by resorting to the procedure under the Madras Revenue Recovery Act, the sale under that Act would not confer a title free of encumbrances. In the case of sales held for recovery of arrears of income-tax, his Lordship Somayya, J., clearly held that revenue sales for recovery of income-tax would not pass a title free of encumbrances and followed the decisions in (1902) ILR 26 Mad 230 and (1884) ILR 7 Mad 434.

19. Having regard to the strong line of authority I hold that the sale in the instant case for recovery of arrears of income-tax subsequent to the mortgage did not have the effect of superseding the rights of the mortgagee nor giving him any priority over the rights of the mortgagee.

20. In this view the document now sought to be filed as an additional evidence, even if it is received, would not advance the case of the 11th defendant as it only indicates that a sum of Rs. 4,885-8-0 was due from the first defendant. There is no evidence on record that the sum for recovery of which the sale was held included this particular amount. Even assuming it to be so, it does not mean that the sale admittedly subsequent to the mortgage gave any priority over the mortgagees.

21. For all these reasons, I agree with the decisions of the Court below that the 11th defendant had not acquired title free of the suit mortgage in respect of item No. 1. No other point has been argued before me.

22. In the result the appeal fails and is dismissed with costs.

RSK/D.V.C.

Appeal dismissed.

AIR 1969 ANDHRA PRADESH 242
(V 56 C 76)

FULL BENCH

P. JAGANMOHAN REDDY, C. J. SATYA-
NARAYANA RAO, SESHACHALA-
PATHI, GOPALRAO EKBOTE AND
KUPPUSWAMI, JJ.Chinnappareddigari Pedda Muthyala-
reddy, Appellant v. Chinnappareddigari
Venkatarreddy and others, Respondents.Appeal No. 101 of 1962, D/-7-12-1967,
against decree of Sub-J, Anantapur, in Ori-
ginal Suit No 35 of 1957.Registration Act (1908), Ss. 49 (c), 17 —
Unregistered partition deed — Though can-
not be looked for terms of partition, can be
looked into for establishing severance in
status AIR 1962 Andh Pra 443 Overruled
and L.P.A No 44 of 1963 dated 1-10-1965
(Andh. Pra.) Partially Overruled.

Where a partition takes place, the terms
of which are incorporated in an unregis-
tered document, that document is inadmissible
in evidence and cannot be looked for the
terms of the partition. It is in fact the
source of title to the property held by each
of the erstwhile coparceners. That docu-
ment, though unregistered, can, however, be
looked into for the purpose of establishing
a severance in status, though that severance
would ultimately affect the nature of the
possession held by the members of the sepa-
rated family who from thence onwards, hold
it as co-tenants. It is now a well-established
principle of Hindu Law that, for a sever-
ance in status, all that is required is a com-
munication to the other members of the
joint family, of an unequivocal intention to
separate. This communication of intention
could be done orally or by a notice in
writing to the other coparceners, or by other
means depending upon the facts and circum-
stances of the case. If the intention is ex-
pressed by reducing the same to writing
such a document, though unregistered, is
admissible and can be looked into, as long
as it is not the source of title of any of the
properties which each of the erstwhile co-
parceners hold as a result of that partition.

AIR 1958 SC 708 (713) and AIR 1960 SC
335 and (1903) ILR 30 Cal 738 (PC), Rel.
on, AIR 1958 SC 199, Explained, AIR
1965 Andh Pra 274 (FB), held, not in con-
flict with AIR 1944 Mad 550 (FB), (1912)
40 Ind App 40 (PC) and AIR 1916 PC 104
and AIR 1964 SC 136, Ref., AIR 1965 SC
1591, Disting.; AIR 1962 Andh Pra 443,
Overruled, and L.P.A. No 44 of 1963, D/-
1-10-1965 (Andh Pra), Partially Overruled.
(Para 34)

Cases Referred: Chronological Paras

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v Lekharam and Co. 35

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- (1965) AIR 1965 Andh Pra 274
(V 52) = (1965) 1 Andh WR 384
(FB), K. Kanna Reddy v. K. Ven-
katarreddy 1, 13, 31, 32, 33, 37
(1965) L.P.A. No 44 of 1963, D/-
1-10-1965 (Andh. Pra.) 32, 33
(1964) AIR 1964 SC 136 (V 51) =
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v. Chenchamma 31
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(V 49) = (1962) 1 Andh WR 230,
Nookaraju v. Ramamurthi 30
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Bachan Singh 25
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Bai 23, 26, 33
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(1947) 1 Mad LJ 90, Subbu Naidu
v. Varadarajulu Naidu 37
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Imbichi Koya 37
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32, 33, 37
(1942) AIR 1942 Mad 125 (V 29) =
(1941) 2 Mad LJ 707, Veera-
raghavarao v. Gopalrao 28
(1930) AIR 1930 Mad 883 (V 17) =
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Mahalakshamma 28
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39 Mad LJ 276, Ahobilachariar v.
Thulasi Ammal 28
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Sadashiv Dundiraj 34
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All 80 (PC), Suraj Narain v.
Iqbal Narain 34
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App 139 (PC), Balakushen Das v.
Ram Narayan Sahu 27

O Chinnappareddy and C. Padmanabha-
reddy, for Appellant. Messrs C. Kon-
diah, R. Subbarao and A. Krishnaiah, for
Respondents

P. JAGANMOHAN REDDY, C. J.:—Bad
Reddy, J., being confronted with having to
choose between two Full Bench decisions,
namely, Ramayya v Achamma, AIR 1944
Mad 550 (FB) and K. Kanna Reddy v K.
Venkatarreddy, AIR 1965 Andh Pra 274 (FB),
both binding on him, dealing with the com-
bined effect of Sec 49 (c) of the Registra-
tion Act and Section 91 of the Evidence
Act, referred the matter to a Division
Bench which in turn referred it to a Full
Bench.

2. The plaintiff who is the first respondent in the appeal, filed the suit for partition of the joint family property and allotment to him of a half share, the first, second and fourth defendants being entitled to the other half share. Plaintiff's father Chinna Muthyalareddy, the first defendant's father Nagi Reddy and the third defendant's husband Chinna Nagireddy were brothers and were members of a joint Hindu family. Chinna Nagireddy, the husband of the third defendant, died issueless prior to 1937 and so the third defendant is said to be entitled only to maintenance. Plaintiff's father died about 40 years before the date of the suit. First defendant's father died $1\frac{1}{2}$ years prior to the date of the suit, leaving two sons, viz., the first defendant and Chinna Mutyal Reddy who died 10 months before the suit, leaving a widow, the fourth defendant. The second defendant is the widow of first defendant's father. Defendants 5 to 7 were added as parties as they are co-owners of items 14 to 17 of the plaint schedule properties. The second defendant having died pending suit, her daughter, the eighth defendant, has been brought on record as her legal representative.

3. The plaintiff averred that he and defendants 1 to 4 have continued joint and are continuing as members of a joint family, though on account of difference, they have been living in separate houses. The plaintiff and the first defendant have each been separately enjoying portions of the joint family properties for convenience of management for the last three or four years. The plaintiff being unwilling to remain joint with other members of the family, wanted to effect partition and to get separate possession, and for that purpose issued a registered notice to the first defendant. But the first defendant in his reply notice, set up a prior partition. It is the plaintiff's case that there was no partition as set up by the first defendant, and even if there was a prior partition, it was vitiated by fraud and misrepresentation and is liable to be set aside.

4. The case of the first defendant, the appellant herein, is that the three brothers, namely, the plaintiff's father, the first defendant's father and the third defendant's husband, had another brother called Pedda Mutyalu Reddy and all the four became divided in status about 50 years ago. Pedda Mutyalu Reddy took his share and went out of the family. The other three brothers got in all about 40 acres of land in which alone the plaintiff can at best ask for partition. He further stated that early in the year 1951 the plaintiff wanted his share to be separated. Accordingly, there was a panchanama at which 30 acres of land were allotted to each of the plaintiffs, the first defendant, the husband of the fourth defendant. On 24-4-1951, the parties wanted to prepare lists to denote the properties which have fallen to the share of each in the partition

which was effected about a fortnight before. Three lists were accordingly drawn up, and each party was given one list showing the property which had fallen to their respective shares.

5. The lists given to the first defendant and the husband of the fourth defendant were produced. These documents, Exts. B-18 and B-19, are unregistered.

6. The second defendant supported her son. The eighth defendant who was brought on record as the legal representative of the deceased second defendant remained *ex parte*.

7. The third defendant contended that her husband Chinna Nagireddy was entitled to a one-third share in the joint family properties and that she is entitled to inherit that share. But if the Court comes to the conclusion that she is not entitled to a share in the plaint scheduled properties, she prayed that she may be awarded maintenance at Rs. 200 per mensem.

8. The fourth defendant contended that her husband Chinna Muthyalu Reddy died possessed of properties which fell to his share under the arrangement in 1951 and that on 17-12-1956, she executed a relinquishment deed conveying most of the properties allotted to the share of her husband to the first defendant.

9. On these pleadings, the following three main issues were originally framed, viz.:—

1. Whether the partition in 1951 between the plaintiff and defendants is true, valid and binding on the plaintiff?

2. Whether the predecessors of the plaintiff and the defendants became divided in status?

3. If so, to what share is the plaintiff entitled and in what properties?

10. The learned Subordinate Judge held on the second issue that only Pedda Muthyalureddy became divided from the family and that the other predecessors of the plaintiff and defendants 1 to 4 did not become divided in status, and continued to be members of a joint Hindu family. On issue 1, he held that the recitals in Exts. B-18 and B-19 would clearly go to show that on the date on which they were executed the properties were actually divided between the three brothers as stated therein, and consequently the oral evidence of defendants 1 and 2 that Exhibits B-18 and B-19 came into existence 2 months after the partition is clearly inadmissible. After pointing out certain discrepancies between the allegations in the written statement and the dates on which Exts. B-18 and B-19 are alleged to have been executed, he held that these unregistered partition deeds are inadmissible in evidence for proving division by metes and bounds, as contended on behalf of the defendants, and that being so, the oral evidence of D.Ws. 1 to 9 is also hit by S. 91 of the Evidence Act and is clearly inadmissible. The finding accordingly on this issue

was that the partition in 1951 between the plaintiff and the defendants is not true and binding on the plaintiff. On the additional issues 1 and 2 which relate to the claim of the third defendant for a one-third share of maintenance, he held that inasmuch as the third defendant's husband died long prior to 1937, she is entitled only to maintenance, and awarded her maintenance at Rs 50 per month for life from the date of suit and a family house for her to live in or in the alternative, directed payment of Rs 2,000 in cash towards her separate residence. On issue 3, he held that all the properties acquired by the first defendant's father after Pedda Mutyalu Reddy went out of the family, are also joint family properties which are liable to be partitioned. In the result, he decreed the plaintiff's suit for a half share in the plant scheduled properties and also in the house built by the plaintiff in the family vacant site. The first defendant and the eighth defendant were held entitled to 5/12th and 1/12th shares each.

11. The Court below directed each party to bear its own costs. Aggrieved by the judgment and decree, the first defendant has preferred the above appeal. The plaintiff has filed a memorandum of cross-objections, objecting to the disallowance of costs.

12. It may be stated here that Exts. B-18 and B-19, besides being unregistered, were also unstamped. But subsequently they were impounded and stamp duty and penalty were collected on 21-10-1961 and thereafter received in evidence in November 1961.

13. The learned Advocate for the appellant, Sri Ramachandrarreddy, contends that there is really no conflict between the two Full Bench decisions, as explained by the latter Full Bench in AIR 1965 Andh Pra 274 (FB) (supra) because in both the Full Bench cases, it was held that non-registration of a document which is required to be registered under Sec. 17 (1) (b) of the Registration Act makes the document inadmissible in evidence under Cl. (c) of Sec. 49 of the Registration Act, even though such a document can be used for a collateral purpose and that oral evidence can be adduced to establish that there was a disruption in status of the joint family. He contends that in such an event, no suit can lie for a partition of the property on the basis that it was still joint family property, when in fact it has ceased to be so after which it is held by the erstwhile members as co-owners.

14. Shri Bhujangarao, on the other hand, contends, firstly, that a partition involves the whole of the process and is one single transaction beginning with division in status and ending with the physical division of the properties by metes and bounds, and consequently, Exts. B-18 and B-19 cannot be looked into even for proving division in status, and even if the documents can be looked into for the purpose of showing that there was severance in status, they cannot be

looked into for ascertaining the nature of the possession or the change in the nature of the possession subsequent to the date of those documents, and, secondly, that oral evidence is inadmissible even to prove the factum of partition and much less to prove the terms thereof.

15. But before we consider these submissions, it is necessary at the outset to deal with the contention that Exts. B-18 and B-19 have not been proved to have been executed nor does the oral evidence adduced in the case establish that they were in fact executed by the parties as alleged by the defendants. If in fact the execution of these two documents cannot be held to be proved, then oral or other evidence in proof of severance of status and partition of the joint family property by metes and bounds will become admissible. It is, therefore, necessary to consider this question first and give a finding thereon before we proceed to the other questions raised and argued before us. (After considering the evidence in paras 16 and 17, the judgment proceeded—Ed.)

18. There is no reason to doubt the evidence of DWs 2 and 3 in any case who are the attesting witnesses. While we agree with the learned Subordinate Judge that Exhibits B-18 and B-19 were executed by the plaintiff, the first defendant and his younger brother, we cannot accept the evidence of the witnesses for further establishing that the division of the properties had, in fact, taken place two months earlier to the execution of these documents.

19. It now falls for consideration whether Exts. B-18 and B-19 require to be registered, and if so, whether they are admissible in evidence and to what extent?

20. We extract below the relevant portions of Exhibit B-18 for ascertaining the nature and effect of that document.

"Partition deed (Vibhaga Dastavozu) entered into on 24-9-1951 by Chinnappa Reddy, Nagi Reddy's sons (1) Pedda Muthyalu Reddy; (2) Chinna Muthyalu Reddy and (3) Muthyalayya's son Venkatareddy, residents of the village of Ramarajupalli.

Till now we have been continuing as members of a joint family and as we are now unwilling to continue as such, we have, as per the advice given by respectable persons, divided the movable and immovable properties belonging to us, into three equal shares and the particulars thereof are as follows:— The document then goes on to divide the agricultural lands and houses, makes adjustments in money for any unequal divisions and divides the debts. It also makes provision for maintenance for junior paternal uncle's wife and ends up in these words

"To this effect is this deed for partition entered into by us as of consent."

Ext. B-19 is an exact copy of Ext. B-18.

21. It is seen that Ext. B-18 is not a mere partition list, it is a partition deed whereby the parties have divided the

moveable and immoveable properties into 3 equal shares as stated in the document. It is also described as a partition deed in the document itself. Thus, there cannot be any doubt that the document Exhibit B-18 is a regular partition deed and is, therefore, compulsorily registrable under Sec. 17 (1) (b) of the Registration Act. The same objection also applies to the admissibility of Ext. B-19 which is in identical terms. The document which is not produced by the plaintiff is also a counterpart of Exts. B-18 and B-19 containing similar terms. All these three counterparts constitute collectively a partition deed, compulsorily registrable under Section 17 (1) (b) of the Registration Act.

22. Under Section 49 (c) of the Registration Act, no document required by S. 17, to be registered shall be received as evidence of any transaction affecting such property unless it has been registered. The proviso further says that an unregistered document affecting immovable property and required to be registered, may be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act or as evidence of any collateral transaction not required to be effected by a registered instrument. (Emphasis ours.) The question is whether Exhibits B-18 and B-19 which require to be registered but are not registered, could be received in evidence to establish severance in status of a joint Hindu family, and even apart from the document, whether oral evidence can be adduced under S. 91 of the Evidence Act, not only to establish the division in status but also the nature or factum of possession.

23. It has been held in a series of decisions that an unregistered partition deed can be looked into for the purpose of finding out whether there has been severance in status. It is unnecessary to refer to all of them in view of the categorical pronouncement of the Supreme Court in *Naini Bai v. Gita Bai*, AIR 1958 SC 706. In that case, it was argued that Exts. D-52, D-53 and D-55 were not admissible in evidence even for the limited purpose of showing separation in estate. The question, therefore, was whether those documents purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property" within the meaning of Sec. 17 (1) (b) of the Registration Act. It was held that those documents, in so far as they seek to establish a division in status, which can be established by any other evidence than by a registered instrument, could not fall within the mischief of Section 17 (1) (b) as it does not affect immovable property. At p. 713, Sinha J. (as he then was) said:

"Partition in the *Mitakshara* sense may be only a severance of the joint status of the

members of the coparcenary, that is to say, what was once a joint title has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-sharers who may not be members of a Hindu coparcenary. For partition in the former sense, it is not necessary that all the members of the joint family should agree, because it is a matter of individual volition. If a coparcener expresses his individual intention in unequivocal language to separate himself from the rest of the family, that effects a partition so far as he is concerned, from the rest of the family. By this process, what was a joint tenancy has been converted into a tenancy in common. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition and is, thus, within the mischief of Section 17 (1) (b), the material portion of which has been quoted above. But partition in the former sense of defining the shares only without specific allotments of property has no reference to immovable property. Such a transaction only affects the status of the member or the members who have separated themselves from the rest of the coparcenary. The change of status from a joint member of a coparcenary to a separated member having a defined share in the ancestral property may be effected orally or it may be brought about by a document. If the document does not evidence of any partition by metes and bounds, that is to say, the partition in the latter sense, it does not come within the purview of Section 17 (1) (b) because so long as there has been no partition in that sense, the interest of the separated member continues to extend over the whole joint property as before. Such a transaction does not purport or operate to do any of the things referred to in that section. Hence, in so far as the documents referred to above are evidence of partition only in the former sense, they are not compulsorily registrable under Section 17 and would, therefore, not come within the mischief of Section 49 which prohibits the reception into evidence of any document "affecting immovable property". It must, therefore, be held that those documents have rightly been received in evidence for that limited purpose."

24. In *Rukmabai v. Laxminarayan*, AIR 1960 SC 335, Subbarao J. (as he then was) emphasised this aspect in one sentence, when he said at page 338:

"Doubtless an unregistered document can effect separation in status."

25. As against this it is suggested that a decision of the Supreme Court in *Mst. Kirpal Kuar v. Bachan Singh*, AIR 1958 SC 199 sounds a different note; but we think not. That was not a case of partition of the joint Hindu family property, but was a case where an attempt was made to get round the inhibition contained in Section 49, by seeking to prove the nature of possession subsequent to the document. In that case, Harnam Kaur, the widow of one Ram Ditta, was in possession of the properties of Ram Ditta after his death and had them mutated in her name. She purported to make a gift of half of the lands to her daughter on the occasion of the latter's marriage. Thereafter an attempt was made to obtain a mutation of the settlement records showing the daughter as the owner of the lands, which due to the objection of the collaterals, was refused. This gave rise to civil and criminal litigation, but subsequently on 6-2-1932, a document was executed by Harnam Kaur whereby she agreed that the lands would belong to her for her life and after her death to her daughter for the latter's life and that none of them would be entitled to sell or mortgage the lands. This document was never registered. In 1939, Harnam Kaur again made a gift, this time of the entire lands to her daughter, and the latter thereafter obtained a mutation of the settlement records showing her as the owner of the lands in the place of Harnam Kaur. The suit was filed by some of the collaterals against Harnam Kaur, her daughter and another for a declaration that the gift of the lands by Harnam Kaur to her daughter and the mortgage of 1936 effected subsequently, were illegal and were not binding on the collaterals who were then reversionary heirs of Ram Ditta. In the suit, Harnam Kaur set up a plea of adverse possession. The plaintiffs contended that even though the agreement of 6-2-1932, though not admissible in evidence in the absence of registration to prove that Harnam Kaur and her daughter had only life estates in the lands, was admissible to show the nature of her possession and that it showed that her possession was not adverse. The High Court held that the agreement of 6-2-1932 was admissible in evidence to prove the nature of Harnam Kaur's possession of the lands though it was not admissible to prove title, as it was not registered, and since it showed that Harnam Kaur's possession was permissible and not adverse the plea of adverse possession fails. Sarkar, J., who spoke for the court observed at p. 203:

"In the present case Harnam Kaur had been in possession before the date of the document and to admit it in evidence to show the nature of her possession subsequent to it would be to treat it as operating to destroy the nature of the previous possession and to convert what had started as adverse possession into a permissive possession and therefore, to give effect to the

agreement contained in it which admittedly cannot be done for want of registration. To admit it in evidence for the purpose sought would really amount to getting round the statutory bar imposed by Section 49 of the Registration Act."

26. In our view there is nothing in this case which militates against the decisions in AIR 1958 SC 706 (supra) and AIR 1960 SC 335 (supra) which are authorities for the proposition that an unregistered document can effect a severance in status, and to that extent does not require to be registered under Section 17 (1) (b). If as stated by the Supreme Court, the document does not require to be registered under S. 17 (1) (b) to effect severance in status, the further question whether it is admissible under S. 49 and if so, to what extent would not arise for consideration, inasmuch as every partition would involve a severance of status though every severance in status need not involve a physical division of properties, which unlike in the case of division of status, is mainly dependent on an agreement between the coparceners.

27. If the documents can be looked into for the purpose of coming to the conclusion that there has been a severance in status and the severance of status is thereby established, the parties thereafter cease to be members of the joint family and hold the property only as co-owners. If authority were needed for this proposition, which is so well established, reference may be made to a decision of the Privy Council in *Balakrishnan Das v. Ram Narayan Sahu*, (1903) ILR 30 Cal 738 (PC). It follows therefore that after the severance of status, any suit for partition can be filed by the plaintiff only as a co-owner and not as a member of the joint Hindu family and accordingly the suit filed in the instant case by the plaintiff as a member of the joint family will not be maintainable.

28. Reliance, however is placed on the decision of the Full Bench of the Madras High Court in AIR 1944 Mad 550 (FB) (supra). In that case the facts were the respondent filed a suit for recovery from the brothers of her deceased husband's properties which she alleged had fallen to his share on partition. The properties in the suit admittedly had formed part of the estate of the joint family. The plaintiff's case was that the partition was effected on 1-3-1934 that her husband obtained possession of the properties which were allotted to him and remained in possession until his death on 11-8-1933, that after his death, his brother trespassed on the land and dispossessed her. It transpired that at the time of partition a document had been drawn up and signed by the parties, though this was denied by the defendants. While the District Munsif held that it merely comprised lists of properties which had been allotted to the respective coparceners and decreed the suit, the Subordinate Judge held that

the document did constitute a deed of partition and required registration but the plaintiff was in law entitled to prove partition by other evidence which he had done. The Full Bench held that a division by metes and bounds took place before the execution of the partition deed, and as the suit property admittedly had belonged to the joint family, a change in character must be proved. Having stated thus, the learned Chief Justice observed at page 551:

"As the agreement for partition cannot be proved the Court can only regard the property as still belonging to the joint family". The words emphasised are said to indicate that what the Full Bench laid down was that even though a division in status could be established, a suit can be filed on the basis that the property is still joint family property, i.e., that the coparcenary property still existed with rights of survivorship and other incidents of joint family. That this was not the intention of the learned Chief Justice was borne out by the sentence immediately following the one which we have extracted above made with reference to observations of Patanjali Sastri, J., which were as will be pointed out by us presently approved by that Full Bench viz.,

"Moreover, as Patanjali Sastri, J., pointed out, one co-owner cannot maintain a suit for trespass against another co-owner".

This very Full Bench has also affirmed the view taken in Subbarao v. Mahalakshamma, AIR 1930 Mad 883, by a Bench of that Court that regard can be had to the terms of an unregistered deed of partition when it is merely a question of deciding whether there has been a division of status. Leach, C. J., who delivered the judgment had earlier in a Letters Patent Appeal, approved of the judgment of Patanjali Sastri J., in Veeraraghavarao v. Gopalrao, AIR 1942 Mad 125, where the facts were almost identical with the facts considered by the Full Bench. In that case, Patanjali Sastri, J., was considering a case where out of 5 brothers, two brothers had previously separated their shares in the joint family in a partition in June 1930 and the other three brothers, viz., the appellant, the respondent and one Subbarao, continued joint till 20-5-1932, on which date the properties held by them jointly till then were divided between them under a document marked Ex. A. The learned Judge held this document to require registration as falling within Sec. 17 of the Registration Act, and being unregistered was held to be inadmissible in evidence. It was contended before him that even if the document was inadmissible, it was still open to the Court to take into consideration the subsequent conduct of the parties, and as both the Courts had found that the respondent was in exclusive possession for about two years after the partition till the appellant trespassed upon the suit property in 1934, the decision of the Court below can be supported on the ground of the respon-

dent's possessory title. But this contention, which was based on a decision of Ramesam, J., in Ahobilachariar v. Thulasi Ammal, AIR 1927 Mad 830, was rejected. Patanjali Sastri J., observed, AIR 1942 Mad 125 at p. 126:

"If the partition deed could be used as evidence of only a division in status and could not be relied on to show that the properties there in question were allotted to the share of the plaintiff's husband as held by the learned Judge the position would be that the plaintiff's husband and his brother were tenants in common of the family properties. As pointed out in AIR 1930 Mad 883, the finding that the partition deed was inadmissible to show what property fell to each co-sharer must result in the conclusion that each cosharer enjoyed an undivided share in each item of the properties. In such circumstances, even if one co-sharer happened to be in sole enjoyment of a particular piece of property he could not as it seems to me sue in ejectment if another co-owner disturbed such enjoyment. He could only bring a suit for partition of all the properties owned in common or, according to some decisions, for joint possession with his co-owners".

In this view, the learned Judge held that the appellant being unable to establish his exclusive title to the property in suit on the basis of its allotment to his share at a valid partition, is not entitled to the relief claimed by him in the suit. The appeal was accordingly allowed and the suit dismissed.

29. It may be noted that the basis upon which it was held that a suit for partition would lie was that the properties were owned in common or that the plaintiff was in joint possession with his co-owners. In other words, the partition deed which can be used in evidence for proving severance in status would have the effect of converting the joint tenancy of the coparceners into a tenancy in common of co-owners. Leach C. J., while approving the correctness of the view expressed by Patanjali Sastri, J., had used the sentence, quoted earlier, upon which an argument destructive of the very emphatic approval of the basis of Patanjali Sastri J.'s decision is sought to be based. We are however of opinion that the sentence relied upon by the 1st respondent does not have the meaning sought to be attributed to it. As stated earlier the learned Chief Justice was pointing out that the plaintiff could not claim the property as belonging to her it having fallen to her husband's share and therefore had to proceed on the footing that the property was not her husband's property. It was in that context as negating the claim of the plaintiff that the property belongs to her absolutely that the Full Bench remarked that the property still belongs to the joint family. In view of what has been stated by the Full Bench in that judgment it is difficult to hold that the learned Judges were of opinion that the

property was joint family property in spite of the fact that they had earlier held that there was a severance in status. It is for this reason as already pointed out, the learned Chief Justice followed the sentence relied upon by saying that one co-owner cannot maintain a suit against another co-owner.

30 This Full Bench decision, however, has been subsequently understood differently. In some of the decisions, it has been assumed that where division had in fact been effected by an unregistered partition deed and the parties were in possession of the respective shares allotted to them, the partition was to be ignored and the property treated as joint Hindu family property, and a suit for partition was maintainable. Thus a Division Bench of this Court in *Nookaraju v Ramamurthi*, AIR 1962 Andh Pra 413 after referring to the several decisions held that the plaintiff represented by his mother, to whom specific items of land were allotted by an unregistered partition deed, could maintain the suit for partition of the properties as if in law there was no valid partition at all.

31 In AIR 1965 Andh Pra 274 (FB) (Supra) what the Full Bench had to consider was whether oral evidence was admissible to prove the fact of partition. This Court did not consider whether the document in question itself could be looked into for the purpose of proving severance in status, but having held that oral evidence was admissible to prove the fact of partition, it concluded that in that event the properties would be held by the members of co-owners, as such the suit for partition brought on the footing that the property was joint family property was not maintainable. In the view we have taken as to the true meaning of the sentence in the decision in (AIR 1954 Mad 550) (FB), there does not appear to be any conflict between the two Full Bench decisions. Whether the conclusion that there was severance in status is arrived at by looking into the document as was done in *Ramayya's case*, AIR 1954 Mad 550 (FB) (Supra), or by considering the oral evidence as was done in *K. Kanna Reddy's case*, (AIR 1965 Andh Pra 274) (FB) (Supra), the position is that the erstwhile coparceners hold the property thereafter as co-owners and the suit on the footing that the property is still joint family property would not be maintainable. But as stated above the decision of the Full Bench in *Ramayya's case*, AIR 1954 Mad 550 (FB) (Supra) has been interpreted as holding that the property is still joint family property and in that view, a conflict may be said to arise between the two Full Bench decisions.

32. In a subsequent case, L. P. A. 44/63, D/-1-10-1965, another Bench of this Court consisting of Satyanarayana Raju C. J., and Kumarayya J., considered these two Full Bench decisions. In the case before

them also the partition lists were required to be stamped and registered. They were therefore held to be inadmissible for want of stamp and registration and the controversy turned on the question as to whether it was competent for the plaintiff to bring a suit for partition of the joint family property. On this question, Satyanarayana Raju, C. J. said "If therefore the partition list is inadmissible and no other evidence is admissible by reason of Section 91 of the Evidence Act, then the position would be as pointed out by the Full Bench in AIR 1954 Mad 550 (FB), that the property must be held to be still belonging to the joint family and the only method of getting relief is by filing a suit for partition". As the learned Chief Justice considered the facts in that case fell within the scope of the Full Bench decision in AIR 1954 Mad 550 (FB) (supra), he held that the property in the suit must be held to be the property of the joint family and the only method of getting relief is for the plaintiff to file a suit for partition, which he had done, and so no exception could be taken to the maintainability of the suit. In this view, the Bench confirmed the judgment of one of us (*Seshachalapathi J.*) who held that the suit for partition was maintainable. Before the Bench, it was argued that after the Full Bench judgment in *Kanna Reddy's case*, AIR 1965 Andh Pra 274 (FB) (Supra) the decision in *Ramayya's case*, AIR 1954 Mad 550 (FB), was no longer good law. But that contention was rejected because in its view the Full Bench of this Court distinguished the Madras Full Bench in these words:

"In the instant case no attempt is made by the defendant to show that any specified item of immovable property was allotted to him in a partition between him and the plaintiff. If he had made such a claim the circumstances of the partition document being unregistered would have been an insuperable hindrance in his way. Section 91 of the Evidence Act also could not have been successfully called in aid by him because what he seeks to prove would be a term of an unregistered partition deed which comes within the words 'other disposition of property' occurring in that section. But there does not appear to be anything in the Evidence Act or in the Registration Act to prevent him from showing that there was in fact a prior partition between him and the plaintiff, and that consequently, the present suit for a fresh partition is not competent".

33. It is somewhat surprising that an important judgment of their Lordships of the Supreme Court in AIR 1958 SC 706 (Supra), which is directly in point, does not appear to have been brought to the notice of the Bench in AIR 1962 Andh Pra 443 (Supra) or the Full Bench in *Kanna Reddy's case*, AIR 1965 Andh Pra 274 (FB) (supra), or in L. P. A. 44/63 (Andh Pra). If the

said decision was brought to the notice of the learned Judges who decided those cases we have no doubt that following that decision it would have been held that there was severance in status and the suit by a member should thereafter be filed only in his capacity as a co-owner. It may be observed that in L. P. A. 44/63 (Andh Pra), the suit was actually brought by the plaintiff in the second instance as a co-owner and though the observation of the Court that the property was joint family property, based on the decision of the Full Bench in Ramayya's case, AIR 1954 Mad 550 (FB) (Supra), may not be correct, the actual decision that the suit for partition was maintainable would be open to question.

34. In our view where a partition takes place, the terms of which are incorporated in an unregistered document, that document is inadmissible in evidence and cannot be looked for the terms of the partition. It is in fact the source of title to the property held by each of the erstwhile coparceners. That document, though unregistered, can however be looked into for the purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family who from thence onwards, hold it as co-tenants. It is now a well-established principle of Hindu law, as held by their Lordships of the Privy Council and the Supreme Court that for a severance in status, all that is required is a communication to the other members of the joint family of an unequivocal intention to separate, see for instance, Suraj Narain v. Iqbal Narain, (1912) 40 Ind App 40 (PC), Giraj Bai v. Sadashiv Dundhiraj, AIR 1916 PC 104 and Raghavamma v. Chenchamma, AIR 1964 SC 136. This communication of intention could be done orally or by a notice in writing to the other coparceners, or by other means depending upon the facts and circumstances of the case. If the intention is expressed by reducing the same to writing such a document, though unregistered, is admissible and can be looked into, as long as it is not the source of title of any of the properties which each of the erstwhile coparceners hold as a result of that partition.

35. Sri Bhujangarao, however, sought to contend though faintly, that since partition involves both division in status as well as physical division, it is one transaction and if the terms of the partition cannot be proved by an unregistered document, the division in status cannot also be established. In support of this contention, he cited United Bank of India v. Lekharam S. and Co., AIR 1965 SC 1591. In that case the defendants created an equitable mortgage to secure advances made by the plaintiff upto the limit of one lakh of rupees as overdraft to carry on their business, and that mortgage was created by the deposit of two title deeds at Calcutta on 11-8-1945. There were

letters of authority authorising one another to deposit the title deeds, and in fact one of them by his letter deposited the title deeds. This letter addressed to the Manager of the plaintiff Bank contained the schedule of documents said to have been deposited. In those circumstances, their Lordships of the Supreme Court held that the letter, upon which reliance was placed as creating a mortgage was not meant to be an integral part of the transaction between the parties and was in fact not intended to create an interest in immoveable property, and therefore did not require registration. It was pointed out that the essential requisite for creating a mortgage by deposit of title deeds was an intention to create a security and that it is a contract between the parties to create a mortgage and hence no registered instrument is required under Sec. 59 of the Transfer of Property Act as in other classes of mortgage. At page 1593, it was observed :

"But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage".

It may be noted that a mortgage by deposit of title deeds can be effected both orally or by a deed. Even the creation of the mortgage by a deed would involve the physical deposit, which is also an essential requisite for the creation of a mortgage of this nature. The deposit of title deeds forms an inextricable part of the transaction, whether it is done under an oral contract or by a deed. That is not so in so far as partition of a joint family property is concerned, where a severance in status could be apart from the physical division. While the former does not involve an agreement of the parties the latter does. The case cited, therefore does not assist the contention of the learned Advocate.

36. In the view we have taken the unregistered partition deed comprised in Exs. B-18 and B-19 and the other counter part (which was not produced) though inadmissible in evidence for want of registration, can be looked into for establishing severance in status.

37. The next question for consideration is whether oral evidence is inadmissible by reason of Sec. 91 of the Evidence Act to prove even the fact of partition. It was argued on the strength of Ramratnam v. Paramanand, AIR 1946 PC 51, that notwithstanding the rejection of the partition deed as inadmissible in evidence, other evidence may be admissible to prove the details of partition. In that case the plaintiff had sued for partition but the defence was that the parties having separated previously, the plaintiff cannot maintain the suit on the basis that the properties were still joint.

The two unstamped and unregistered memoranda which were produced were held inadmissible in evidence for any purpose. As such oral evidence was looked into for deciding the most important question whether partition had been effected before the institution of the suit in December 1939. Their Lordships found that a physical division of much of the joint property in February 1939, was established and accordingly, dismissed the suit except as regards the lands which the defendant admitted to be joint. In *Koyatti v. Imbichi Koya*, AIR 1946 Mad 534, in view of the above decision of the Privy Council, a doubt was expressed by Somayya J., as to whether the Full Bench decision in AIR 1954 Mad 550 (FB) (Supra), requires reconsideration. This doubt of Somayya J., was not shared by Patanjali Sastri J., delivering the judgment of a Division Bench in *Subbu Naidu v. Varadarajulu Naidu*, AIR 1948 Mad 26. It was pointed out by Patanjali Sastri, J., that the Full Bench was dealing with a suit for ejectment and recovery of possession of specific properties where the plaintiff could succeed only by proving her title. The partition deed whereby those properties had been allotted to her deceased husband's share having been held to be inadmissible for want of registration, she sought to prove such allotment by other evidence; in other words, she sought to prove the terms of the partition by means of other evidence. Thus the Full Bench held she could not do, having regard to Sec. 91 of the Evidence Act. Patanjali Sastri, J., pointed out.

".....the oral evidence considered by their Lordships was in support of the plea that there having been a previous partition, the suit 'in the present form', i.e., framed as one for partition did not lie. In other words, their Lordships considered the oral evidence to find out whether the fact of a partition prior to the suit was established. The discussion of the evidence also shows that they were considering it only from that point of view. As Section 91 of the Evidence Act excludes oral evidence only in proof of the terms and not of its existence as a fact of a contract, grant or other disposition of property, no reference was made to that section in the judgment nor to the Full Bench decision which related to its applicability."

The Full Bench of this Court in *K. Kanna Reddy's case*, AIR 1963 Andh Pra 274 (FB) (supra), also took the view that oral evidence is admissible to prove the factum of partition, though it was not admissible to prove the terms of the partition. It is, however, unnecessary to consider this question in the view we have taken that the partition deed itself is admissible to prove the severance in status and in view of the severance in status, the suit for partition on the footing that the property is still joint family property is not maintainable, and will have to be dismissed accordingly. Thus, how-

ever, does not preclude, if it is open to the plaintiff from filing a fresh suit for partition of the property as a co-owner nor does it prevent the widow, viz., the third defendant, from filing a suit for her maintenance.

38. The appeal is accordingly allowed and the suit is dismissed as against defendants 1 to 8. In view of the dismissal of the suit, the decree passed in favour of defendants including those who have not appealed, is also set aside. In the circumstances each party will bear his own costs here and in the Court below. The cross-objections are dismissed, but without costs. RSK/D.V.C. Appeal allowed.

AIR 1969 ANDHRA PRADESH 250

(V 56 C 77)

FULL BENCH

P. JAGANMOHAN REDDY, C.J., SESA-
CHALAPATI AND CHINNAPPA
REDDY, JJ.

Katragadda Ramayya and another, Appellants v. Kollu Nageswararao and others, Respondents.

Letters Patent Appeal No. 129 of 1963, D/-25-9-1967, against order of High Court D/-31-7-1963 in C.M.S.A. No. 114 of 1959.

(A) Civil P. C. (1908), S. 48 — Previous execution petition dismissed for default for non-payment of batta — Subsequent execution petition cannot be treated as revival of the previous one, AIR 1963 Andh Pra 1 (FB), Rel. on — (Limitation Act (1908), Art. 182).

(B) Civil P. C. (1908), Ss. 48, 40 and O. 21, R. 53 — Limitation Act (1908), S. 15 — Limitation for execution of decree — Order of attachment of the decree by another Court under O. 21, R. 53 in execution — Period during which attachment subsisted cannot be excluded for purpose of limitation under Section 15, Limitation Act — Attachment under Order 21, Rule 53, does not amount to an injunction or order of stay within meaning of Section 15, Limitation Act — Attachment does not amount to absolute stay — It is within power of holder of decree sought to be executed and holder of decree attached, to execute the decree by getting the notice withdrawn — Effect of attachment by precept under Section 46 indicated, AIR 1955 Andhra 229 and AIR 1959 SC 193 and AIR 1964 Andh Pra 1 (FB), Rel. on; AIR 1952 Mad 186 (FB), Ref. (Paras 12, 14)

(C) Civil P. C. (1908), S. 48 — Section is not controlled by S. 19 of Limitation Act (1908) — Limitation Act (1908), Ss. 19, 29(2), Arts. 181 and 182.

Sub-section (2) of Sec. 29 of the Limitation Act (as amended by Act 10 of 1922) makes only Ss. 4, 9 to 18 and 22 applicable

to special or local law only to the extent to which they are not excluded by such special or local law and the remaining sections shall not apply unless they are expressly made applicable by the special or local law.

(Paras 19, 20)

Section 48, Civil P. C. (1908), though incorporated in the general law relating to procedure, prescribed a period of limitation, and to that extent, was a special law within the meaning of S. 29 of the Limitation Act. This being so, S. 19 of the Limitation Act will not apply to it, because that is not one of the sections specified in S. 29 (2) of the Limitation Act.

(Paras 21, 22, 26)

Construction of S. 48, C.P.C. and S. 19 and Articles 181 and 182 of the Limitation Act, would show that they are independent and parallel provisions, different in their scope and object.

(Para 23)

Section 48, Civil P. C., not only prescribes a period of limitation, but also enumerates the contingencies under which that period could be extended. One cannot, therefore, look to other provisions in the Limitation Act for extending the period of limitation, unless the Legislature has specifically intended the application of any of the provisions, such as was contemplated under S. 29 (2) of the Limitation Act. If it was the intention of the Legislature to apply the provisions of Sec. 19 for extending the period of limitation under Sec. 48, Civil P. C., the Legislature had to specifically say so, because Sec. 19 provides for a fresh period of limitation from the date of the acknowledgment which, if applicable to Sec. 48, would have the effect of keeping alive the decrees for any number of periods of 12 years, as long as the decree-holder can manage to get acknowledgment from the judgment-debtor. Even if the word "prescribed" in Sec. 19 of the Limitation Act is construed to apply to periods of limitation prescribed in either special or local laws or for that matter even to a period of limitation in a general law, such as the Civil P. C., it is the period prescribed for an application for execution that is extended. Though Art. 181 refers to Sec. 48, Civil P. C., it has not specified any application under Sec. 48, Civil P. C., but only to the period of limitation under Sec. 48 by way of contrast with applications for which no period of limitation is provided elsewhere in that schedule. This clearly suggests that the period of limitation is not fixed for any application under S. 48 but refers to the period of limitation itself. All that Art. 181 does is to prescribe three years' period for all applications other than those applications for which no period of limitation is provided elsewhere in the schedule or by Sec. 48, Civil P. C. In respect of the limitation prescribed in Sec. 48, Civil P. C., Art. 182 again envisages the case of applications for execution of decrees or orders of any Civil Court not provided for by Art. 183 or by Sec. 48, Civil P. C.

Both these Articles, while referring to S. 48, are providing for contingencies other than those envisaged under Sec. 48.

(Para 24)

In either view, namely, whether on the basis that Sec. 48, Civil P. C., is a special law or on the basis that S. 19, Limitation Act and Sec. 48, Civil P. C., are independent and parallel provisions, the scope and object of which are different, Sec. 19 of the Limitation Act cannot be held to control S. 48, Civil P. C. and the acknowledgment will not give a fresh period of 12 years fixed as the outer limit for filing a fresh application for execution of a decree. Case-law discussed.

(Para 26)

(D) Civil P. C. (1908), S. 5, O. 7, R. 7 and Sec. 48 — Present execution petition asking for treating same as continuation of previous E. P. 3/46 — No prayer for revival of E. P. 26/40 which was closed by reason of A. P. (Andhra Area) Agriculturists Relief Act 4 of 1938 — In E. Ps. filed subsequently but before present E. P., no prayer made for revival of E. P. 26/40 — Oral application in present E. P., for revival of E. P. 26/40 cannot be entertained — What is not asked for or prayed cannot be granted.

(Para 8)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 SC 260 (V 51) = | |
| 1964 (1) Cri LJ 152, Kaushalya | |
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| (1964) AIR 1964 Andh Pra 1 | |
| (V 51) = (1963) 2 Andh WR 205 | |
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| 301 (FB), Pingle Venkata Rama | |
| Reddy v. Kakarla Buchanna | 8 |
| (1959) AIR 1959 SC 198 (V 46) = | |
| 1959 SCR 1287, Siraj-ul-Haq v. | |
| S. C. Board of Waqf | 13 |
| (1955) AIR 1955 Andhra 229 (V 42) = | |
| 1953 Andh WR 299, Sooraya v. | |
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| 15, 17, 20, 22 | |
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 (1902) ILR 25 Mad 220 (FB), Nara-
 yana Aiyar v Venkatarama Aiyar 17
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 7 (PC), Phoolbas Koonwur v Lalla
 Jogeshwar 15

C V Dikshatula, C N Babu and V.
 Joggya Sarma, for Appellants, B Srinivasa
 Rao, for B Manwala Choudary and Langayya
 Chaudhary, for Respondents Nos 1 to 3.

P. JAGANMOHAN REDDY C. J.: Manohar Pershad, J (as he then was) and Kumarayya, J, after hearing fully this Letters Patent Appeal, preferred against a judgment of Sharifuddin Ahmed, J., referred the case to a Full Bench because not only a question as to whether Sec. 19 of the Indian Limitation Act, 1908 (hereinafter referred to as "the Limitation Act") controls Section 48, Civil P. C., but also in addition, other questions of law and fact are involved in the case. Before we set out the questions of law upon which we are required to express an opinion, it is necessary to set out briefly the relevant facts. Katragadda Nagaratnamma, whose legal representatives are the appellants herein filed a suit, O S. No 32/35 in the District Judge's Court, Masulipatam on the foot of a promissory note dated 28-4-1932 and obtained a decree on 26-2-1937 for recovery of Rs 4484-11-2 together with interest and costs against defendants 1 and 2, Sunkara Ramakotayya and Kollu Seshayya personally and against all the defendants from their joint family assets. Defendants 1 and 2 died and their legal representatives have been brought on record, respondents 1 to 3 herein being the two sons and widow of defendant No 2 and respondents 4 to 8 being the legal representatives of the 1st defendant. An execution petition No 26 of 1940, was filed in the executing Court on 2-2-1940, for the sale of properties which were attached before judgment. That E. P. was, however, closed on 19-4-1940, as a consequence of an application filed under Section 20 of the Madras Agriculturists Relief Act (4 of 1938), for scaling down the debt, with a direction that the attachment should subsist. After the scaling down of the debt, the decree was amended on 8-4-1941.

2. It may however be stated that the decree-holder in O S 32 of 1935 viz., Katragadda Nagaratnamma filed a suit O S No 67/33 on the file of the Sub Court, Tenali against Devneni Basavayya and Devneni Raghavayya. That suit was dismissed with costs. There was an appeal against the dismissal of that suit, which also was dismissed on 9-9-1933 (vide Ex. A-8). Since the costs were not paid by Katragadda Nagaratnamma, the judgment-debtor, Devi-

nem Basavayya and Raghavayya filed E. P. 67/40 for execution and had a precept issued by the Sub Court, Tenali, to the District Judge's Court, Masulipatam, for staying the execution of the decree in O S No 32/35. This precept was issued on 5-11-1940 and was served on the Sheristadar of the District Court, Masulipatam, on 15-11-1940 (vide Ex. A-3 (a)). After this precept was issued, Nagaratnamma filed E. P. 41/42 in O S 32/35 in the District Court, Masulipatam, on 6-3-1942 (vide Ex. A-4). But this E. P. was returned on the ground that the decree in O S 32/35 was attached in O. S. 67/33, Sub Court, Tenali. The plaintiff (Nagaratnamma) stated that she had put in a petition in the attaching Court for permission to execute her decree. Notices were directed to be issued to the Sub Court, Tenali, and several adjournments were given for payment of batta and for awaiting return of those notices. Ultimately, the attaching decree-holders (Devneni Basavayya and Raghavayya) were personally served on 9-11-1942 and the case was posted for ascertainment of the result of the petition for permission said to have been filed in the Tenali Sub Court. On 12-11-1942, the District Judge noted that permission from the attaching Court was not produced and accordingly dismissed E. P. 41/42. After the dismissal of that E. P., the plaintiff filed E. P. 3/46 in O S 32/35 (Ex. A-5) on 29-10-1945. But since the decree was still under attachment by reason of the precept issued by the Sub-Court, Tenali, notices under Order 21, Rule 22 to the attaching decree-holders and the judgment-debtors in O S. 32/35 were ordered on 29-1-46. But as the batta was not paid, the E. P. was dismissed on 1-3-1946.

3. The attaching decree-holders in O S. 67/33, filed an Execution Application No 54/67 Ex. A-8 praying that the decree may be transmitted to the District Munsif's Court, Masulipatam for execution. That application was returned with certain objections and in resubmitting the same, the attaching decree-holders stated that the previous E. P., shows that the decree in O S 32/35 on the file of the District Court, Krishna was attached and the attachment was made absolute. Some other objections also were raised, but they were satisfied. Ultimately, the Court passed the following order on 19-3-1947:

"J. D. affixed as gone to Pesaralanka. Called absent. Ex parte, Transmt".

4. The plaintiff-decree-holder in O S 32/35 filed an Execution Application No 72/49 Ex. A-6 in the District Court, Krishna, praying for transmission of the decree to the Sub Court, Masulipatam for execution, upon which the Court ordered on 4-4-1949 "Transmt. Notice subject to be taken in the Sub Court, Masulipatam". After transmission of the decree to the Sub Court, Masulipatam, the plaintiff filed E. P. 38/49 (Ex. A-7) in that Court for execution. The Subordinate

Judge directed issue of notice subject to the objection regarding limitation. After notices were served, a counter was filed, in which the judgment-debtors also took the plea of of limitation. Ultimately the plaintiff's plea endorsed on 31-8-1949 that the E. P. was not pressed. The Subordinate Judge dismissed the E. P. and ordered payment of costs by the plaintiff to the judgment-debtors therein, on the same day, viz., 31-8-1949.

5. The present E. P. 83/52 was filed on 30-8-1952 in the Sub Court, Masulipatam with a prayer for sending for E. P. 3/46 filed on 29-10-1945 and that the same may be continued. It was there stated as follows:

"As this E. P. is a continuation of the E. P., dated 29-10-45, there is no limitation. Moreover, the defendants (judgment-debtors) while alienating some of their properties, made the decree-holder believe from time to time that they will pay up this decree-debt and promised to do so, and in the sale deeds executed by them, they directed the vendee to pay this decree debt out of the sale price by a specific clause and thereby made the decree-holder believe that they will discharge the decree debt in that manner, but ultimately they failed to do so and acted contrary to the terms of the sale deeds executed by them and thus deceived this decree-holder. Hence the period commencing from 1939 when they started making the alienations will have to be deducted from the prescribed period of 12 years. If it is so deducted this decree is not barred by limitation".

It is further stated:

"Apart from this, as this decree was attached in execution of the decree in O. S. No. 67/33 on the file of the Sub Court, Tenali, this decree could not be executed. The said attachment was in force till the year 1946. For that reason also the E. P., dated 29-10-1945 should be revived and continued. Hence the rule of 12 years' limitation will not apply to the execution of this decree. Moreover this decree was amended as per Act IV of 1938. The decree can be executed within 12 years from the date of the amended decree. In these circumstances, there is no limitation for the execution of this decree".

The acknowledgments referred to above are Exs. A-9 and A-10, which are sale deeds executed in favour of third parties by the judgment-debtors in O. S. 32/35. Admittedly Ex. A-9 sale deed D/-21-12-39, in which the alleged acknowledgment is contained, was one before the filing of the first E. P. 26/40 (Ex. A2) dated 19-4-1940. Ex. A-10 sale deed dated 4-1-1943 is relevant in that it contains an acknowledgment whereby judgment-debtors 2 to 4 (defendants 2 to 4 in the suit) while selling their property to Yarlagadda Raghavayya and Vemulapalli Achayya, acknowledged the decree debt in O. S. 32/35 as follows:

"Out of the sale consideration, we have received Rs. 2500 by your undertaking to pay the same on our behalf to Katragadda Rajaratnamma Garu towards the decree obtained by her against us in O. S. 32 of 35 on the file of the said District Court, Krishna".

It may be noticed that there is no acknowledgment by the 1st defendant, and as such, there is no acknowledgment binding on his legal representatives, respondents 4 to 8.

6. On the above facts, the questions raised and argued before this Full Bench are as follows:

1. Whether E. P. No. 83/52 is a fresh application or is it merely to revive an earlier E. P. viz., 3/46 which was dismissed as not pressed.

2. Whether E. P. 26/40 dated 19-4-1940 which was closed by reason of Act IV of 1938 can be revived and proceeded with.

3. Whether the period during which the precept, issued by the Subordinate Judge, Tenali on 11-11-1940 to the District Judge, Masulipatam, served on the Sheristadar on 15-11-1940, subsisted can be excluded under Section 15 of the Limitation Act for the purpose of computing the 12 years outer limit prescribed in Section 48, Code of Civil Procedure.

4. If the 5 years 2 months and 21 days, i.e., the period during which the precept subsisted, cannot be excluded by the application of Section 15 of the Limitation Act, whether by reason of acknowledgment in Ex. A-10 the decree-holder is entitled under Section 19 of the Limitation Act to a fresh period of 12 years from the date of the acknowledgment, namely, 4-1-1943; and

5. Whether the execution petition Ex. A-7 filed on 6-4-1949, which was obviously beyond the period of 12 years from the date of the decree passed on 26-2-37, regarding which, notwithstanding an objection by the judgment-debtors that it is barred by limitation, was dismissed as not pressed on 31-8-1949, operates as res judicata.

7. It is apparent from the statement of facts that what the appellants are confronted with in the execution of their decree is the bar of 12 years under Section 48 Civil P. C. Admittedly, E. P. 83/52 was filed beyond the period of 12 years from the date of the decree. Section 48 Civil P. C., is in the following terms:

"(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

(a) the date of the decree sought to be executed, or

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment

or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application, or

(b) to limit or otherwise affect the operation of Article 183 of the First Schedule to the Indian Limitation Act, 1908". This section inhibits a Court from passing any orders in execution, if a fresh application is presented after the expiration of 12 years from the date of the decree sought to be executed. There is little doubt that E P 83/52 filed on 30-8-1952 is a fresh application, and it was filed long after 12 years from the date of the decree, viz., 26-2-1937. In order to get over this objection, the appellants have raised various contentions viz., (1) that it is not a fresh application but only a revival or a continuation of the execution petition No 3/46 which was closed, (2) alternatively, if for any reason that contention is negatived and E. P. 83/52 is considered to be a fresh application, then the bar of 12 years is again sought to be got over (a) by the acknowledgment contained in the sale deed Ex. A-10, under Section 19 of the Limitation Act, (b) the inability of the decree-holder to execute her decree by reason of the attachment of that decree in execution of the decree in O. S. 67/33 on the file of the Sub Court, Tenali, and (c) that the decree was amended as per Act IV of 1938 and accordingly the 12 year period should be counted from the date of the amendment of the decree on 8-4-1941.

8. In so far as the first question is concerned, we have little doubt that E.P. 83/52, though the appellants state that it is a continuation of E. P. 3/46 filed on 29-10-1945, is a fresh application for execution within the meaning of Section 43, Civil P. C. The whole anxiety of the appellants is to save E. P. 83/52 from the bar of 12 years; as such, they have furnished several grounds for getting over that objection. It is clear that E. P. 3/46 was dismissed for non-payment of batta, on 1-3-1946 and therefore it can neither be revived nor can it be said that E. P. 83/52 is a continuation of that E. P. In *Pingle Venkata Rama Reddy v. Kakarla Buchanna*, AIR 1963 Andh Pra 1 (FB) at p. 3, Chandra Reddy, C. J., delivering the judgment of the Full Bench of this Court consisting of himself, Kumarayya and Narasimha, JJ., observed that there is a long course of authority for the position that when once an execution petition is dismissed for default of the decree-holder, it terminates the execution proceedings and a subsequent application for the same purpose

will constitute a fresh application within the meaning of Section 48, that there is no question of continuing or reviving a petition which has been finally and properly dismissed, that it is a different matter if the petition was dismissed without any fault on the part of the decree-holder or without notice to the parties, and that in such an event, the execution petition would be treated as one "pending in the eye of law" (Vide page 3) Nor can we, on the second question, entertain an oral application of the learned advocate for the appellants, Mr. Dikshitulu, that E. P. 26/40 dated 19-4-1940 which was closed by reason of Act IV of 1938 to revive and proceeded with the execution because it was followed by several fresh applications, in none of which did the decree-holder pray for revival of E. P. 26/40. In the present E. P. also, the specific prayer is only for the revival of E. P. 3/46 and consequently what is not asked for or prayed cannot be granted.

9. On the third question, the argument of the learned Advocate for the appellants is that the period during which the attachment of the decree in O. S. 32/35 was continued as a result of the precept issued by the Sub Court, Tenali, in execution of the decree in O. S. 67/33 should be deducted under Sec. 15 and if the 5 years 2 months and 21 days is deducted in computing the period of 12 years under Section 48, Civil P. C., the execution petition 83/52 would be well within time. We have already stated that the precept Ex. A-3 (a) issued by the Tenali Court in execution of the decree in O. S. 67/33 was served on the sheristadar of the District Court, Masulipatam on 15-11-1940. Both the learned Advocates appear to have assumed under some misapprehension that this precept was issued under Sec. 48, Civil P. C. On this assumption the learned Advocate for the respondents, Sri Srinivasa Rao contended that by virtue of the proviso to Section 46 Civil P. C. no attachment under that precept can continue for more than 2 months, unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for sale of such property. This was countered by Mr. Dikshitulu for the appellants who submits that due to the fault of the Court, E. P. 41/42 was not proceeded with on the ground that there was an attachment of the decree by the Tenali Court in O. S. 67/33. If the precept could only endure for two months, then the attachment would not subsist on the date when the decree-holder filed E. P. 41/42 and the Court ought to have proceeded with the execution, and that for this fault of the Court in not proceeding with the execution of the decree, the decree-holder ought not to be made to suffer. It however became apparent during

the course of the arguments, when we called for the original precept Ex. A-3 (a), that the order of attachment was issued under Order 21, Rule 53, Civil P. C. and was effected by a notice in Form 22 in Appendix E of the Civil Procedure Code. This form is in conformity with sub-rule (4) of R. 53, of Order 21, which is as below:

"Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1) the attachment shall be made, by notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent".

There is a provision for attachment of decrees in Rule 177, of the Civil Rules of Practice also, which are applicable to the mofussil Courts in addition to the Civil P. C. It provides:

"....If an order of attachment is made it may be as in Form No. 63 or 64 and the application shall be adjourned to a fixed day for the applicant to apply to the Court, or if the decree of another Court is attached, to that Court, for execution of the attached decree; and notice may, if the Court thinks fit, be given to the holder of the decree." Form 63 of the Civil Rules of Practice is to be used for issuing an order of attachment of the decree when both the decrees are of the same Court, while Form 64 is for attachment of a decree of another Court. The form that would be applicable in cases such as the one we are considering is Form No. 64.

10. Both under Form No. 22 in Appendix E of the Civil P. C. and Form No. 64 in the Civil Rules of Practice the Court whose decree is attached is requested to stay the execution of the decree until an intimation from the Court issuing the notice is received cancelling the said notice. Apart from this, in Form 22 there is a further provision that the stay of the execution of the decree is to continue only until execution of the said decree is applied for by the holder of the decree sought to be executed or by his judgment-debtor.

11. It is obvious therefore that the attachment in this case was effected under Order 21, Rule 53 and has nothing to do with a precept under Section 46, Civil P. C., under which the attachment to be effected is in Form No. 2 of Appendix E, directing the Court in which the property specified in a schedule to be annexed thereto, is situate to hold the same pending any application which may be made by the decree-holder for execution of the decree. This is to enable the decree-holder to apply for execution of the decree within 2 months from the issue

of the precept in the Court to which the precept was sent.

12. The attachment in this case, as we have already stated, is in Form 22 and therefore there is no question of the attachment ceasing to have effect after 2 months. On the other hand, it will continue till the happening of one of the contingencies specified in Form 22. While no doubt the decree-holder was unable to execute the decree as long as the attachment in O. S. 67/33 by the Tenali Sub-Court continued, it is contended by Mr. Srinivasa Rao that it is due to the fault of the decree-holder, the execution could not be proceeded with, because the decree-holder could have paid the amount to the attaching decree-holders in O. S. 67/33 and satisfied the decree or could have moved to obtain permission from the Tenali Sub Court to raise the attachment, which is what she had represented to the District Court, Masulipatam that she would do when an objection to the execution was taken by that Court. There is force in this contention, inasmuch as attachment under Order 21, Rule 53 does not amount to an absolute stay because it is within the power of both the holder of the decree sought to be executed and the holder of the decree attached, if they choose, they can execute the decree by getting the notice withdrawn. The crucial question is whether an attachment under Order 21, Rule 53 satisfies the requirement of Section 15 of the Limitation Act in order that the period during which the attachment subsisted, can be excluded for the filing of the execution application. A Full Bench of the Madras High Court in *Kandaswami Pillai v. Kannappa Chetty*, (1951) 2 Mad LJ 668 = (AIR 1952 Mad 186) (FB), no doubt held that Section 48, Civil P. C., is controlled by Section 15 of the Limitation Act. In that case, an insolvency Court ordered stay of execution of the decree on 18-8-1931 under Section 29 of the Provincial Insolvency Act, and that stay continued till 10-2-1942, when the decree-holder filed an I. A. in the said E. P. and got permission to execute the decree and put the proceeds into Court. When two E. Ps. were filed in 1942, they were dismissed in limine as having been barred by limitation under Section 48 Civil P. C. Later he filed another E. P. and claimed that it was in time as he was entitled, under Section 15 of the Limitation Act, to deduct the period from 18-8-1931 to 10-2-1942 covered by the stay order given by the insolvency Court for which he was not responsible. There is no doubt that a stay of institution of a suit or an application for execution of a decree by an injunction or order entitles the plaintiff or the decree-holder to exclude the period during which that stay or injunction continues, in computing the period of limitation prescribed for any suit or application for execution and accordingly the period during which the stay of execution of the decree continued,

would be an order contemplated by Sec 15 of the Limitation Act. We are for the present not concerned as to whether Sec. 48, Civil P C is controlled by Section 15, Limitation Act. The question is whether the attachment under Order 21, R. 53, Civil P C would amount to an injunction or order of stay within the meaning of Section 15. It has been held that it does not.

13. In *Soorayya v. Mallayya*, 1955 Andh WR 299 = (AIR 1955 Andhra 229), Subba Rao, C J and Bhimasankaram, J., held that an order made under Rule 53 of Order 21, Civil P C by the attaching Court is not a stay order contemplated by Section 15 of the Limitation Act and that the period during which the stay subsisted cannot be excluded from the period of limitation prescribed for the filing of the execution application. In that case also, the order of stay issued by the Collector to the District Munsif was in terms of Form 22 of Appendix E of the Civil P C. The learned Chief Justice after examining the several cases which were subjected to judicial scrutiny by the various High Courts, observed at pp 303, 304 (of Andh WR) = (at p. 282 of AIR).

"It will be seen from the aforesaid decisions that the scope of the provisions of Section 15 of the Limitation Act is confined only to an absolute stay granted by Courts. The principle underlying the section is apparent. If the execution of the decree was stayed, it would be an unnecessary burden on the decree-holder and an empty formality if he should be compelled to file execution applications at the risk of his decree otherwise getting barred. A decree, which has been stayed, cannot obviously be executed. So, under this section, the period covered by the stay order is allowed to be excluded from the period of limitation. That reason cannot hold good if the decree-holder or his representative is not prevented from executing the decree".

After setting out the terms of Order 21, Rule 53 it was further stated:

"But both the holder of the decree sought to be executed and the holder of the decree attached can, if they choose, execute the decree. Their right to execute the decree was not affected in any way by the stay order. In the circumstances, following the aforesaid decisions, we hold that an order made under Order 21, Rule 53, Civil Procedure Code, by the attaching Court was not a stay order contemplated by Section 15 of the Limitation Act and therefore that period could not be excluded from the period of limitation prescribed for the filing of the execution application".

The Supreme Court in *Suraj-ul-Haq v S C. Board of Waqf*, AIR 1959 SC 198, also held that for excluding the time under Section 15, it must be shown that the institution of the suit in question had been stayed by an injunction or order, in other words, the

section requires an order or an injunction which stays the institution of the suit, and that in cases falling under Section 15, therefore, the party instituting the suit would by such institution be in contempt of Court, that if an express order of injunction is produced by a party, that clearly meets the requirements of Section 15 and that even assuming that Section 15 would apply even to cases where the institution of a suit is stayed by necessary implication of the order passed or injunction issued in the previous litigation, there would be no justification for extending the application of Sec. 15 on the ground that the institution of the subsequent suit would be inconsistent with the spirit or substance of the order passed in the previous litigation. *Gajendragadkar, J* (as he then was) observed at p. 205.

"It is true that rules of limitation are to some extent arbitrary and may frequently lead to hardship, but there can be no doubt that, in construing provisions of limitation, equitable considerations are immaterial and irrelevant, and in applying them effect must be given to the strict grammatical meaning of the words used by them".

Subsequently a Full Bench of this Court consisting of Chandra Reddy, C. J., Gopalakrishnan Nair and Gopalrao Elbote, JJ in *Ramarao v. S Ranganaykalu*, AIR 1964 Andh Pra 1 (FB), held that Clause (b) of Rule 53 (1) of Order 21 does not enact an absolute rule prohibiting the execution of the decree, that it is a request to the Court which passed the decree, to stay execution until the two events contemplated by R. 53 (1) (b) happen, that that being the position, it does not in any way affect the right of the assignee decree-holder to pursue the remedy available to him under O 21, R. 16 and that it cannot be predicated that an attachment destroys the right of an assignee decree-holder to apply for execution. It was further held that the object of Order 21, Rule 53 is to prevent the holder of the attached decree from realising and taking away the fruits of the decree and to enable the attaching creditor or creditors to come to the Court which passed the decree to apply for execution and thus to safeguard the interest of the attaching creditors also and that it also appears from Rule 53 that all persons interested in the decree attached have to approach the Court which passed the decree, which means that the claims of all persons have to be adjudicated upon only by that Court.

14. Having regard to the above decisions, it is apparent that the period during which the order of attachment subsisted under Order 21, Rule 53, Civil P C., cannot be excluded under Section 15, Limitation Act.

15. On the question whether Section 48 Civil P. C is governed by Sec 19, Limitation Act, at the very outset it may be pointed out, as we have already noticed, that Ex. A-10 would amount to an acknowledgment as contemplated by Section 19. It is

during the pendency of this Civil Rule purporting to revise the pay scale of the petitioner to a slightly better grade than the grade he was drawing. We consider that such amendments in a case pending before the High Court ought not to have been resorted to by the Government without reference to this Court.

9. In the result we direct that the petitioner should be paid the 1964 revised scale of pay of Rs. 550—40—830—(EB)—45—1,100 as shown at page 104 under the publication of the Government mentioned above. The rule is thus made absolute and the petition is allowed with costs. Advocate's fee Rs. 100.

JRM/D.V.C.

Petition allowed.

AIR 1969 ASSAM AND NAGALAND 81 (V 56 C 17)

P. K. GOSWAMI, J.

Ram Lakhan Rai Choudhary, Petitioner v. Raghunath Choudhary and others, Opposite Party.

Criminal Revn. No. 144 of 1965, D/-20-8-1968.

(A) Criminal P. C. (1898), Ss. 146, sub-sections (1B) and (1D), 435, 439—Final order under Sec. 146 (1B) — Revision against not barred by Sec. 146 (1D) — AIR 1960 All 599 and AIR 1959 Cal 366, Dissented from.

A revision application under Sec. 435 or 439 against an order passed by a Magistrate under Section 146 (1B) is not barred under Section 146 (1D). AIR 1963 Pat 243 (FB), Rel. on; AIR 1960 All 599 and AIR 1959 Cal 366, Dissented from. (Para 4)

Section 146 (1D) had to be advisedly inserted in Section 146 in order to prevent multiplicity of proceedings. The Civil Court's assistance being requisitioned by the Criminal Court as provided for under the law, unless a barring provision is introduced in the way it is done under sub-section (1D) it would have been open to the party aggrieved by the decision of the Munsiff to agitate about the correctness of that decision in the hierarchy of Civil Courts either by way of appeal or by way of revision. Section 146 (1D) therefore, in terms bars appeal, review or revision of the finding of the Civil Court in specific terms. The word "Review" is also a pointer that Section 146 (1D) refers only to a review before the Civil Court as there is no review as such provided for under the Code of Criminal Procedure. (Para 4)

After the final order is passed under Section 146 (1B) by the Criminal Court, it is open to an aggrieved party in an appropriate case to invoke the revisional jurisdiction under Sections 435 and 439 of the Code of Criminal Procedure. Whether such a petition succeeds or not is a different matter,

but a Petition cannot be said to be not maintainable in law. (Para 4)

(B) Criminal P. C. (1898), S. 146 — Civil Court of competent jurisdiction — Competency as to territorial and not pecuniary jurisdiction is required — AIR 1968 Punj 301, Dissented from.

The Magistrate in a proceeding under Section 146 of the Code of Criminal Procedure has to refer the case to the Court of Civil Jurisdiction which is territorially competent to deal with the matter and in the fitness of things the lowest Court in the hierarchy of the Civil Courts should be the proper Court to which the reference should be made. AIR 1963 Pat 252 (FB) and AIR 1964 Mys 195 and AIR 1959 All 467, Rel. on; AIR 1966 SC 1888, Dist.; AIR 1968 Punj 301, Dissented from. (Para 6)

If the competent Court of Civil jurisdiction has anything to do with the pecuniary jurisdiction, the Legislature would have certainly made provisions in the section itself for giving the value of the property about which the dispute is arising. In the absence of any such provision, it is difficult to hold that the Court of competent jurisdiction mentioned in Section 146 has anything to do with the pecuniary jurisdiction. The matter which is investigated under Sec. 145 or under Section 146 Criminal Procedure Code is only about possession without reference to right to such possession or to any title to the immovable property. (Para 6)

(C) Criminal P. C. (1898), S. 146 (1) — Reference to Civil Court — Magistrate should always draw up a statement of the case — Mere omission to do so cannot, however, be fatal to the validity of the proceedings. (Para 7)

| Cases Referred: | Chronological | Paras |
|---|---------------|-------|
| (1968) AIR 1968 Punj 301 (V 55) = | | |
| 1968 Cri LJ 971, Maharaj Kumar Gajbir Singh v. Maharaj Satbir Singh | | 5 |
| (1966) AIR 1966 SC 1888 (V 53) = | | |
| 1966 Cri LJ 1514, Ram Chandra Aggarwal v. State of Uttar Pradesh | | 5 |
| (1964) AIR 1964 Mys 195 (V 51) = | | |
| 1964 (2) Cri LJ 319, Hanumappa v. Kondappa | | 5 |
| (1963) AIR 1963 Pat 243 (V 50) = | | |
| 1963 (2) Cri LJ 25 (FB), Raja Singh v. Mahendra Singh | | 3, 4 |
| (1963) AIR 1963 Pat 252 (V 50) = | | |
| 1963 (2) Cri LJ 34 (FB), Ramdutta Trivedi v. Shambhu Nath Sinha | | 6 |
| (1960) AIR 1960 All 599 (V 47) = | | |
| 1960 Cri LJ 1279, Chokhey Lal Moti Ram v. Babulal Behari Lal | | 3 |
| (1960) AIR 1960 Mad 169 (V 47) = | | |
| 1960 Cri LJ 489, Rengammal v. Rama Subbarayalu Reddiar | | 3 |
| (1959) AIR 1959 All 467 (V 46) = | | |
| 1959 Cri LJ 912, Sheonath Prasad v. City Magistrate Varanasi | | 5 |

(1959) AIR 1959 Cal 368 (V 46) =
1959 Cri LJ 700, Ram Narayan
Goswami v. Biswanath Goswami 3

K Lahiri and D N. Chaudhury, for Petitioner; B M Goswami, for Opposite Party (Nos. 1 and 2).

ORDER: This application in revision is directed against an order passed under Section 146 (1B) of the Code of Criminal Procedure by the Magistrate, First Class, Gauhati, in a Proceeding under Section 145 Criminal Procedure Code. The Petitioner earlier unsuccessfully moved the learned Sessions Judge under Section 435/438 of the Code of Criminal Procedure.

2. In this proceeding under Section 145 Criminal Procedure Code, the learned Magistrate passed an order under Sec. 146 Criminal Procedure Code, referring the matter to the Civil Court for a decision. The Sadar Munsiff in due course, after hearing the parties, held in favour of the first party's possession. On receipt of this decision from the Civil Court, the learned Magistrate passed his order declaring the first party to be in possession in conformity with the decision of the Civil Court and it is this order which is being impugned in this revision application and it is also urged by Mr. Lahiri, the learned Counsel for the Petitioner, that the reference itself was bad and that the Sadar Munsiff was not competent to entertain the reference inasmuch as the property was valued more than the pecuniary jurisdiction of that Court.

3 At the outset Mr. Lahiri had to face a preliminary objection, in that it has been urged by the Opposite Party that this application under Section 439 Criminal Procedure Code is not maintainable in view of the provisions under Sec. 146 (1D), which may be set out:

"No appeal shall lie from any finding of the Civil Court given on a reference under this section nor shall any review or revision of any such finding be allowed". Several decisions of the different High Courts have been very fairly placed by Mr. Lahiri including those against his contention. The first decision to which reference may be made is AIR 1963 Pat 243 (FB), *Raja Singh v Mahendra Singh*. This was a case under Article 227 of the Constitution and following observations are relied upon by Mr. Lahiri:

"The provisions of sub-section (1D) of Sec. 146 bar an appeal, review or revision under the Code of Civil Procedure, and even under the Code of Criminal Procedure, only so long as the Magistrate does not pass his order in conformity with the decision of the Civil Court. This provision does not impose any bar to any review or revision of the order of the Magistrate passed under sub-section (1B). The High Court can interfere with the finding of the Civil Court under Sections 435 and 439 of the Code of

Criminal Procedure after the finding is adopted by the Magistrate and the final order is passed. When a revision is preferred against the order of the Magistrate under sub-section (1B), not only the operative order of the Magistrate but the entire proceeding including the findings of the Civil Court are before the Court and, therefore, the High Court can, in appropriate cases, interfere with the findings of the Civil Court, if they are in flagrant violation of the well recognised Principles of law". The next decision is AIR 1960 Mad 169, *Rengammal v. Rama Subbarayalu Reddhar*, wherein the following observation is relied upon by Mr. Lahiri to support his contention that this application under Section 439 is maintainable. Referring to Section 146 (1D) his Lordship observed as follows:

"This restriction is but proper because the findings get merged in the decision of the Magistrate and all the grounds that can be urged against the finding can be urged against the finalised decision and if there is not such restriction there will be multiplicity of proceedings and possible conflicting revisional orders reducing the whole thing to an absurdity". The first decision which is against Mr. Lahiri is AIR 1960 All 599. This was writ application and the Court held that no such application will lie against an order passed under Section 146 Criminal Procedure Code. His Lordship Bhargava, J., as he then was, observed as follows:

"It is clear that neither there can be an appeal nor a revision nor review against order passed under Section 146 Criminal P. C., which means that the Legislature intended these orders to be final. If the Legislature had made those orders final, I do not think that the Petitioners are entitled to challenge that by means of a Writ Petition".

The next decision which is cited is AIR 1959 Cal 368, *Ram Narayan Goswami v. Biswanath Goswami*, where the following observation occurs:

"The decision of the Civil Court on a reference under Sec. 146 of the Criminal Procedure Code cannot even be challenged, sub-section (1D) of Section 146 of the Code of Criminal Procedure being a bar. The only remedy left would be to go to a Court of competent jurisdiction under sub-section (1E) of Section 146 of the Code of Criminal Procedure".

4. The point which now arises for consideration is whether an application under Section 439 Criminal Procedure Code is absolutely a bar against an order passed by a Magistrate under Section 146 (1B) in view of the provisions under Section 146 (1D). We have already seen that there are two parts in this proceeding under Section 145 Criminal Procedure Code. After the order to the first part viz., when he is unable to decide as to which of the parties at the relevant time was in possession of the sub-

ject matter of dispute or when he is of the opinion that none of the Parties was in such possession, the Magistrate in conformity with Section 146 (1) refers all the proceedings to the Civil Court after drawing up a statement of the facts of the case and informing the parties to appear before the Civil Court on a date which he himself fixes. The proceedings thereafter come back to the referring Magistrate with the decision of the Civil Court and then he next passes the final order in the case in conformity with the said decision. Section 146 (1D) had to be advisedly inserted in Section 146 in order to prevent multiplicity of proceedings. The Civil Court's assistance being requisitioned by the Criminal Court as provided for under the law, unless a barring provision is introduced in the way it is done under sub-section (1D) it would have been open to the party aggrieved by the decision of the Munsiff to agitate about the correctness of that decision in the hierarchy of Civil Courts either by way of appeal or by way of revision. Section 146 (1D), therefore, in terms bars appeal, review or revision of the finding of the Civil Court in specific terms. The word "Review" is also a pointer that Section 146 (1D) refers only to a review before the Civil Court as there is no review as such provided for under the Code of Criminal Procedure. Section 146 (1D) therefore, cannot be invoked to be a bar against a revision application under Section 435 or 439 Criminal Procedure Code. After the final order is passed under Sec. 146 (1B) by the Criminal Court, it is open to an aggrieved party in an appropriate case to invoke the revisional jurisdiction under Sections 435 and 439 of the Code of Criminal Procedure. Whether such a petition succeeds or not is a different matter, but a petition cannot be said to be not maintainable in law. With respect, I agree with the observations of the Patna High Court in AIR 1963 Pat 243 (FB) referred to above. The objection as to the maintainability of this application is therefore overruled.

5. Mr. Lahiri's first submission regarding the invalidity of the impugned order is that the Sadar Munsiff is not the Court of competent jurisdiction to which this reference was made under Section 146 (1) of the Code of Criminal Procedure. Here also, he has fairly placed the decisions in his favour as well as those against his contention. Excepting the decision in AIR 1968 Punj 301, Maharaj Kumar Gajbir Singh v. Maharaja Satbir Singh, which is in his favour, no other authority could be pointed out. He particularly relies on the following observations of the learned Judge:

"Competent jurisdiction' in that provision refers, in my opinion to the competency as to the territorial jurisdiction as well as pecuniary jurisdiction".

This was, however, a case under Sec. 24 of the Code of Civil Procedure and as such

this observation appearing in the judgment is not of much assistance to the learned Counsel. On the other hand, the decision in AIR 1964 Mys 195, Hanumappa v. Kondappa, is directly against the proposition advanced. The learned Judge in that case observed as follows:

"The proceedings before the Civil Court under Section 146 are not civil proceedings. The competency referred to under Sec. 146 (1) is with reference to territorial jurisdiction and the conception of Pecuniary Jurisdiction is foreign to the Criminal Procedure Code".

To the similar effect is the decision of the Allahabad High Court in AIR 1959 All 467, Sheonath Prasad v. City Magistrate Varanasi, where the following observation appears:

"It is impossible to determine the Pecuniary value of the matter which has got to be decided by the Civil Court under Section 146, Criminal Procedure Code. The Civil Court has not to decide as to which party is the owner of the property in dispute or has a right to possession; it has simply to decide as to any, and if so which, of the parties, irrespective of merits, was in possession of the property in dispute at a particular time. A matter like this is incapable of Pecuniary valuation. If there are more than one Court having territorial jurisdiction it is open to a Magistrate to send the reference to any one of those Courts".

The next decision cited by Mr. Lahiri is AIR 1966 SC 1888, Ram Chandra Aggarwal v. State of Uttar Pradesh. This was a case relating to a proceeding under Section 24 of the Code of Civil Procedure and the following observations of their Lordships will make it clear:

"The decisions of the Privy Council and one decision of this Court which we have earlier quoted would warrant the application of the provisions of the Code of Civil Procedure generally to a proceeding before a civil Court arising out of a reference to it by a Magistrate under Section 146 (1) of the Code of Criminal Procedure. The expression "proceeding" used in this section is not a term of art which has acquired a definite meaning".

This decision is, therefore, not of much assistance to the particular point which arises for consideration in this case.

6. The object of the proceedings under Section 145 Criminal Procedure Code is of a limited character. Chapter XII in which this section appears, relates to disputes as to immovable property. The object of Section 145, Criminal Procedure Code is to prevent likelihood of breach of the peace which exists concerning immovable property. With that end in view, a summary procedure has been laid down, to enable the Magistrate to conclude the enquiry if possible within two months from the date of appearance of the parties before him. At

this stage even the Magistrate in most cases may be able to pass his order after perusal of the documents and affidavits and hearing the parties unless he thinks that it is fit to summon and examine persons whose affidavits have been put in. All this indicates an emphasis on the disposal of the proceeding at an early date. When, however, he is to act under Section 146 Criminal Procedure Code and to refer the matter to the Civil Court, his only limitation is that he has to refer it to a competent Court of Civil Jurisdiction. The expression "competent Court" is not defined in the Code. That being the position, as the Magistrate, has himself to fix a date for appearance of the parties in the Civil Court, he is necessarily required to name the Court where the parties have got to appear on the date fixed by him. The question of pecuniary jurisdiction arises only when the Civil Court has to deal with a suit. Section 6 of the Code of Civil Procedure is in the following terms:

"6 Pecuniary jurisdiction.— Save in so far as it is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits if any of its ordinary jurisdiction".
Section 141 of the Code of Civil Procedure may also be read:

"41. Miscellaneous Proceeding. — The Procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction".

It will be seen that Section 6 refers to a suit and Section 141 itself uses the expression "as far as applicable". Mr. Lahiri relying on these two sections, contends that since the value of the property is more than the pecuniary jurisdiction of the Sadar Munsiff, the said Court had no jurisdiction to deal with the matter. It is, however, not shown that in an application under Sec 145 Criminal Procedure Code, the value of the property has got to be given. The Magistrate is only required to draw up proceedings under Section 145 in respect of immovable property and there is no reference to the value of the property in that section. Even if therefore it was necessary to find out the pecuniary value of this property, the learned Magistrate was unable to come to any conclusion regarding the same and such an enquiry is also not permissible under the provisions of Section 145 Criminal Procedure Code. If the competent Court of Civil jurisdiction has anything to do with the pecuniary jurisdiction, the Legislature would have certainly made provisions in the section itself for giving the value of the property about which the dispute is arising. In the absence of any such provision, it is difficult to hold that the Court of competent jurisdiction mentioned in Section 146 has anything to do with the pecuniary jurisdiction. The matter which is investigated under

Section 145 or under Section 146 Criminal Procedure Code is only about possession without reference to right to such possession or to any title to the immovable property. That being the position, the narrow point which is the subject matter of the controversy in a proceeding under Section 145 or under Section 146 Criminal Procedure Code does not permit of any differentiation on the basis of valuation of the property. I am, therefore, clearly of opinion that the Magistrate in a proceeding under S. 145 (S 146) of the Code of Criminal Procedure has to refer the case to the Court of Civil jurisdiction which is territorially competent to deal with the matter and in the fitness of things the lowest Court in the hierarchy of the Civil Courts should be the proper Court to which the reference should be made. Mr. Goswami, the learned Counsel for the opposite party, has also drawn my attention to a decision in the case of Ramdutta Trivedi v. Shambhu Nath Sinha, reported in AIR 1963 Pat 252 (FB), and the view I have taken receives support in that case. The contention of Mr. Lahiri is, therefore, devoid of any substance.

7. Mr. Lahiri then submits that the reference to the Civil Court was itself bad as the learned Magistrate did not draw up a statement of the case. I do not think that this objection has any substance. It is clear from the referring order that the Magistrate was unable to decide as to which of the party was in possession of the property and, as such, he was competent to refer the matter to the Civil Court which he did by writing a brief order as well as forwarding all the records of the case to the Civil Court and the Civil Court thereafter has applied its mind, examined witnesses, heard parties and given its decision. It is not shown how the petitioner is prejudiced by the learned Magistrate having not drawn up a statement of the present case. Although, it is true that under Section 146 Criminal Procedure Code, the learned Magistrate has to draw up a statement of the case, it is always proper that he should do so, but a mere omission to do that cannot per se be fatal to the validity of the proceedings.

8. In the result, the application fails and is accordingly dismissed.
GWM/D.V.C. Application dismissed.

AIR 1969 ASSAM AND NAGALAND 84
(V 56 C 18)

P. K. GOSWAMI AND
M. C. PATHAK, JJ.

The Union of India, Appellant v. Kuthari Trading Co., Ltd., Respondents.

First Appeal No 36 of 1964, D/-20-9-1968, from decision of Sub-J., Lower Assam Districts, Tezpur, D/-17-8-1963.

LL/AM/F962/68

(A) Civil P. C. (1908), S. 80 — Scope — Notice under — Identity of person issuing notice and person bringing suit — Held there was compliance with S. 80 — Railways Act (1890), S. 77 (old).

Section 80 Civil P. C. is express, explicit and mandatory and admits of no implications or exceptions. Though the terms of this section are to be strictly complied with, that does not mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from commonsense. A little commonsense must be imported in the notice under Section 80. But the question of using a little commonsense arises when the Court deals with the question of cause of action and reliefs, but there is little scope for the use of commonsense where the Court is to consider the question of the name of the plaintiff. AIR 1961 SC 1449, Foll. (Para 7)

Where a composite notice under Sec. 80, Civil P. C. and S. 77, Railways Act was issued by K. Mills, of which M/s. Kuthari Trading Co., were the proprietors but the suit was filed by M/s. Kuthari Trading Co., who were the owners of K. Mills.

Held, there was identity of the person who had issued the notice with the person who had brought the suit and as such the notice fulfilled the requirements of notice under S. 80, Civil P. C. (Para 8)

(B) Civil P. C. (1908), Ss. 96 and 80 — Question of validity and propriety of notice under Sec. 80 specifically raised in trial Court — Issue not pressed at time of hearing by lawyer of defendant — Defendant held not barred from raising question of validity of notice in first appeal. (Para 9)

(C) Railways Act (1890), S. 72 (Old) — Non-delivery of goods — Claim for damages Measure of — Onus.

In a suit brought against a common carrier for the loss, damages or non-delivery of goods entrusted to him for carrying it is not necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. The burden of proof of absence of negligence is thrown upon the common carrier, on the theory that the loss or damage to the goods is prima facie due to negligence of the common carrier. (Para 11)

Therefore where the goods in question were booked in the railway to the consignee and the goods had not been delivered to the consignee and the defendant railway had not adduced any evidence to prove that there was no negligence on his part, the defendant must be held liable to compensate the plaintiffs for the loss sustained by them due to non-delivery of the goods in question. (Para 9)

(D) Railways Act (1890), Ss. 72 (old) and 77 (old) — Claim for non-delivery of goods

— Quantum of damages — Determination of.

In cases of non-delivery of goods to consignee by the railway, the measure of damages is the value of the goods at the place of destination in the condition in which the carrier undertook to deliver them at the time when they should have been delivered less the proper charges of transportation and delivery, if these have not been paid by the consignor. The natural and probable consequence of the failure of the carrier to deliver the goods at the time and place they should have been delivered is prima facie a loss to the owner amounting to the value of the goods at that point. AIR 1921 Cal 315 and AIR 1965 Pat 408, Rel. on. (Para 12)

But the plaintiffs would not be entitled to get more than what they claimed in their notices under Sec. 80, Civil P. C. and Section 77, Railways Act. (Para 15)

(E) Railways Act (1890), Sec. 72 (Old) — Suit for non-delivery of consignment of coal — Claim for special damages due to closure of Mills for want of supply of coal — No definite data before Court to show how many days Mills were stopped, what was exact loss suffered and whether there was any stock of coal or not — Nothing to show that railways at time of accepting consignments knew that goods in question would be used for running the Mills — In absence of any claim in notices issued by consignee for such special damages due to stoppage of running Mills and lack of reliable evidence on the point, plaintiffs could not claim any special damages — Contract Act (1872), S. 72. (Para 17)

Cases Referred: Chronological Paras

(1965) AIR 1965 Pat 408 (V 52), 12

Bala Prasad v. Union of India

(1961) AIR 1961 SC 1449 (V 48) =

(1962) 1 SCR 560, S. N. Dutt v.

Union of India 7.

(1960) AIR 1960 SC 1309 (V 47), 7.

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Vadilal v. Govt. of Bombay 7.

(1927) AIR 1927 PC 176 (V 14) =

54 Ind App 338, Bhagchand

Dagdusa v. Secy. of State 7.

(1921) AIR 1921 Cal 315 (V 8) =

ILR 47 Cal 1027, Indian General

Navigation and Railway Co., Ltd. 12, 17

v. Eastern Assam Co., Ltd.

(1844) 153 ER 149 = 13 M and W

360, Jones v. Nicholls 7.

R. K. Goswami, for Appellant; J. P. Bhattacharjee and S. N. Medhi, for Respondents.

PATHAK, J.: The defendant in M. S. No. 15/57 has preferred this appeal against the judgment and decree passed by the

learned Subordinate Judge, L. A. D. Nowgong-camp at Tezpur, by which he decreed the plaintiffs-respondent's suit for Rs 7410, made up of Rs 6238 being the market value of the goods not delivered at the rate of Rs 2-12-0 per maund, Rs 219 as freight claimed for one consignment in which goods of one wagon were delivered out of two wagons and Rs. 953 as special damages for the loss suffered due to stoppage of the plaintiffs' mill for want of coal which was caused due to the non-delivery of the coal by the defendant.

2. The plaintiffs' case is that they are the owners of Kalyan Rice and Oil Mills at Tezpur. For running the mill, the plaintiffs indented on various dates Assam coal from Margherita, Ledo and Nagrimora Railway stations under the North-Eastern Railway, as it was then called, under the invoice and Railway Receipts as follows:

1. One wagon No 15285 of 11 tons (300 maunds) under Invoice No. 9, R/R No 485322 dated 7th August 1956.

2. One wagon No. 15696 of 11 tons (300 maunds) under Invoice No 10, R/R No. 485340 dated 16th August 1956.

3. One wagon No 80445 of 14 tons (381 maunds) under Invoice No. 2, R/R No. 485340 dated 30th October 1956.

4. One wagon No. 15313 of 300 maunds under Invoice No 5, R/R No. 081584 dated 18th March 1957.

5. One wagon No. 22599 of 18 tons (490 maunds) under Invoice No. 3, R/R No. 020020 dated 30th November 1956.

6. Two wagons Nos. 16497 and 177216 of 12 tons and 18½ tons respectively despatched under Invoice No. 30 R/R No 1852 dated 13th March 1957.

The total value of the coal in consignments Nos 1 and 2 above is Rs. 1650 at Tezpur market rate at the relevant time. The market values of coal in consignments in items Nos. 3, 4, 5 and 6 are Rs 1048, Rs 825, Rs 1348 and Rs 1367 respectively. The plaintiffs paid the price of the goods to the consignee coal company in advance and thus they are the owners thereof. The goods of the above consignments were not delivered to the plaintiffs-consignees and therefore they served notices under Section 77 of the Indian Railways Act and under Section 80, Civil P. C. on the defendant. Accordingly they brought the suit for recovery of Rupees 6238 as the market value of the goods not delivered and Rs 1905 for loss suffered due to stoppage of the mill for want of coal and Rs. 219 as the freight realised for the goods

undelivered of Invoice No. 30 in Item 6 above.

3. The defendant raised various contentions in the written statement, such as, non-service of valid and proper statutory notices, that there was no cause of action for the suit, that the plaintiffs have no right to sue, that the suit was barred by limitation, that the claim was highly excessive and that the plaintiffs were not entitled to remote damages and so on.

4. A number of issues were framed in the case. The plaintiffs examined four witnesses and defendants examined one witness. Both the parties filed certain documents which were marked as exhibits in the case. The learned Subordinate Judge decreed the suit for Rs. 7410 as stated above.

5. Mr. R. K. Goswami, the learned counsel appearing for the defendant-appellant, has raised mainly two points which require consideration in this appeal. His first contention is that no legally valid notice under Section 80, Civil P. C., was served in the instant case and as such the suit is not maintainable. On this point, he has drawn our attention to Ext. 7 and Ext. 10 which are the two composite notices under Section 77, Indian Railways Act and under Section 80, Civil P. C. Ext. 7 is a composite notice in respect of (i) invoice No 9, R/R No 485322 under wagon No 15285 NEKC dated 7th August 1956, and (ii) invoice No. 10, R/R 485340 under wagon No 15696 NEKC dated 16th August 1956. It may be observed that in this notice the value of the goods has been stated to be Rs 571-10-0 and the amount of loss sustained by the plaintiffs has been estimated at Rs 150 and the total claim as value and compensation for the goods of the above two consignments not delivered is Rupees 721-10-0 and this notice is dated 29th September, 1956 addressed to the Regional Superintendent, N. E. Railway, Pandu (Assam) and it was given by the Attorney of Messrs. Kalyan Rice and Oil Mills, Proprietor: Messrs. Kuthari Trading Co.

6. Ext. 10 is a composite notice given on behalf of Kalyan Rice and Oil Mills, Proprietor: Kuthari Trading Co (Private) Ltd., and addressed to the General Manager, North Eastern Railway, Gorokhpur. In this notice, the plaintiffs have mentioned all the above-mentioned six consignments, the goods of which were not delivered, including the wagons mentioned in Ext. 7. In Ext. 10, the plaintiffs have claimed as follows:

| | Market value Rs. | Special damages Rs. | Freight Rs. |
|--|------------------------|---------------------------|----------------|
| For the goods of wagons Nos. 15285 and 15696 | 1650 | 500 | |
| " 80445 | 1048 | 200 | |
| " 22599 | 1848 | 425 | |
| " 15313 | 825 | 250 | |
| " 177216 | 1367 | 480 | 219 |

The total claim of the plaintiff in the notice is Rs. 8362 (Rs. 6238 as the market value of the goods, Rs. 1905 as special damages and Rs. 219 as refund for freight paid), which is the claim in the suit also.

7. Mr. R. K. Goswami's objection to these notices is that Ext. 7 is not addressed to the proper authorities as required under Section 80, Civil P. C. In Ext. 10 it has been stated that M/s. Kalyan Rice and Oil Mills will sue as the plaintiffs or the complainants. But the suit has been filed by M/s. Kuthari Trading Co. (Private) Ltd., and as such neither Ext. 7 nor Ext. 10 fulfils the requirements of Section 80, Civil P. C., and therefore the suit must be dismissed. In this connection, he has relied on the decision of S. N. Dutt v. Union of India, AIR 1961 SC 1449. In the said decision, the Supreme Court has considered its decision reported in Dhian Singh Sobha Singh v. Union of India, AIR 1958 SC 274, wherein at page 281, the following observations occur:

"The Privy Council no doubt laid down in 54 Ind App 338 = AIR 1927 PC 176, that the terms of this section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from commonsense. As was stated by Pollock C.B. in Jones v. Micholls, ((1844) 153 ER 149, at p. 150). 'We must import a little commonsense into notices of the kind'. Beaumont, C. J., also observed in Chandulal Vadilal v. Govt. of Bombay, ILR (1943) Bom 128 = AIR 1943 Bom 138: 'One must construe Sec. 80 with some regard to commonsense and to the object with which it appears to have been passed'".

The Supreme Court also in AIR 1961 SC 1449, considered its decision reported in State of Madras v. C. P. Agencies, AIR 1960 SC 1309. After considering the above decisions, the Supreme Court held at p. 1451 as follows:

"It must however be remembered that the defect with which this Court was dealing in these cases was in the matter of cause of action and relief, and this Court pointed out that it was necessary to use a little commonsense in such circumstances. Where the matter (for example) concerns the relief or the cause of action, it may be necessary to use commonsense to find out whether Section 80 has been complied with. But where it is a question of the name of the plaintiff, there is in our opinion little scope for the use of commonsense, for either the name of the person suing is there in the notice or it is not. No amount of commonsense will put the name of the plaintiff there, if it is not there".

The law laid down by the Supreme Court may be summarised as follows: Section 80, Civil P. C., is express, explicit and mandatory and admits of no implications or exceptions. Section 80 peremptorily requires that

no suit shall be filed against the Government or a public officer in respect of anything done in his official capacity until after the expiry of two months from the service of a notice in the manner therein prescribed stating the cause of action, the name, description and place of residence of the plaintiff and the reliefs which he claims. Though the terms of this section are to be strictly complied with, that does not mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from common sense. A little common sense must be imported in the notice under Section 80. But the question of using a little common sense arises when the Court deals with the question of cause of action and reliefs, but there is little scope for the use of common sense where the Court is to consider the question of the name of the plaintiff.

8. In the instant case the notice Ext. 10 was issued by the Kalyan Rice and Oil Mills, P. O. Tezpur, Assam, Pro: Kuthari Trading Co. (Private) Ltd., and in the plaint the description of the plaintiff is in these terms:

"Messrs. Kuthari Trading Company Limited carrying on business with their Registered Office at 4 Raja Woodmunt Street, Calcutta I, owners of the Kalyan Rice and Oil Mills at Tezpur, which is carrying on business at Tezpur, Mouza Mohabbairab in District Darrang in Assam".

So it appears that the notice under Sec. 80, Civil P. C., was issued by M/s. Kalyan Rice and Oil Mills, P. O. Tezpur, Assam, of which Messrs. Kuthari Trading Co. (Private) Ltd., are the Proprietors, and the suit has been filed by Messrs. Kuthari Trading Co. (Private) Ltd., who are the owners of M/s. Kalyan Rice and Oil Mills, Tezpur. On a perusal of the notice and the plaint, we are of the opinion that there is identity of the person who has issued the notice with the person who has brought the suit. In the circumstances, we hold that Ext. 10 fulfils the requirements of the notice under Section 80, Civil P. C., in the instant case.

9. Mr. J. P. Bhattacharjee, the learned counsel appearing for the respondents, has raised a preliminary point that the appellant in this appeal is debarred from raising the question of the legality of the notice under Section 80, Civil P. C., inasmuch as issue No. 4 which deals with the validity of the notice under Section 77, Indian Railways Act, and under Section 80, Civil P. C., was not pressed before the learned Subordinate Judge. In paragraph 5 of the written statement, the defendant challenged the validity and propriety of the notice under Sec. 80, Civil P. C., and accordingly an issue was framed to the following effect:

"Whether any valid notices under Sec. 77, Indian Railways Act and under Section 80, Civil Procedure Code, were served? If not, whether the suit is bad and not maintainable?"

The defendant specifically raised the question of the validity and propriety of the notice under Section 80, Civil P. C., and because the issue was not pressed at the time of hearing by the lawyer of the defendant that would not, in our opinion, debar the defendant from raising the question of the validity of the notice in a First Appeal. Considering all the facts and circumstances of the case, we hold that in this appeal the defendant is not debarred from raising the question of the validity of the notice under Section 80, Civil P. C., but we have already held that the notice in question is not bad in law.

10. The next point urged by Mr. R. K. Goswami, the learned counsel for the appellant, is that if the market value of the goods at the relevant time and place is to be accepted as the measure of compensation in this case, then the railway freight for carrying the goods to the destination station, if not already paid, and the handling charges necessary for carrying the goods from the station to the market must be deducted from the market value because it is admitted that the market value is determined by taking into consideration the cost price, the railway freight and the handling and transport charges Mr. Goswami has referred to the definition of damages in paragraph 383 at page 216, Halsbury's Laws of England, Third Edition, Volume II, which reads as follows:

"Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or a tort, or, put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him".

In paragraph 404 of the same volume, the following passage occurs:

"Damages normally limited to actual loss. The measure of damages will normally permit the recovery of damages in respect of damage, injury or loss which arises naturally and directly from the act or omission complained of, but this is to be regarded as establishing a maximum. Where damages are capable of computation in money, and the damage actually suffered is less than such as might naturally have arisen from the act or omission complained of, only such damages as have actually accrued can be awarded."

In the light of the above, Mr. Goswami has argued that a person is entitled for non-delivery of goods only to such damages as have actually accrued to him.

11. It is proved and admitted in the instant case that the goods in question were booked in the railway to the consignee and the goods have not been delivered to the consignee. In a suit brought against a common carrier for the loss, damages or non-

delivery of goods entrusted to him for carrying it is not necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. The burden of proof of absence of negligence is thrown upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* due to negligence of the common carrier. In the instant case, the defendant has not adduced any evidence to prove that there was no negligence on his part. In the circumstances, the defendant must be held liable to compensate the plaintiffs for the loss sustained by them due to non-delivery of the goods in question.

12. The next point to be considered is how to determine the quantum of compensation where goods are lost in transit and not delivered to the consignee by the Railways or the common carrier. The quantum of damages in such cases may be estimated by two methods (i) by taking the cost price of the goods and adding a reasonable amount to it by way of loss of profit suffered for non-receipt of the goods, (ii) by taking the market value of the goods at the time and place of destination. When the damages are assessed according to the market value, the amount which would have caused to get them to the place of delivery must be deducted. In other words, the measure of damages is the value of the goods at the place of destination in the condition in which the carrier undertook to deliver them at the time when they should have been delivered less the proper charges of transportation and delivery, if these have not been paid by the consignor. The natural and probable consequence of the failure of the carrier to deliver the goods at the time and place they should have been delivered is *prima facie* a loss to the owner amounting to the value of the goods at that point. These views are supported by the decisions in *Indian General Navigation and Railway Co Ltd. v. Eastern Assam Co Ltd.*, reported in AIR 1921 Cal 315 and *Bala Prasad v. Union of India*, reported in AIR 1965 Pat 408.

13. It has been admitted by P.W. 1, Jethmal Bengani, attorney of Kalyan Rice and Oil Mills, that the market price of goods are fixed by calculating the actual cost price, the commission, freight, handling charges, shortage plus a reasonable profit. This statement is in consonance with the common practice and we accept the same.

14. On a consideration of the law and the judicial pronouncements on the point, it is clear that in the instant case the plaintiffs are entitled to get the market value of the coal at the relevant time and at Tezpur less the freight charges and handling charges. The evidence on the point of market value at the relevant time is that of P.W. 3 only who stated that in August 1956 to December 1956 and in January 1957 to April 1957

the selling rate of Assam Coal was Rs. 2-11-6 per maund at Tezpur. There is no evidence on the side of the defendant contradicting it and as such we hold that the market price of coal at the relevant time at Tezpur was Rs. 2-11-6 per maund and the plaintiffs will be entitled to the compensation at this rate. There is no evidence on either side as to what would be the approximate handling charges for unloading and carrying the coal from the station to the market. In the circumstances, no handling charges can be deducted from the market price in the present case. On the facts and circumstances of the case, we hold that the plaintiffs are entitled to get damages at the rate of Rs. 2-11-6 per maund for the goods not delivered less the railway freight that would have to be paid for carrying the goods to the place of destination.

15. From Ext. 7, it appears that for the goods booked under invoice No. 9, R/R No. 485322 under wagon No. 15285 NEKC and invoice No. 10, R/R No. 485340 under wagon No. 15696 NEKC dated 7th August 1956 and 16th August 1956, respectively, the plaintiffs claimed the value of the goods at Rs. 571-10-0 and the loss or damage for non-delivery of the goods was estimated at Rs. 150 and the plaintiffs' total claim for value and compensation was Rs. 721-10-0. For the goods of these two wagons, therefore, the plaintiffs are not legally entitled to get more than what they claimed in their notice, Ext. 7 and for the non-delivery of the goods of these two wagons, we allow Rs. 721-10-0 as total compensation to the plaintiffs.

16. Regarding the remaining wagons, the total quantity of goods not delivered is 1,667.8 maunds and at the rate of Rs. 2-11-6 per maund, the market value comes to Rs. 4,535. The total freight required to be paid for these wagons is Rs. 736-7-0. So the plaintiffs are entitled to get Rs. 3,798-9-0 only for the goods of these wagons and for the goods of all the six wagons the plaintiffs are entitled to Rs. 4,520-3-0.

17. Next we are to consider the question of special damages. The plaintiffs claimed special damages of Rs. 1,905 which they alleged they suffered due to closure of the mills for want of supply of coal. On a consideration of the evidence on record, the learned Subordinate Judge has found that there is no definite data before the Court from the plaintiffs' side to show how many days the mills were stopped, what was the exact loss suffered and whether there was any stock of coal or not. We have considered the evidence on record and we agree with the said finding of the learned Subordinate Judge. In AIR 1921 Cal 315, the Calcutta High Court held that "the aggravations of the normal consequences are not to be taken into account in the assessment of damages, except so far as the circumstances to which they are due were the ordi-

nary probable circumstances which might before hand be expected to attend or follow upon the breach of obligation. This is subject to the exception that if the party, who has broken the contract, entered into it, in contemplation of special circumstances which would affect the consequences of a breach and accepted those circumstances as condition under which the contract was to be performed, he is liable for any special loss which may have resulted. The knowledge must be brought home, to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. A person cannot consequently be allowed compensation for losses which might have been reasonably avoided."

We are in respectful agreement with the principle laid down in this decision. In the instant case there is nothing in evidence to show that the Railways at the time of accepting the consignments knew that the goods in question would be used for running the plaintiffs' mills after they arrived at Tezpur and that they entered into the contract of carrying the goods in contemplation of such special circumstances affecting the consequences of the breach of the contract, if and when caused, and that they accepted those circumstances as a condition under which they contracted to perform the contract. On the other hand, in Ext. 7, there is no claim for such special damages due to stoppage of running of the mills and there is no reliable evidence on the point also, as we have already observed. In the circumstances, we hold that the plaintiffs are not entitled to any special damages in the instant case and the finding of the learned Subordinate Judge decreeing the special damages of Rs. 953 is set aside.

18. The defendant-Railway realised Rupees 803-7-0 as freight for goods under wagons Nos. 16479 and 177216. But the goods of wagon No. 16479 only was delivered and on this ground the plaintiffs have claimed refund of Rs. 219, which was realised for the freight of goods which were not delivered. In assessing the market value of the goods of the four wagons, we have not deducted the sum of Rs. 219 as freight as it was already paid; hence the plaintiffs are not entitled to further refund of this sum. In the circumstances, the plaintiffs are entitled to a decree for Rs. 4,520-3-0 or Rs. 4,520-19 p. (rupees four thousand five hundred twenty and paise nineteen only) against the defendant. The amount of Rs. 7,410 decreed by the learned Subordinate Judge is reduced to Rs. 4,520-19 p.

19. In the result, the judgment and decrees of the learned Subordinate Judge are modified to the extent indicated above. The

appeal is partly allowed with proportionate costs

20 P. K. GOSWAMI, J.: I agree.
LGC/D.V.C. Appeal partly allowed.

AIR 1969 ASSAM AND NAGALAND 90
(V 56 C 19)

P. K. GOSWAMI, J.

Boloram Baruati, Petitioner v. Mt. Surjya Baruati, Opposite Party.

Criminal Revn. No 130 of 1967, D/-20-8-1968, against judgment of S. J., Lakhimpur, D/-19-10-1967.

Penal Code (1860), S. 494 — Scope — Prosecution under S. 494 — Parties, Ahoms following "Saklong" form of marriage — Material ceremonies of second marriage, not proved — Mere admission of second marriage by accused, not enough — Accused held, not liable under S. 494 — (Hindu Marriage Act (1955), S. 17) — (Evidence Act (1872), Ss. 18, 3) — (Criminal P. C. (1893), S. 367).

The offence, which is known in English law as bigamy, is directed against the second marriage. The second marriage must be a legally valid marriage so as to come within the mischief of Sec. 494. In order to appreciate whether the second marriage is void under the law, where the parties are Hindus, Court has to refer to Sec. 17 of the Hindu Marriage Act. Section 17 pointedly refers to solemnization of marriage after the commencement of the Act. Prosecution, therefore, is under an obligation to satisfactorily establish by evidence that the second marriage has been solemnized in accordance with law or custom which is applicable to the parties. (Para 3)

Where in prosecution under Sec. 494, the parties concerned were Ahoms following "Saklong" form of marriage and the material ceremonies of second marriage necessary to be performed in that form of marriage were not proved, mere admission of second marriage by accused would not satisfy the ingredients necessary to be established by prosecution and the accused was not liable under Sec. 494. AIR 1965 SC 1564 and AIR 1966 SC 614, Rel. on.

(Para 3)

| Cases | Referred | Chronological | Paras |
|------------------------------------|-------------------------------|---------------|-------|
| (1966) AIR 1966 SC 614 (V 53) = | 1966 Cr LJ 472, Kanwal Ram v. | | |
| Himachal Pradesh Administration | | | 8 |
| (1965) AIR 1965 SC 1564 (V 52) = | 1965 (2) Cr LJ 544, Bhaurao | | |
| Shankar v. State of Maharashtra | | | 8 |
| (1892) ILR 5 All 233, Empress of | | | |
| India v. Kallu | | | 8 |
| (1879) ILR 5 Cal 566 (FB), Empress | | | |
| v. Pitambur Singh | | | 8 |
| (1767) 4 Burr 2057, = 98 ER 73, | | | |
| Morris v. Miller | | | 8 |

LL/LL/F965/68

K. C. Bexbarua, for Petitioner; G. L. Talukdar and D. K. Talukdar, for Opposite Party.

ORDER: This criminal revision is directed against the judgment of conviction under Section 494 Indian Penal Code and sentence of six months' rigorous imprisonment, passed by the learned Magistrate First Class, Dibrugarh and affirmed by the learned Sessions Judge, Lakhimpur.

2. The prosecution case is that the petitioner married the Opposite Party, Mst. Surjya Baruati, on 14th September, 1963 according to Hindu rites and they were living as husband and wife for some time. A female child was born at wedlock. Thereafter, however, the petitioner deserted Mst. Surjya and married one Manorama Konwar on 8th September, 1965. On these allegations the petitioner was charged under Section 494 Indian Penal Code and convicted and sentenced as stated above.

3. The only point which the learned Counsel for the petitioner urges before me is that the second marriage with Mst. Manorama has not been established by the Prosecution to have been solemnized as provided for under the law and that the conviction under Section 494 Indian Penal Code is, therefore, not tenable. Sec. 494 Indian Penal Code is in the following terms:

"494. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

This offence, which is known in English law as bigamy, is directed against the second marriage. The second marriage, therefore, must be a legally valid marriage so as to come within the mischief of Section 494 Indian Penal Code. In order to appreciate whether the second marriage is void under the law, since the parties are admittedly Hindus, we have to refer to Section 17 of the Hindu Marriage Act, 1955, which is as follows:

"Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and provisions of Sections 494 and 495 of the Indian Penal Code (Act 45 of 1860) shall apply accordingly". Section 17 pointedly refers to solemnization of marriage after the commencement of the Act. Prosecution, therefore, is under an obligation to satisfactorily establish by evidence that the second marriage with Manorama has been solemnized in accordance with law or custom which is applicable to the parties. The parties in this case claim to be Ahoms and they also admit that the form of their marriage is known as "Saklong". In dealing with Sec. 494, Indian Penal

Code, the Supreme Court in the case of Bhaurao Shankar v. State of Maharashtra, AIR 1965 SC 1564, has observed as follows :

"The marriage between two Hindus is void in view of Sec. 17 if two conditions are satisfied: (i) the marriage is solemnized after the commencement of the Act; (ii) at the date of such marriage, either party had a spouse living.

The word 'solemnize' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form' according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is 'celebrated or performed with proper ceremonies and due form' it cannot be said to be 'solemnized'. It is, therefore, essential, for the purpose of Section 17 of the Act, that the marriage to which S. 494, I.P.C., applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married will not make the ceremonies prescribed by law or approved by any established custom".

In the case of Kanwal Ram v. Himachal Pradesh Administration, AIR 1966 SC 614, their Lordships observed as follows :

"In a bigamy case, the second marriage as a fact, that is to say, the ceremonies constituting it, must be proved: *Empress v. Pitambur Singh*, (1879) ILR 5 Cal 566 (FB), *Empress of India v. Kallu*, (1882) ILR 5 All 233, Archbold, Criminal Pleading Evidence and Practice (85th Ed.) Article 3796. In *Kallu's case*, (1882) ILR 5 All 233 and in *Morris v. Miller*, (1767) 4 Burr 2057 = 98 ER 73, it has been held that admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case".

It is, therefore, clear that there must be a finding of the Court below in this case based on the evidence produced by the prosecution that the second marriage has been performed according to the 'Saklong' custom of the parties. It may be stated here that the learned Sessions Judge has not gone into that aspect of the matter and has disposed of this point by merely observing as follows :

"While this marriage (referring to the first marriage) subsisted it is admitted by accused-appellant himself that he married Musst. Manorama Konwar, and, as such, he clearly committed the offence under S. 494, I. P. C."

Evidence of the first marriage was given by the prosecution by examining several witnesses and after appreciating that evidence the Courts below came to the conclusion that the first marriage with Musst. Surjya was valid marriage in accordance with the custom of the parties. This being a finding

of fact, the petitioner is not entitled to challenge it and even if it were permissible, I am clearly of opinion that the conclusion arrived at by the learned Sessions Judge is perfectly correct and sound. As has been noticed above, the learned Sessions Judge has not discussed any evidence regarding the second marriage. I had therefore to find out what evidence was led by the prosecution on this point. As it appears from the records as well as the judgment of the learned Magistrate, evidence in that regard came only from P. W. 6, whose brief testimony does not refer to the solemnization of the marriage at all. The witness merely stated that the marriage was solemnized according to Ahom custom, that is 'Saklong'. It is not at all clear from the evidence what are the ceremonies which are performed in connection with this 'Saklong' marriage. My attention has been drawn to Gait's 'History of Assam', 1963 revised edition, where the following description appears relating to this type of marriage:

"Ahoms who embraced Hinduism observed Hindu marriage ceremony. The real Ahom rite is called Saklong. The detailed descriptions of their ceremony are given by P. R. Gurdon thus: "The bridegroom sits in the courtyard; the bride is brought in, and she walks seven times round the bridegroom. She then sits down by his side. After this both rise and proceed to a room screened off from the guests. Here one end of the cloth is tied round the neck of the bride, the other being fastened to the bridegroom's waist. They walk to a corner, where nine vessels full of water have been placed in plantain leaves, the Shiring Phukan (or master of the ceremonies) reads from the Saklang puthi; and three cups containing milk, honey and rice frumenty, are produced, which the bride and the bridegroom have to smell. Some uncooked rice is brought in a basket, into which, after the bride and the bridegroom have exchanged knives, rings are plunged by bride and bridegroom respectively, unknown to one another, it being the intention that each should discover the other's ring and wear it on the finger. The exchange of the knives and rings is the binding part of the ceremony. Bride and bridegroom are then taken outside and do sewa (homage) to the bride's parents and to the people assembled, and the marriage is complete".

There is no evidence to show that any of the material ceremonies, which are necessary to be performed in a Saklang marriage, have been observed. In the absence of any evidence in that regard, mere admission by the accused that he married Mst. Manorama will not satisfy the ingredients which are necessary to be established by the prosecution in an offence under Section 494 Indian Penal Code. The offence under Section 494 Indian Penal Code has, therefore, not been proved in this case and as such the accused is entitled to acquittal.

4. In the result, the petition is allowed and the conviction and sentence are set aside and the accused-petitioner is acquitted. The petitioner is discharged from his bail bond.

SSG/D.V.C.

Petition allowed.

AIR 1969 ASSAM AND NAGALAND 92
(V 56 C 20)

P. K. GOSWAMI AND
M. C. PATHAK, JJ.

Chua Ram Miri (Saikaa), Petitioner v. Commissioner of Plains Division, Assam, Gauhati and others, Respondents.

Civil Rule No 283 of 1966, D/-21-3-1968.

Arms Act (1959), Sec. 17 (3) and (5) — Scope—Licence-holder suspected of poaching in sanctuary — His licence revoked "in the interest of public" — Revocation illegal — (Arms Rules (1962), R. 6).

Where a licence-holder is suspected of poaching in a sanctuary and his licence is revoked "in the interest of public", the revocation is illegal. (Para 8)

Under Section 17 (3) and (5) of the Arms Act, the licensing authority may revoke a licence for the "security of the public peace" and for "public safety". Under Sec 17 (3), all that is necessary for the licensing authority is to pass an order in writing and under Section 17 (5) he has to record in writing the reasons for revoking the licence and only when the licence-holder demands the reasons, a brief statement of the same has to be given. Before an order is passed, the authority must apply his mind to the facts and circumstances leading to the cancellation of the licence and record his reasons for passing the order. The fact that the authority can withhold the reasons from the licence-holder in public interest shows that the reasons must be contained in an order, the only operative portion of which, namely the cancellation, may be communicated to the licence-holder. This is also clear from the introduction of Sec. 17 (5) in the 1959 Act. The order containing the reasons may however be in a separate document.

(Para 5)

In view of Rule 6 of the Arms Rules it is also clear that under the Rules, when the reasons are not disclosed to the licence-holder, these are allowed to be scrutinised by the appellate authority so that there is no arbitrariness in the order.

(Para 6)

The reason of suspecting the licence-holder of poaching in sanctuary cannot be equated with the requirements under Section 17 (3) of "security for public peace or for public safety". "Public peace" or "public safety" relate to the peace and safety of the people and not to animal life. Further, a

licence cannot be revoked merely on suspicion. (Para 7)

Thus, such revocation of licence is without jurisdiction and is not in conformity with Sec 17 (3) (b) and as such is illegal. Civil Rule No 283 of 1966, D/-16-6-1967 (Assam and Nag), Dist. (Para 8)

Cases Referred: Chronological Para
(1967) Civil Rule No. 283 of 1966,
D/-16-6-1967 (Assam and Naga.) 8

D. C. Goswami and P. Talukdar, for Petitioner; D. Pathak, for Respondents.

GOSWAMI, J.: This application under Art. 226 of the Constitution is directed against the order of the Deputy Commissioner, Sibsagar, revoking a gun licence, which was confirmed in appeal by the Commissioner of Plains Division, Assam.

2. The petitioner was the holder of a gun licence and the same was in force in 1966 though on 3-7-64, the following order was passed by the Deputy Commissioner, Sibsagar:

"Seen Police report conveyed in Memo No. IV/12621, D/-3-6-64. In the interest of public licenses of these 8 (eight) persons are cancelled. Ask S. D. O., Golaghat to collect the guns with licences and to keep in the Court (Gol) Malkhana until further order. Send copy to S P., also for information".

The petitioner appealed to the Commissioner of Plains Division under Section 18 of the Arms Act, 1959, hereinafter referred to as the Act, and the relevant portion of the order of the Commissioner while rejecting the same may be set out:

"From the report of the Deputy Commissioner, Sibsagar it is seen that the D. C. passed the orders appealed against on being satisfied on the report of the Police that the weapons of these persons were suspected of being used in poaching in the nearby Kaziranga Game Sanctuary. It is also reported that after cancelling the Gun Licenses the number of poaching cases in the sanctuary have reduced considerably. The Deputy Commissioner therefore was justified in acting on suspicion. If any greater proof were forthcoming the Deputy Commissioner would have prosecuted the suspects in a Court of law. The Act or the Rules thereunder do not also provide that the Deputy Commissioner should give a hearing to the Licensees before revoking the licenses. No one can therefore demand a hearing".

3. Mr. Pathak, the learned Counsel for the respondents, at the outset draws our attention to an unreported decision of a Bench of this Court, in Civil Rule No 283 of 1966, disposed of on 16-6-67 to which one of us was a party, and submits that the present case is fully covered by the same. It will, however, be seen that in that case the only ground urged was that no reasons were given in the order of the Deputy Com-

missioner or even in the appellate order. The petitioner in that case admitted that no demand was made for the reasons for the order. Therefore, the case proceeded on the assumption that there might have been reasons and if asked for and demanded, as required under the law, would have been either given or refused in the public interest. It was not pleaded that the order was defective for non-compliance with the terms of Section 17 (3) of the Act nor was the Court called upon to decide the question in that light.

4. In the present Rule, Mr. Goswami, the learned Counsel for the petitioner, strenuously urges for our consideration the following points:

(1) that the order of the Deputy Commissioner, which is based on a Police report stating the reasons disclosed therein, cannot be held to be valid in view of the provisions of Section 17 (3) (b) of the Act; and

(2) that no order of cancellation of the licence could be passed without hearing the petitioner.

These submissions will have to be dealt with in this case and we do not think that the decision, on which Mr. Pathak relies, has considered these questions.

5. As is seen from the order of the Deputy Commissioner, which was confirmed by the Commissioner in appeal, the reason for the order was that the petitioner was suspected of poaching in the Kaziranga Game Sanctuary, and, as such, the gun licence had to be cancelled "in the interest of public". The provision for cancellation of a gun licence is contained in Section 17 (3) of the Act and the material portions for our purposes may be quoted:

"17. (1)

(3) The licensing authority may, by order in writing, suspend a licence for such period as it thinks fit or revoke a licence—

(a)
(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence;

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

From the above provisions it is clear that the licensing authority may revoke a licence if it deems it necessary for the security of the public peace and for public safety. The expressions used are "for the security of the public peace" or "for public safety", and

not "in the interest of public" which the Deputy Commissioner has stated in his order. The petitioner was holding a licence which was in force and if the same had to be cancelled, the provisions of law in that behalf should have been complied with. It is true that the reasons need not, in a given case, appear in the order itself which was communicated to the petitioner. Under Section 17 (3) of the Act, all that is necessary for the licensing authority to do was to pass an order in writing, and under Sec. 17 (5) it has to record in writing the reasons for revoking the licence.

Under Section 17 (5) it is only when the licence-holder makes a demand for furnishing the reasons, a brief statement of the same has to be given. It is, therefore, permissible to communicate the order of revocation to a licence-holder, but care must be taken that before such an order is passed, the Deputy Commissioner applies his mind to the facts and circumstances of the entire case leading to the cancellation, and records his reasons for passing the order. The fact that the licensing authority could withhold the reasons from the licence-holder in the public interest goes to show that the reasons must be contained in an order, the only operative portion of which, namely the cancellation of the licence, may be communicated in writing to the licence-holder.

The above conclusion is reinforced by the fact that a change was brought out in the matter, amongst others, of cancellation of licence under the Arms Act particularly by introduction of Section 17 (5) wherein the legislature has made provision for withholding the reasons of cancellation in the public interest. The earlier section was Section 18 of the Arms Act, 1878, where such a provision was not there. Since the licensing authority in the public interest can refuse to disclose to the licence-holder the reasons for revocation, it stands to reason that the order containing the reasons may be in a separate document. It is in this view of the matter that a conclusion irresistibly follows that what is contemplated in Section 17 (3) of the Act is that it is enough if the operative part of the order, which is in writing, is communicated to the petitioner and the reasons can be furnished when demanded as provided for under Section 17 (5) of the Act.

6. Under Rule 6 of the Arms Rules, where a licensing authority is of opinion that it is not in the public interest to furnish reasons for the refusal, renewal, variation of conditions, revocation or suspension, of a licence, to the applicant, the recorded reasons therefor and the facts of the case shall be communicated by him to the appellate authority. There is therefore a salutary provision in the Rules even where the reasons are not disclosed to the petitioner, these are allowed to be scrutinised by the appellate authority so that there is no arbitrariness in the order passed by the licensing authority.

7. In this case, we have now a clear picture of the reasons which were taken note of by the Deputy Commissioner, derived from the Police report, which may be considered as a part of the order. Unfortunately, however, the reasons which are disclosed do not make out a case for revocation of the licence under Section 17 (3) of the Act. The learned Commissioner is clearly wrong that a licence of this kind can be revoked merely on suspicion. There must be a finding by the Deputy Commissioner that on the facts at his disposal he is definitely of the opinion that the licence is liable to be revoked for the "security of the public peace" or "for public safety". The reason given, namely that the petitioner was suspected of poaching in the Kaziranga Game Sanctuary and therefore perhaps committed acts injurious to wild life in the sanctuary, cannot be equated with the requirement of law which necessitates security for the public peace or for public safety to be the basis of an order of revocation of the licence under Section 17 (3) of the Act.

"Public peace" or "Public safety" relate to the peace and safety of the people and do not appertain to animal life. There is no suggestion in the reasons that security of the public peace or public safety of the kind required under the law were involved in the matter. Under Section 17 (3), besides these reasons, there are other reasons under four heads for which a licence could be revoked and it was open to the Deputy Commissioner to find for himself an appropriate reason for revoking the order under any of these heads when applicable. But to cancel a licence under Section 17 (3) (b), the order must clearly show that the "security of the public peace" or "public safety" are involved and by no stretch of imagination can it be said in this case that these reasons existed.

8. We are, therefore, satisfied that the order of the Deputy Commissioner is without jurisdiction and is not in conformity with section 17 (3) (b) of the Act, and, as such, is liable to be quashed, in exercise of our powers under Article 226 of the Constitution.

9. In the view we have taken on the first point, it is not necessary to consider and decide in this case whether the order of the Deputy Commissioner was bad also on the ground that the petitioner had not been heard before the revocation of the licence.

10. In the result, the petition is allowed and the order of the Deputy Commissioner cancelling the gun licence of the petitioner is quashed. We make no order as to costs.

JRM/D.V.C.

Petition allowed.

AIR 1969 ASSAM AND NAGALAND 94
(V 56 C 21)S. K. DUTTA, C. J. AND
M. C. PATHAK, J.

U. Mesingh Syiem, Petitioner v. Secretary, Executive Committee of the District Council of the Autonomous District of Khasi and Jaintia Hills and others, Opposite Parties

Civil Rule No 266 of 1966, D/-29-7-1968

(A) United Khasi and Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act (2 of 1959), Ss. 3, 5 and 11 — Assam Autonomous District (Constitution of District Councils) Rules (1951), Rr. 23 (1) and 29 (2) (f) — Appointment of Syiem — After election of Syiem executive committee must publish the result and place the same for approval before District Council — It has no jurisdiction to issue notice for fresh election — Constitution of India, Sch. 6.

In pursuance of a purwana issued by the executive Committee of the District Council, United Khasi and Jaintia Hills, Shillong, the election of the Syiem was held in accordance with the existing customs prevailing in the Elaka concerned and the petitioner got the highest number of votes. The Chairman of the Durbar of the Myntries and Electors of Syiemship forwarded the result of the election along with the true copy of the proceedings of the Durbar to the Chief Executive Member and to the secretary, Executive Committee of the District Council. But the Executive Committee instead of publishing the result or placing the same before the District Council, issued a purwana for fresh election of the Syiem.

Held, that the purwana issued for the fresh election was without jurisdiction and must be quashed. The executive must publish the result of the election and also submit the same before the District Council for approval and appointment as required by the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act (2 of 1959).

(Paras 15 and 24)

After the Syiem is elected by the electoral college in accordance with the existing customs prevailing in the Elaka concerned as provided in Section 3 of the Act, the Executive Committee, who are invested with the executive functions of the District Council under Rule 23 (1) of the Assam Autonomous Districts (Constitution of District Councils) Rules, 1951, must publish the election result and also place the same before the District Council for approval and appointment, as required under the provisions of the Act. Without such approval and appointment, the Chief or the Syiem will not be an administrative officer under the District Council for purposes of administration, which is vested in the District Council.

under the Sixth Schedule of the Constitution of India. AIR 1961 SC 276, Foll.

(Paras 15, 23)

Unless the result of the election is published and any election petition is filed before it, the Executive Committee has no jurisdiction whatsoever to interfere with the result of the election. The power of appointment of the Syiem has been kept with the District Council itself and this power cannot be exercised by the Executive Committee. Though under Rule 28 (1) of the Assam Autonomous Districts (Constitution of District Councils) Rules, 1951, the executive functions of the District Council have been vested in the Executive Committee, but under Rule 29 (2) (f) of the said Rules, all important appointments are to be referred to the District Council for final approval. This power of appointment of the Syiem or the Chief has not been vested in the Executive Committee is also clear from the express provision in Section 11 of the Act, which authorises the Executive Committee to appoint the Acting Chief. Case law discussed.

(Paras 15, 19)

(B) Constitution of India, Art. 226, Sch. 6 — United Khasi and Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act (2 of 1959), S. 3 — Election of Syiem under — Person securing highest number of votes filing writ petition on allegation that Executive Committee of District Council, which is constituted under Constitution failed to exercise or has wrongly exercised the jurisdiction vested in them by refusing to place his election before District Council for approval and appointment and by ordering fresh election—Petitioner held, had right to approach High Court in writ petition. (Para 14)

| Cases Referred: | Chronological | Paras |
|---|---------------|--------|
| (1966) Civil Rule No. 298 of 1964, D/-7-6-1966 (Assam) Ka Hiertikiri v. U. Francis | | 16 |
| (1963) Civil Rule No. 242 of 1963 (Assam), U. Broshon Roy Phantwanjah v. District Council of Autonomous District U. K. and J. Hills | | 11 |
| (1961) AIR 1961 SC 276 (V 48) = (1961) 1 SCR 750, T. Cajee v. U. Jormanik Siem | | 16, 23 |
| (1959) Civil Rule No. 70 of 1959 (Assam), U. Pentisijen v. Executive Committee of District Council, Khasi Jaintia Hills | | 10 |

Dr. J. C. Medhi and D. C. Goswami, for Petitioner; N. M. Lahiri, for Opposite Parties.

M. C. PATHAK, J.: This is an application under Articles 226/227 of the Constitution of India for quashing the notice dated 16-5-1966 issued by the Secretary, Executive Committee, District Council, United Khasi and Jaintia Hills, Shillong, requiring the members of the electoral body for the election of the Syiem of Sohrah (Cherra) to ap-

pear before the Executive Member in charge of Rural Administration in the office of the Syiem of Sohrah (Cherra) for recording their votes to elect the Syiem in place of late U. Join Manik Syiem and for issuing a direction to the Executive Committee not to give effect to that Purwana and also for a direction to the Executive Committee to publish the result of the election held on 14-3-1966 and to place the same before the District Council for approval.

2. The facts of the case are as follows: Before the Independence of India, Syiemship of Cherra was a semi-independent State under the suzerainty of the British Crown. After Independence of India there was a standstill agreement and with the commencement of the Constitution this State as well as the other States in the Khasi Hills got merged into the State of Assam. Thereafter the merged States in the Khasi Hills formed into an Autonomous District, namely United Khasi and Jaintia Hills for the purposes mentioned in the Sixth Schedule to the Constitution of India, hereinafter called 'the Sixth Schedule'. In exercise of the powers under paragraph 3 of the Sixth Schedule, the District Council passed the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, 1959 (United Khasi-Jaintia Hills Act No. II of 1959), hereinafter called 'the Act'. This Act received the assent of the Governor of Assam on the 16th October 1959 and was published in the Assam Gazette dated 28th October 1959, in pursuance of paragraph 11 of the Sixth Schedule.

3. It is submitted at the Bar that no rules have been framed up-till now under this Act.

4. The petitioner's case is that under the existing custom prevalent in the Elaka concerned, the Syiem of Cherra is to be elected by an electoral college from among such members of the Syiem clan as may contest for the syiemship. One who is not a member of the Syiem clan is not eligible to contest for the office. Shri Join Manik, the Syiem of Cherra, died in July 1963 and the District Council appointed Shri Rudramanik, the acting Syiem, under the Act. By a Purwana dated 8-1-1966 the Secretary of the Executive Committee of the District Council called upon the electoral college to elect a Syiem within thirty days to fill up the vacancy caused by the death of Sri Join Manik. The names of the members of the electoral college were also put in the said Purwana. It was also stated in the said Purwana that the District Council reserved the absolute discretion to reject or to accept any nominee offered by the electors and that his office as Syiem would not be valid and complete until it has been expressly approved by the District Council.

5. That a meeting of the electoral college was held on 22-1-1966 in which it

called for the nomination of the candidates and also requested the Executive Committee of the District Council to extend the time for election. The Executive Committee extended the time till 23-2-1966 which was further extended till 15-3-1966. A notice was issued under the signature of eleven prominent members of the electoral college fixing the election to be held at 10-00 a.m. on the 14th March, 1966, at the office of the Syiem of Cherrapunji and the said notice was served by special messengers on every member of the electoral college. At 10-00 a.m. on 14-3-1966, the electoral college sat in a meeting at the office of the Syiem at Cherrapunji under the chairmanship of Shri Sheksing Sarler and open vote was taken. Ultimately there were two candidates for the syiemship. In that election, 20 voted for the petitioner while 14 voted for Shri Rudra Manik. The Chairman did not cast his vote. The report of the election held was drawn up in the meeting which was read over to and signed by all the members of the college present including the Chairman and also by the Secretary of the meeting who was also the permanent Secretary of the Durbar. The Chairman was authorised to present the report on 15-3-1966 as fixed by the District Council. Accordingly, the report along with the true copy of the proceedings of the Durbar of the Myntries and electors of Cherra Syiemship was submitted on 15-3-1966 to the Chief Executive Member and the Secretary, Executive Committee, District Council, United Khasi-Jaintia Hills, Shillong.

6. The Executive Committee, while extending the time for election till 15-3-1966 by their letter dated 21-2-1966, warned that no more time would be allowed after that. On 10-3-1966, the electoral college applied for further extension of time but as the office of the District Council was closed and no order for the extension of the time was passed by the Executive Committee, the election was held on the 14th March 1966 with the above result.

7. After the election was held on 14-3-1966, the Executive Committee, however, by a Purwana dated 18th March 1966 intimated that time for election was extended till 13-4-1966. A meeting of the electoral college was thereupon held on the 9th April 1966 and the members expressed their views that as the electoral college had already elected the Syiem on 14-3-1966 finally, there was no room for any fresh election. The members once again requested the Executive Committee to place the result of the election held on 14-3-1966 before the District Council for approval.

8. That on 16-5-1966 the Secretary of the Executive Committee, however issued the Purwana No DC/PC/13/63/65/3260 dated 16-5-1966, which has been challenged as illegal and without jurisdiction in this writ petition.

9. At the outset, Mr. Lahiri, the learned counsel on behalf of the Opposite Parties, has submitted that the petitioner has no legal right to approach the Court in the instant case under Articles 226/227 of the Constitution of India and as such the petition should be dismissed in limine.

10. In this connection, he has referred to a decision of this Court in Civil Rule No. 70 of 1959 (Assam), *U. Pentisjen v. Executive Committee of District Council, Khasi-Jaintia Hills*. In that case, the petitioner got the highest number of votes for appointment to the post of Sirdar of Mawdon Syiemship. It was, however, subsequently contested that he was not entitled to be elected to that post. It was found that the petitioner was not a resident of Mawdon Elaka and also had not given an undertaking to the effect that he would on his election reside in that Elaka and as such was not qualified to be appointed to that post and accordingly the name of Opposite Party No. 2 in that case, who secured the next highest number of votes, was recommended and this recommendation was accepted by the District Council and the Opposite Party No. 2 was appointed to that post. By a writ petition the petitioner in Civil Rule No. 70 of 1959 challenged this appointment of Sirdar of Mawdon Syiemship. On these facts, the High Court held that the petitioner could not establish that he had any right to the post of Sirdar merely because he secured the highest number of votes and the appointment rests with the District Council. In the circumstances that petition was dismissed as the petitioner had no right to the post as such. The facts of the case before us are, however, different.

11. Mr. Lahiri then referred to the decision of this Court in Civil Rule No 242 of 1963 (Assam), *U. Broshon Roy Phanwanjah v. District Council of Autonomous District, U.K. and J Hills*. In that case, one Ijoll who was the Syiem of Mawsyram died on 6-7-1954 and the Executive Committee of the District Council, United Khasi and Jaintia Hills, asked four Myntries to fill up the vacancy. Accordingly, the Myntries sat together and three out of the four Myntries elected the petitioner as the Syiem of Mawsyram and the fourth Myntry did not nominate anybody. The result was reported to the District Council for approval as required under S. 3 of the Act. Thereafter, the Special Officer of the Executive Committee of the District Council issued a circular on 18-8-1963 saying that a general election would be held on 1-10-1963. The petitioner filed an objection petition before the Executive Committee on 23-9-1963 against the proposed election claiming that as the petitioner had already been elected as the Syiem, his election should be placed before the District Council for approval and that it was against the custom to hold such a general election. But the election was held on 1-10-1963. The petitioner and two

husband cannot be said to be the heir of the other husband by any stretch of imagination from whom the property is inherited by her. But it is not possible to conceive that the Legislature could have intended to give a different meaning to the same phraseology in different clauses of the same section. If the Legislature had intended to give a different meaning to the word "son or daughter" in clause (b) of sub-section (2) from its natural and plain meaning and from the meaning which seems to have been given to the same in two other clauses of the same section, the Legislature would have expressed its intention explicitly by employing appropriate language. It will only be reasonable to presume that the Legislature intended to give the same meaning to the same expression or phraseology not only in every part of the same section but in fact in very part of the same Act. We do not find any reason or warrant whatsoever for the proposition that the phraseology employed in clause (b) could have been intended to have a different meaning than the one which the Legislature appears to have given to the same in the earlier two clauses of the same section.

10. Much is sought to be made out of the supposed object of the Legislature in carving out an exception in Section 15(2) (b). Contention is that the object in enacting this sub-clause (b) is to deprive all the heirs of the female Hindu from succession to such property inherited by her from her husband and allow the heirs of such husband to succeed to the exclusion of her heirs such as her sons from first husband, who could have no blood relation with second husband. We are frankly not impressed by these submissions and we do not find any basis for assumption that legislature intended in Section 15(2)(b) to exclude the son or daughter of the female Hindu born to her from any other husband than the one from whom she had inherited this property in dispute. We do not find any basis for this submission either in the historical background of the enactment or in the language of the enactment itself. As is well known, the rights of female Hindus in the property suffered from several infirmities under the original text of the Hindu law. Attempts were made from time to time to remove such infirmities, limitations and restrictions on their rights, to hold, acquire and inherit the properties. Finally, Section 14 of this Act converted all properties inherited and acquired and possessed by female Hindus into properties of their absolute ownership without regard to which school of Hindu law they belonged and without regard to the source from which the said properties were acquired by them. What

is provided in Section 15 is the necessary incidence and consequence of conferring such absolute rights in the property on such female Hindus. The scheme of sub-section (1) of Section 15 at once shows that the property of Hindu females dying intestate is to devolve on her own heirs. The list of such heirs is enumerated in Section 15 (1) clauses (a) to (e) who can be said to be nearer and dearer to the deceased female Hindu having regard to the current notions and conceptions about the closeness of the relationship. Sub-section (2) provided for exceptions only with regard to one source of acquisition viz., the inheritance, and then again the exception is confined to the property inherited by her either from her (1) father or mother or (2) from her husband or from her father-in-law. But in engrafting these two exceptions the Legislature has taken care to emphasise that these exceptions will operate only in the event of the female Hindu not leaving her direct heirs, viz., her son or daughter or children of the pre-deceased son or daughter. In our opinion, by making the exception to operate only in the contingency of female Hindu not leaving any son or daughter or children of the pre-deceased son, or daughter, the legislature has only acted consistently with its main object of conferring absolute title on female Hindus to the properties inherited by them. When female Hindus were made absolute owners of the property, the Legislature seems to have rightly and justly thought that the question of reversion of such properties to the source such as father or the husband should not arise so long as direct heirs of such female Hindus dying intestate were still alive and available to claim the inheritance. If female Hindu could claim absolute rights in the said property inherited by her from her father or mother or from her husband and father-in-law, and could have disposed of it during her life time in any manner she liked without allowing it to go back to the heirs of her father or heirs of her husband from whom she had inherited this property, the legislature seems to have thought—and rightly—that in the event of property not having been disposed of by the female Hindu as absolute owner during her lifetime, the sons and daughters born to her without regard to from which husband they were born, should be enabled to have preferential rights to succeed before the same goes to the heirs of the father or heirs of the husband. We are of the opinion, therefore, that there is no warrant to assume that the Legislature intended to deprive the sons and daughters or their children from inheritance of the property left by a female Hindu dying intestate merely because they were born to her from some other husband than the one

from whom the property in dispute was inherited by the female Hindu.

11. We accordingly hold that the petitioner is entitled to succeed to the property in preference to the respondents. We set aside the order passed by the Commissioner and restore the order passed by the District Deputy Collector.

12. The petitioner will get his costs of this Special Civil Application from respondents Nos. 1 to 5.

K.S.B. Application allowed.

AIR 1969 BOMBAY 210 (V 56 C 35) TARKUNDE AND DESHPANDE, JJ.

Anant Dattatraya Mall and another, Petitioners v. Chintaman Govind Patil & another, Respondents.

Spl. Civil Appln. Nos. 1676, 1677 and 1817 of 1964 D/- 20-6-1968.

Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948) (as amended by Bombay Act 38 of 1957), Ss. 32-F(1)(a), Proviso, 32-G, 31(3) — Expression "such person" in proviso to S. 32-F(1)(a), meaning of — Requirements of proviso — Share of widow in joint family property other than agricultural land not separated by metes and bounds in partition — Partition held, did not satisfy requirements of proviso and could not have effect of postponing date on which tenant of lands allotted to widow would be entitled to become statutory purchaser of those lands.

Where the share of the widow in the properties of the joint family other than agricultural land was not separated by metes and bounds in the partition between her and her sons, the partition did not satisfy the requirements of the proviso to S. 32-F(1)(a) and could not have the effect of postponing the date on which the tenant of the lands allotted to the share of widow would be entitled to become the statutory purchaser of those lands. (Para 13)

The expression "such person" in proviso to S. 32-F(1)(a) denotes a disabled person — a minor, a widow or a person subject to mental or physical disability — and not a person who is not disabled. (Para 9)

The main effect of the proviso is to postpone the date on which a tenant could become a purchaser of the leased land where the land belonged to a joint family of which a disabled person was a member and in which a partition took place before 31st March 1958 fulfilling certain conditions. The first requirement of the proviso makes it obligatory that the share of the disabled person

must be separated by metes and bounds "in the joint family" and not merely in the agricultural land of the joint family. The proviso is not satisfied unless the share of a disabled person is separated by metes and bounds in all the joint family property and unless the agricultural land allotted to him corresponds to his share in the entire property and is not in excess thereof. (Paras 7, 12)

P. S. Joshi, for Petitioners, Raghavendra A. Jahagirdar, for Respondent No. 1 (in Spl. C. A. No. 1676 of 1964); P. S. Joshi, for Petitioners; Raghavendra A. Jahagirdar, for Opponent No. 4 (in Spl. C. A. 1677 of 1964); V. M. Limaye, for Petitioner; V. N. Ganpule, for G. S. Gupta, for Respondent No. 1 (in Spl. C. A. No. 1817 of 1964).

TARKUNDE, J.: These three petitions under Article 227 of the Constitution raise a common question of law relating to the interpretation of the proviso to clause (a) of sub-section (1) of Section 32-F of the Bombay Tenancy and Agricultural Lands Act, 1948.

2. To appreciate the question involved it would be sufficient to notice the facts in Special Civil Application No. 1676 of 1964. One Dattatraya was the owner of several agricultural lands in a village in the Jalgaon District. It appears that Dattatraya also owned several houses and had a money-lending business. He died in 1962 leaving behind a widow Laxmibal & two sons Anant and Balwant. After the Bombay Tenancy and Agricultural Lands Act, 1948 (hereafter referred to as the Bombay Tenancy Act) was extensively amended by Bombay Act No. 13 of 1956 with effect from 1st August 1956, a partition was effected between the widow Laxmibal and the two sons Anant and Balwant by a registered document dated 20th November 1956. By that partition several agricultural lands, which were in the possession of the 1st respondent as a tenant, were allotted to the share of Laxmibal. On the assumption that the 1st respondent had become the owner of these lands on the Tiller's Day, a proceeding for the determination of the purchase price of these lands was commenced under Section 32G of the Bombay Tenancy Act. Notice of this proceeding was given to Anant and not to Laxmibal. Anant appeared before the Agricultural Lands Tribunal and contended that the lands had fallen to the share of Laxmibal in a family partition, that since Laxmibal was a widow and the partition was covered by the proviso to Cl. (a) of Section 32F (1) of the Bombay Tenancy Act the 1st respondent had not become the purchaser of the lands and that the proceeding for the determination of the purchase price of the lands under Section 32G was, therefore, incompetent. In reply to these conten-

tions the 1st respondent claimed that the alleged partition between Laxmibai and her sons was bogus and that he had become the purchaser of the lands on the Tiller's Day. After recording evidence on these rival contentions, the Agricultural Lands Tribunal came to the conclusion that the alleged partition was not genuine and directed that the proceeding under Section 32G should continue. The Agricultural Lands Tribunal observed that there was no division of the house property between Laxmibai and her sons and that the ancestral money-lending business had admittedly been kept joint between them.

3. In an appeal filed by Anant from this decision the Deputy Collector came to the conclusion that there had been a genuine partition between Laxmibai and her sons in respect of agricultural lands, that the lands allotted to the share of Laxmibai were not more than her one-third share in the entire joint family property, and that although other properties, such as houses, ornaments and the ancestral money-lending business were not partitioned, the partial partition in respect of agricultural lands was good in law and was protected by the proviso to clause (a) of Section 32F(1) of the Bombay Tenancy Act. On these findings the Deputy Collector allowed the appeal and set aside the order of the Agricultural Lands Tribunal.

4. From the order of the Deputy Collector the 1st respondent approached the Maharashtra Revenue Tribunal in revision. This revision application, along with other applications in which questions relating to the interpretation of the proviso to clause (a) of S. 32F(1) of the Bombay Tenancy Act were involved, was placed before a Full Bench of three Members of the Revenue Tribunal. The Full Bench gave its findings on the question of interpretation of the said proviso which were raised in the course of arguments in all the applications. Thereafter a Division Bench of the Revenue Tribunal dealt separately with each of the revision applications. In the revision application filed by the 1st respondent the Division Bench of the Revenue Tribunal set aside the order of the Deputy Collector and restored that of the Agricultural Lands Tribunal on the ground that a partial partition of joint family properties was not recognised by the proviso to clause (a) of Section 32-F (1).

5. The present petition (Special Civil Application No. 1676 of 1964) was filed by Anant under Article 227 of the Constitution with a view to challenge the legality of the above decision of the Maharashtra Revenue Tribunal. The petition was subsequently amended to add Laxmibai as the 2nd petitioner.

6. In order to appreciate the arguments addressed before us it is necessary to notice the provisions of clause (a) of Section 32F(1) of the Bombay Tenancy Act. That clause runs as follows:

32F (1) "Notwithstanding anything contained in the preceding sections, — (a) Where the landlord is a minor, or a widow or a person subject to any mental or physical disability the tenant shall have the right to purchase such land under Section 32 within one year from the expiry of the period during which such landlord is entitled to terminate the tenancy under Section 31:

Provided that where a person of such category is a member of a joint family, the provisions of this sub-section shall not apply if at least one member of the joint family is outside the categories mentioned in this sub-section unless before the 31st day of March 1958 the share of such person in the joint family has been separated by metes and bounds and the Mamlatdar on inquiry is satisfied that the share of such person in the land is separated, having regard to the area, assessment, classification and value of the land, in the same proportion as the share of the person in the entire joint family property and not in a larger proportion".

7. The proviso quoted above was added to clause (a) of Section 32F (1) by Bombay Act No. 38 of 1957 but was given retrospective effect from 1st August 1957, i.e., from the date on which Sections 32 to 32R were introduced in the Bombay Tenancy Act. A proviso in the same terms was also introduced by Bombay Act No. 38 of 1957 in sub-section (3) of Section 31 of the Bombay Tenancy Act and was given the same retrospective effect. Sub-section (2) of Section 31 provides that when a landlord requires any leased land for personal cultivation, he shall give to the tenant a notice on or before 31st December 1956 terminating the tenancy and shall file an application for possession under Section 29 on or before the 31st day of March 1957. Sub-section (3) of Section 31 lays down an exception to this rule in cases where the landlord is a minor, a widow or a person subject to mental or physical disability. For the sake of convenience these landlords may be designated as "disabled persons." Sub-section (3) of Section 31 provides in effect that where such disabled persons are landlords, the notice terminating the tenancy for personal cultivation may be given and an application for possession under Section 29 may be made within one year of the date on which the disability of such landlords comes to an end. Correspondingly, Cl. (a) of Section 32F (1) lays down that where the landlord belongs to one of the categories of disabled persons, the tenant

shall have the right to purchase the leased land under Section 32 within one year from the expiry of the period during which such landlord is entitled to terminate the tenancy under Section 31. Now, the proviso which was introduced in identical terms in S 31 (3) and S 32F (1) (a) was designed to meet cases where such disabled persons were members of a joint family. The proviso says, in the first place, that where a disabled person was a member of a joint family, the provisions of Section 31(3) and of Section 32F(1)(a) shall not apply if at least one member of the joint family was outside the categories of disabled persons. The proviso, however, further lays down that the aforesaid provisions (the provisions of Section 31(3) and of Section 32F(1)(a)) shall apply to disabled persons who were members of a joint family, if there was a partition in the family before 31st March 1958 and if that partition fulfilled certain requirements. Thus the main effect of the proviso is to postpone the date on which a tenant could become a purchaser of the leased land where the land belonged to a joint family of which a disabled person was a member and in which a partition took place before 31st March 1958 fulfilling certain conditions.

8. As stated above, the Full Bench of the Maharashtra Revenue Tribunal gave findings on several questions which were raised before the Bench in the course of arguments relating to the interpretation of the proviso quoted above. For the purpose of deciding the cases before us we have to consider two questions on which findings were given by the Full Bench. One of these questions related to the meaning of the expression "such person" which occurs in the proviso. The question was whether the expression "such person" refers to a disabled person or a person who is not disabled. There was a difference in the Members of the Full Bench on the interpretation of this expression. The majority consisting of two Members of the Full Bench held that the expression "such person" refers to a person who is not disabled, whereas the remaining Member came to the conclusion that the expression refers to a disabled person.

9. On this disputed question we are inclined to accept the minority view. Like the main provisions of sub-section (3) of Section 31 and clause (a) of Section 32F(1), the proviso deals with the rights of a landlord who is a disabled person. It is the share of "such person" which is to be separated in a partition on or before 31st March 1958. Moreover, the proviso lays down that in the partition the share allotted to "such person" in the land must be in the same proportion as his share in the entire joint family and "not in a larger propor-

tion". Obviously, in making this provision the Legislature intended to ensure that members of a joint family shall not adversely affect the rights of tenants by allotting agricultural land to a disabled member in excess of his proper share in the entire joint family property. The interests of tenants would not be adversely affected if a member of the family, who was not a disabled person, was given in a family partition a larger proportion of agricultural land than the proportion which represented his share in the entire joint family property. It must follow that the expression "such person" in the proviso denotes a disabled person and not a person who is not disabled.

10. The second question, which was raised before the Full Bench of the Revenue Tribunal and which is relevant to the cases before us, is whether, in order to satisfy the requirements of the proviso, the family partition may be confined to agricultural lands only or must extend to the entire joint family property. The Full Bench of the Revenue Tribunal dealt with this question in the following passage:

"According to the true notion of an undivided Mitakshara family (which governs the State of Maharashtra) no individual member of that family, whilst it remains undivided, can predicate of the joint property that a particular member has a certain definite share one-third or one-fourth (See Mulla's Hindu Law p. 492 Edn. 12). Until, therefore, the entire joint family property is divided or partitioned, it would not be feasible to determine what the value of a share of a particular member be. It is, therefore, clear that for the purpose of the provisos, there cannot be a valid partition which is partial either in relation to persons or properties. The agricultural lands must be divided by metes and bounds, but the other property need not be physically partitioned. It is sufficient if the interest of the members in the other property is made legally separated."

Thus, according to the Full Bench of the Revenue Tribunal, the requirements of the proviso are satisfied if, in the partition, the agricultural lands are divided by metes and bounds and the rest of the property is divided only notionally and not physically.

11. If this were the correct interpretation of the proviso, we find it difficult to appreciate why in the present case, the Revenue Tribunal allowed the revision application of the 1st respondent and set aside the decision of the Deputy Collector. The Deputy Collector had found that, whereas the agricultural lands were divided by metes and bounds between Laxmibai and her sons Anant and Balwant, the rest of the joint family property remained undivided. There was

no finding of the Deputy Collector that even a notional partition had not taken place in the rest of the property and that Laxmibai and her sons continued to be members of a joint Hindu family in regard to that property.

12. We are, however, not in agreement with the view of the Full Bench that the requirements of the proviso are fulfilled if, in a family partition, agricultural lands are divided by metes & bounds & the rest of the property is only notionally partitioned. The proviso lays down two requirements of a family partition; (1) that "the share of such person (i.e. the disabled person) in the joint family has been separated by metes and bounds" and (2) that "the Mamlatdar on inquiry is satisfied that the share of such person in the land is separated, having regard to the area, assessment, classification and value of the land, in the same proportion as the share of that person in the entire joint family property and not in a larger proportion". The first of these requirements appears to have escaped the notice of the Revenue Tribunal. That requirement makes it obligatory that the share of the disabled person must be separated by metes and bounds "in the joint family" and not merely in the agricultural land of the joint family. The proviso is not satisfied unless the share of a disabled person is separated by metes and bounds in all the joint family property and unless the agricultural land allotted to him corresponds to his share in the entire property and is not in excess thereof.

13. In the petition under consideration (Special Civil Application No. 1676 of 1964) it has been found by the Agricultural Lands Tribunal as well as by the Deputy Collector that Laxmibai's share in the properties of the joint family other than agricultural land was not separated by metes and bounds in the partition between her and her sons. The partition, therefore, did not satisfy the requirements of the proviso and could not have the effect of postponing the date on which the 1st respondent, who was the tenant of the lands allotted to the share of Laxmibai would be entitled to become the statutory purchaser of those lands. We must accordingly uphold the decision of Maharashtra Revenue Tribunal although on a ground different from the one which appealed to the Revenue Tribunal.

14. Similarly, in each of the other two petitions (Special Civil Applications Nos. 1677 of 1964 and 1817 of 1964), it has been found that the share of the disabled person in joint family properties other than agricultural land was not separated by metes and bounds at the par-

tition on which the petitioners relied. Hence these petitions must also fail.

15. In the result, the petitions are dismissed. There will be no order as to costs in all these petitions.
LGC/D.V.C. Petitions dismissed.

AIR 1969 BOMBAY 213 (V 56 C 36)
(AT NAGPUR)

ABHYANKAR AND PADHYE, JJ.

Kisan Januji, Petitioner v. Anilkumar Manilal and another, Respondents.

Spl. Civil Appln. No. 339 of 1968, D/- 3-7-1968, from order of Extra Asstt. J. Akola D/- 10-4-1968.

(A) Municipalities — Maharashtra Municipalities Act (40 of 1965), Ss. 12, 11 — Right to vote at Municipal election is statutory — Only list of voters prepared and authenticated under S. 11, has to be seen to find out whether a person is qualified or not to vote at such election — Name of citizen included in electoral roll of Legislative Assembly but not in list of voters prepared for municipal election — No step taken to get name included under S. 11 — List held was conclusive evidence under S. 12(2) of the rights of persons who were entitled to vote — Right to franchise must be deemed to have been denied to those whose names were not in the list. AIR 1967 Bom 232, Applied.

(Paras 8, 10, 13)

(B) Municipalities — Maharashtra Municipalities Rules (1965), R. 37 — Mark made by voter not on face but on back of ballot paper over that part where symbol could be seen against light — Requirement of R. 37 held not complied with by voter — Vote held invalid. AIR 1960 All 66, Expl.

(Para 15)

Cases Referred: Chronological Paras
(1967) AIR 1967 Bom 232 (V 54)=

1966 Mah LJ 869, Dhondba v.

Civil J., Jr. Dvn. Hinganghat

11

(1960) AIR 1960 All 66 (V 47)=1959

All LJ 607, Swarup Singh v.

Election Tribunal Municipal

Board, Aligarh

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P. G. Palshikar and V. G. Palshikar, for Petitioner; V. R. Manohar and S. N. Kherdekar, for Respondent No. 1.

ABHYANKAR J.: The petitioner by this petition under Article 227 of the Constitution challenges the order of the Extra Assistant Judge, Akola, as an Election Tribunal, setting aside the election of the petitioner as a member to the Municipal Council, Akot from Ward No. 15 held recently.

2. An election programme for electing members from different wards to the Municipal Council at Akot under the pro-

LL/AM/G293/68

visions of the Maharashtra Municipalities Act, 1965, was fixed by the authorities in 1967. The dates for acceptance of nomination papers was 10th May 1967, scrutiny was on 13th May 1967, date for withdrawal was 20th May 1967, poll was taken on 4th June 1967 and the votes were counted and the results declared on 5th June 1967. The petitioner and the first respondent were the only contesting candidates from Ward No. 15. On a scrutiny and counting of ballot papers, it was found that each of them, that is, the petitioner and the first respondent, had secured 320 valid votes. Under Rule 58 of the Maharashtra Municipalities Election Rules, 1966 if after the counting of the votes is completed an equality of votes is found to exist between any candidates and the addition of one vote will entitle any one of the candidates to be declared elected, the Returning Officer is required forthwith to decide between these candidates by lot. Accordingly such lot was drawn and the verdict was in favour of the petitioner and the petitioner was, therefore, declared elected.

3. The election of the petitioner in these circumstances was challenged by the first respondent on several grounds before the Extra Assistant Judge, who is empowered to decide disputes relating to elections under Section 21 of the Maharashtra Municipalities Act. Among other issues arising out of the pleadings of the parties was issue No. 9. The contention of the first respondent giving rise to this issue appeared to be that two citizens viz., Shri Shantaram Yadaorao Deshpande and Smt. Sulabha Shantaram Deshpande were entitled to vote at this election and that their names were included in the electoral roll of the Maharashtra Legislative Assembly, but their names were not incorporated in the list of voters prepared by the Chief Officer for the Municipal elections and they were not allowed to vote at the election and therefore, the result of the election was materially affected. It will be seen that each of the contesting candidates has polled equal votes and if it could be established that the two citizens had a right of franchise to cast their votes at this election from this ward and were illegally prevented from voting, then the result of the election could be said to be affected by such improper refusal of the franchise.

4. It seems at the instance of the respondent No. 1 a copy of the electoral roll for the Maharashtra Legislative Assembly was filed and it is marked as Exhibit 45. The electoral roll comprised of a printed list and two appendages. The printed list includes names of 768 persons and thereafter the names of Shri Shantaram Deshpande and Smt. Sulabha Deshpande were mentioned at serial Nos 769 and 770. On the first appendage, and

thereafter on the second appendage names of seven other voters bearing serial Nos. 771 to 777 appear to be printed. It is an admitted position, however, that the names of the two Deshpandes do not appear in the voters' list maintained and authenticated by the Chief Officer and it was also filed as Exhibit 43. That was the copy of the voters list pertaining to Ward No. 15.

5. In this list though the names at serial Nos. 769 and 770 from the electoral roll of the Legislative Assembly are omitted, it appears that the list of persons at serial Nos. 771 to 777 appearing in the electoral roll for the Legislative Assembly was included in Exhibit-43 at serial Nos. 769 to 775. In other words, except for the omission to include the names of Shri Shantaram Deshpande and Smt. Sulabha Deshpande which appeared in the appendage or part of the electoral roll for the Legislative Assembly for this ward, all other names apparently were included in Exhibit 43.

6. It seems to have been contended before the learned Assistant Judge that the Chief Officer who was required to do his job of preparing and maintaining a list of voters under S. 11 of the Maharashtra Municipalities Act, 1965, did not do it diligently and carefully and this resulted in the omission of the names of the two voters from the list maintained by him. It was incumbent, the argument was, on the Chief Officer to copy down the voters list accurately from the electoral roll of the Legislative Assembly for the ward and if he failed to comply with this provision under the Act, such failure to comply with a mandatory provision vitiated the further action. It was, in effect, therefore, contended that the failure to comply with the mandatory provisions deprived the list of its status as an authentic list and the authenticity and finality attached to it was, therefore, taken away. As there was no authenticity or finality to the list prepared by the Chief Officer, it was not binding in the sense that exclusion from that list in respect of any citizen would not disentitle him to exercise his right of franchise and if that be the result of the failure of the Chief Officer to carry out his duty, the election in the instant case, which resulted in equality of votes should be held to be vitiated on account of such failure. This contention found favour with the learned Extra Assistant Judge and on this sole ground the petition was allowed and the election has been set aside.

7. In support of this petition challenging the finding on this issue, the learned counsel for the petitioner has invited our attention to the scheme of preparation of list of voters and conferral of the

right to vote given by the Legislature in Sections 11 and 12 of the Maharashtra Municipalities Act. As the principal argument is based on either side on proper construction to be put on these two provisions of the Act, it is necessary to reproduce these provisions which are as follows:

"11(1). The electoral roll of the Maharashtra Legislative Assembly prepared under the provisions of the Representation of the People Act, 1950, and for the time being in force on such date as the Director may by general or special order notify in this behalf (being a date not earlier than one month from such notification) for such constituency of the Assembly or any part thereof as is included in the municipal area, shall be divided by the Chief Officer (or such other officer of the Council or Government as may be designated by the Director in this behalf) into different sections corresponding to the different wards in the municipal area; and a printed copy of each section of the roll so divided and authenticated by such officer shall be the list of voters for each ward. The ward lists shall collectively be deemed to be the municipal voters' list.

(2) The Chief Officer shall maintain the lists of voters prepared under sub-section (1) and the lists so maintained, shall be deemed to be the authentic lists for all elections under this Act.

(3) At least fifteen days before the last date fixed for nomination of candidates for every general election, the Chief Officer shall keep open for public inspection at the municipal office and at such other places in the municipal area as the Council may fix, copies of the lists of voters of each ward maintained under sub-section (2).

12(1). Every person whose name is in the list of voters maintained under the last preceding section shall be qualified to vote, and every person whose name is not in such list shall not be qualified to vote, at the election of a Councillor for the ward to which such list pertains.

(2) The list of voters maintained under the last preceding section shall be conclusive evidence for the purpose of determining under this section whether a person is qualified or is not qualified to vote, as the case may be, at any election."

8. According to the learned counsel for the petitioner, an Election Tribunal adjudicating the validity of an election under Section 21 of the Maharashtra Municipalities Act acts without jurisdiction if it does not give effect to the legislative mandate unequivocally expressed in Section 12 of the Maharashtra Municipalities Act. According to the petitioner, the right to vote at a municipal election is given by the Statute, name-

ly, the Maharashtra Municipalities Act, and that right must be found within the framework of the Statute and nowhere else. Section 12 of the Act, in terms, restricts that right to vote only to those whose names are in the list of voters and denies to everyone else whose name is not in the list of voters. If for any reason, a person's name is not included in the list of voters, then such a person has been denied the right of franchise to vote at a municipal election. There is no getting out of this position so long as and as long as the person's name cannot be found in the voters' list. In our opinion, this contention is well founded and must be accepted.

9. It was urged on behalf of the contesting respondent that the voters' list that is really made the basis of franchise is the electoral roll of the Maharashtra Legislative Assembly prepared under the provisions of the Representation of the People Act, 1950 and for the time being in force on such date as the Director may notify. If a person's name is found included in such electoral roll, then the Chief Officer in copying out the names from that roll in exercise of his power to prepare the list of voters for the municipal election has no right to exclude any name or omit any name from the electoral roll. If such Chief Officer omits, inadvertently may be, the name of any one who is included in the electoral roll of the Maharashtra Legislative Assembly, such an omission should not deprive that person of his right to vote at the municipal election. In other words, the argument suggests that the function entrusted to the Chief Officer is merely administrative or mechanical function of copying out the list of names of persons included in the electoral roll of the Maharashtra Legislative Assembly and a mere omission to include some of the names which are albeit in the electoral roll should not have the effect of depriving such omitted persons of their right to vote.

10. In our opinion, it is not possible to construe the provisions of Section 11 of the Maharashtra Municipalities Act in this manner. A close scrutiny of sub-section (1) of Section 11 will show that the duty cast on the Chief Officer is to prepare his own list of voters who will be entitled to vote at the ensuing municipal election and the basis for inclusion in such list is the electoral roll of the Maharashtra Legislative Assembly for that particular area or ward. He is required not only to divide the electoral roll into appropriate wards which will become the ward roll, but is further required to authenticate such list for each ward. The right to authenticate also imposes a duty and it is only the authentication which, in our opinion, invests the list of voters pre-

pared by the Chief Officer with the status of an authentic list of voters for the municipal election in that ward. The Chief Officer is required to maintain the list of voters prepared under sub-section (1) and sub-section (2) itself expressly says that the lists so maintained shall be deemed to be the authentic lists for all elections under this Act. If it was the intention of the Legislature to make the electoral roll of the Maharashtra Legislative Assembly prepared for that area or the ward as the authentic list, nothing was easier than to say so which has been done in some other statutes. For instance under the Bombay Village Panchayats Act Section 12 provides that the electoral roll of the Maharashtra Legislative Assembly prepared under the provisions of the Representation of the People Act, 1950, and in force on such day as the State Government may by general or special order notify in this behalf for such part of the constituency of the Assembly as is included in a ward or a village shall be the list of voters for such ward or village. We have to contrast this provision with the provision made in Section 11 of the Maharashtra Municipalities Act enjoining on the Chief Officer to prepare a separate and independent list of voters although the basis of such preparation is the electoral roll of the Maharashtra Legislative Assembly for that area. We are, therefore, unable to accede to the contention of the contesting respondent that merely because the names of some persons may be found in the electoral roll of the Maharashtra Legislative Assembly that by itself is enough to enfranchise them to entitle them to vote at the municipal election. That franchise is earned when their names are repeated in an authentic list of voters required to be prepared by the Chief Officer. The wording of Section 12 in both its sub-sections also makes it clear that it is only such list of voters maintained under Section 11, that is, the list of voters prepared and authenticated by the Chief Officer, which alone has to be seen to find out whether a person is qualified to vote and every person whose name is not in such list is not qualified to vote. The Legislature has expressed its intention to restrict the right to vote only to those citizens whose names are found in the list of voters maintained by the Chief Officer and expressly denies it to others whose names, whatever may be the reasons, are not to be found in the list of voters maintained and authenticated by the Chief Officer. If that be the nature of the grant and its limitation, we fail to see what scope there is, for contending that merely because a citizen's name appears in the electoral roll of the Legislative Assembly, he should

be held entitled to vote at the municipal election. Though it is true that the electoral rolls prepared for the Assembly elections are treated as the basis from which lists of voters are prepared for municipal elections, so far as the municipal elections are concerned, the right to franchise seems to be necessarily restricted only to those persons whose names are in the list of voters and is specifically denied to those whose names are not in the list.

11. A somewhat similar question arose before this Court in *Dhondba v. Civil Judge, Junior Division, Hinganghat*, 1966 Mah LJ 869=(AIR 1967 Bom 232). There, the question was interpretation of Sections 15, 12 and 13 of the Bombay Village Panchayats Act, but the issue raised was identical. As in this case a contention seems to have been raised that the names of the persons in that case were included in the electoral roll of the Legislative Assembly for a particular ward though they were not residents of that ward and the names of persons who were residents of a particular ward were excluded from the Assembly electoral roll. As in this case, it seems to have been complained that there is no specific provision either in the Bombay Village Panchayats Act or the rules made thereunder empowering the Chief Officer to correct the voters' list to be maintained and authenticated by him. It was, therefore, contended that if any citizen's name is wrongly omitted from such list, that should be a sufficient ground for contesting the election because the electoral roll was not properly maintained. Repelling this contention, the Division Bench has observed as follows:

"The Panchayats Act has conferred power on the designated officer to prepare and maintain the voters' list as required, and in our view it must necessarily include the power to make necessary corrections which are within the scope of his authority. This is borne out from the fact that sub-rule (4) requires copies of list of voters to be kept open for inspection at the Village Panchayat office and the Chavdi. Everyone is free to go to the village Chavdi and to the Panchyat Office and inspect the copies of the voters' list. There is no limit of period prescribed for which the lists are to be kept open. Since the lists must be kept open, it must suggest therefore, that there would be ample opportunity to any person to point out mistakes and get them corrected before the date of nominations.

Even sub-rule (5) gives a sufficiently long notice prior to the nomination, specifying the places where copies of relevant lists of voters are kept open for public inspection. One of the essential pur-

poses of keeping open these copies for public inspection must be, to have such mistakes corrected so far as are possible to be corrected within the frame work of the Act. Though, therefore, there is no specific provision made by the State Government by the rules for getting mistakes in the voters' lists rectified, still in our view it would be open to the petitioners to have the list corrected. If no steps are taken to have the same corrected, then for the purposes of election, under sub-section (3) of Section 13 the list is conclusive evidence and cannot be challenged".

12. In our opinion, this principle applies with equal force to the provisions of the Maharashtra Municipalities Act, 1965. Under Section 12(2) of this Act, the voters' list prepared, maintained and authenticated by the Chief Officer is conclusive evidence for the purpose of determining whether a person is qualified or not qualified to vote. Similarly, under sub-section (3) of Section 11 of the Act, for at least a fortnight before the date fixed for nomination of candidates for every general election, the Chief Officer has to keep open for public inspection at the municipal office and at such other places in the municipal area as the Council may fix, copies of the lists of voters of each ward maintained under sub-section (2). This requirement is necessarily for the benefit of those whose names may have been omitted, though liable to be included, from the authentic list. It is not the case of the first respondent that the two citizens who complained of being deprived of their right of franchise went to the Chief Officer with a request to have their names included in the voters' list prepared by him. If such a request was made and denied, it would be another matter. We have also no doubt that the Chief Officer is bound to include the names of those who are eligible, that is, the names of those whose names are to be found in the electoral roll of the Legislative Assembly for the appropriate area. If there is refusal to include these names, a right can be exercised or enforced by asking for a mandate from the Court, but in absence of any such steps being taken to make the voters' list complete, we are unable to hold that merely because a person's name is in the electoral roll of the Assembly, that by itself would entitle him to claim franchise under the Municipal Act which is restricted to only those whose names are in the list of voters prepared by the Chief Officer.

13. Differing from the Tribunal, therefore, we have come to the conclusion that there was no jurisdiction in the Tribunal to adjudicate on the issue raised in the form before it. The voters' list prepared by the Chief Officer is made

conclusive evidence as to the rights of persons who are entitled to vote and it is not permissible to travel beyond that list. As the names of the two Deshpandes were not in the voters' list, admittedly they had no right to exercise any franchise at this election and that fact, therefore, could not affect the election in the manner in which it was contended by the first respondent. This finding is enough to set aside the order of the learned Extra Assistant Judge.

14. It is also urged in his own petition filed by the first respondent, and which was at his request placed for admission for today, that the first respondent had secured two valid votes in addition to the votes declared to be secured by him and thus the first respondent had secured a majority of two valid votes. No such contention was raised in the original petition filed before the Extra Assistant Judge. The first respondent seems to have been allowed to amend his election petition after scrutiny of ballot papers, that is, long after the period of limitation fixed for filing such an election petition. We are not sure whether any such contention could have been allowed to be raised by the learned Assistant Judge after the limitation for filing the election petition was long passed. The two ballot papers were rejected by the Returning Officer because it was found that on each of them mark was made on the reverse of the ballot paper, over that part where the symbol of standing lion could be seen against light. The contention of the first respondent was that a mark so made even though on the reverse of the ballot paper, should be held as a proper mark on the ballot paper because it is on the symbol of the candidate for whom the voter intended to vote and this intention can be gathered from the fact that the mark, though on the reverse, is on the obverse of this symbol.

15. In support of this contention our attention was invited to two decisions. One of them is the one Swarup Singh v. Election Tribunal, AIR 1960 All 66. In that case, the symbol was clearly visible on the back of the ballot paper, but the name of the candidate was not. The mark was made by the voter not on the face of the ballot paper, but on the reverse. The judgment in paragraph 7 observes that the voters who voted on these ballot papers made the marks on the back of the ballot papers and not on the front and were probably led to do so because the symbols which were more prominent than the written names appeared clearly on the back of the ballot papers as well. The Returning Officer rejected these ballot papers because the voters marked on the back side of the ballot papers, while the Election Tribunal

did not consider it to be a good reason to reject the ballot paper. When the matter came up to the High Court, the learned Judge has observed.

"I do not consider such marking in this particular case, to be marking against the provisions of paragraph 43."

If we have to deduce from this observation that the High Court seems to accept the principle, contended for here, that even if the voter makes a mark on the reverse side of a ballot paper, that is, not on the face but on the back side, such mark should be held to be a valid compliance with Rule 37 which prescribes the voting procedure in this case we are unable to agree. In Rule 37, the voter on receiving the ballot paper has forthwith to proceed to one of the polling compartments and there make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote. We are not in a position to construe this requirement of the procedure to have been complied with by a voter, who makes mark with the instrument supplied to him not on or near the symbol of the candidate, which is necessarily on the face of the ballot paper, but on the reverse, merely because the symbol is visible either because the ballot paper is translucent or because there is so much ink used or appearing in the symbol that it seeps through the paper and is visible on the back side. The intention of the rule is very clear in our opinion, and does not permit any infraction in its observance. The ballot paper is intended to be used as such by making a mark with the instrument supplied on the face of the ballot paper and not on the reverse. The two ballot papers in the instant case were the only ballot papers on which such marks are found to have been made by two voters. It is not as if a majority of voters were misled into thinking by reason of the appearance of the symbol on the reverse side that marks were to be made on the reverse of the ballot paper. We are unable to accede to the proposition that merely because a symbol may be visible on a ballot paper on its reverse side, it is permissible for a voter to make a mark with the instrument supplied to him on the obverse side of the ballot paper. However an illiterate person may be, he is not ignorant nowadays of the procedure which is explained with pains not only by the candidate but also by the officers. Therefore, if in a given case the ballot paper is found to have marking on the reverse side, it must be wholly due to the negligence of the voter and not because of exercise of a choice to mark it either on front side or on back side, as no such choice is given to the voter.

On plain reading of the rule, we are unable to accept that exercise of franchise in this fashion in violation of the instructions and the procedure prescribed by the rules would amount to exercise of a proper marking or recording of one's vote. So to allow, would lead to several difficulties and there is no limit where one would be able to restrict the scope of such infractions. We are, therefore, unable to hold that the learned Extra Assistant Judge was in error in rejecting this contention of the first respondent and holding that the two ballot papers were rightly rejected. We have dismissed the petition filed by the first respondent and we have given reasons for the same in this petition as both the petitions came to be heard together.

16. The result is Special Civil Application No. 339 of 1968 is allowed. The order of the Extra Assistant Judge is set aside and the result declared by the Returning Officer is held to be properly declared. The petitioner will be entitled to his costs from the first respondent.

HGF/D.V.C. Application allowed.

'AIR 1969 BOMBAY 218 (V 56 C 37)

(NAGPUR BENCH)

PADHYE, J.

Brajvallabh Shankarlal, Petitioner v. Maharashtra Revenue Tribunal, Nagpur and 3 others, Respondents.

Special Civil Appln. No. 724 of 1966, D/- 10-4-1968.

Tenancy Laws — Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Ss. 33, 16, 18, 20 and 21 — Appeal under S. 33 when lies — Findings given under S. 18 — Appeal not maintainable.

Under S 33, no appeal lies against the mere findings given in S. 18. It can only lie after the declaration has been given under S 21.

Before the Collector makes a declaration under Section 21, he has to decide certain other matters mentioned in Sections 18, 19 and 20 for arriving at the figures required for a declaration. Necessarily, the declaration must be preceded by an antecedent enquiry in which all the objections and contentions raised by various persons have to be decided and findings thereon have to be given. After these findings are given the Collector is in a position to find out the matters specified in Section 21 and that is the final declaration which is made appealable under Section 33. The result of the enquiry made under Section 18 is merely a finding and not the final decision.

(Para 8)

J. N. Chandurkar, for Petitioner; C. S. Dharmadhikari, Asstt. Govt. Pleader, for Respondents Nos. 2 and 4; K. G. Chendke, for Respondent No. 3.

ORDER: The only question that is involved in the present petition is whether the finding which has been given by the Sub-Divisional Officer in the proceedings under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, is appealable. The Maharashtra Revenue Tribunal has by its order dated 26th April 1966 held that the appeal is not maintainable under Section 33 of the Act. The matter arises in this way.

2. The respondent No. 3 Rambilas was the tenure-holder of Survey No. 5, area 22 acres 19 gunthas of mouza Aurangpur, taluq Daryapur, district Amravati amongst other property. The said Rambilas executed a deed of gift in respect of this field on 31st March 1960 in favour of the petitioner Brijvallabh. This gift deed was said to be in pursuance of a kararnama said to have been executed by Rambilas in favour of Brijvallabh on 12th of December 1958.

3. Proceedings under the Ceiling Act were taken against Rambilas. There was a report by the revenue authorities that on 4-8-1959 the field Survey No. 5 was of the ownership of Rambilas and for the purposes the Ceiling Act must be taken to be his. In these proceedings the petitioner Brijvallabh raised objections contending that the field was donated by Rambilas to him and it was his property. The Sub-Divisional Officer rejected his contention and held that the gift deed appeared to defeat the objects of the ceiling legislation to whatever extent possible. He held that the survey No. 5 cannot be exempted and with a view to safeguard the interest of the objector and also of the Government the landlord will retain this survey number with him in the light of the provisions of Section 16(1) of the Ceiling Act at the time of exercising his right of retaining lands with him under Section 16 (2) of the Ceiling Act. This order or the result of the enquiry was challenged by the present petitioner before the Maharashtra Revenue Tribunal. The Revenue Tribunal held that this decision was not appealable under Section 33 of the Ceiling Act.

4. Right of appeal is provided by Section 33 of the Ceiling Act. Section 33 provides for an appeal against an order or award of the Collector to the Maharashtra Revenue Tribunal in the following cases:

"(2) a declaration or any part thereof under Section 21.

The declaration that is mentioned in Section 33 is the declaration which is

given under Section 21 of the Act. Section 21 provides that as soon as may be after the Collector has considered the matters referred to in Section 18 and the questions, if any, under sub-section (3) of Section 20, he shall make a declaration stating therein his decision on the matters mentioned in this section. The matters which are required to be considered by the Collector are given in Section 18 and one of the matters that is required to be considered by the Collector under Section 18 is whether any land transferred or partitioned between the period from the 4th day of August 1959 and the appointed day, should be considered in calculating the ceiling area as provided by sub-section (1) of Section 10. Section 10 provides for the consequences of certain transfers and acquisitions of land. Section 10(1) reads:

"10. (1) If—

(a) any person after the 4th day of August 1959 but before the appointed day, transfers or partitions any land in anticipation of, or in order to avoid or defeat, the objects of this Act, or

(b) any land is transferred or partitioned in contravention of the provisions of Section 8, then, in calculating the ceiling area which that person is entitled to hold, the area so transferred or partitioned shall be taken into consideration, and land exceeding the ceiling area so calculated shall be deemed to be in excess of the ceiling area for that holding notwithstanding that the land remaining with him may not in fact be in excess of the ceiling area."

Section 10(1) further provides that all transfers and partitions made after the 4th day of August 1959 but before the appointed day, shall be deemed (unless the contrary is proved) to have been made in anticipation of, or in order to avoid or defeat the objects of this Act. The appointed day is 26th of January 1962.

5. Under the Ceiling Act power is given to the Collector to hold an enquiry. Section 14 requires the Collector to hold an enquiry in respect of every person holding land in excess of the ceiling area and has to determine the surplus land held by such person. For holding an enquiry the Collector has to issue a public notice in the prescribed form and call upon all persons interested in the land to submit to the Collector their objections within a period of one month from the date of the publication of the notice. He has also to serve notices to the same effect on the holder and all other persons who are known or believed to be interested in the land, calling upon them to appear before him personally or through an agent and to state any objections or suggestions to the particulars given in the

notice to show cause wherever necessary, why any land transferred or partitioned in contravention of the provisions of Section 8, or any land transferred or partitioned during the period specified in clause (a) of sub-section (1) of Section 10, should not be taken into consideration in calculating the ceiling area as provided by sub-section (1) of Section 10. After this is done and after hearing the holder and other persons interested and who are present, he has to consider the matters which are given in Section 18.

6. In this case, the present petitioner who claimed to be interested in Survey No 5 made objections in the proceedings before the Collector and contended that the field was given to him by way of a gift by virtue of the registered gift deed dated 31st March 1960, which was executed in his favour in pursuance of the kararnama of 12th December 1958. Besides the matters required to be considered under Section 18, there are certain other questions in Sections 19 and 20. Section 16 of the Ceiling Act gives a right of selecting the land which the holder can retain with him within the ceiling area. It provides

"16 (1) Where a person holds land in excess of the ceiling area, and the whole or part of such land is subject to an encumbrance, then subject to the provisions of sub-section (1) of Section 10 and Section 15 he shall retain such encumbered land (where he is the owner or tenant thereof) up to the extent of the ceiling area".

Sub-section (2) of Section 16 provides that subject to the provisions of sub-section (1), a person shall be entitled to select the lands he wishes to retain with himself, upto the ceiling area.

7. The Scheme of the Ceiling Act, therefore, appears that after the matters mentioned in Section 18 and the questions given in Section 20 have been decided, the total land with the holder on the relevant date is determined and after that is done, a right is given to the holder to select as much land from the land as he is entitled to retain with himself upto the ceiling area and in selecting that land, the land which has already been encumbered and the land which is held to have been transferred or partitioned in anticipation of or in order to avoid or defeat the objects of the Act will also be included in that area. It is after the selection has been made that the Collector is in a position to delimit the land as surplus land and he has then to make a declaration stating therein his decision on the points given in Section 21 of the Ceiling Act. He gives the decision on the following matters:

(a) the total area of land which the person is entitled to hold as the ceiling area;

(b) the total area of land which is in excess of the ceiling area;

(c) the name of the person to whom possession of land is to be restored under Section 19, and area and particulars of such land;

(d) the area, description and full particulars of the land which is delimited as surplus land;

(e) the area and particulars of land, out of surplus land, in respect of which the right, title and interest of the person holding it is to be forfeited to the State Government.

8. It will thus appear that before the Collector makes a declaration as contemplated by Section 21, he has to decide certain other matters for arriving at the figures which are required for a declaration under S. 21. Necessarily, the declaration must be preceded by an antecedent enquiry in which all the objections and contentions raised by various persons have to be decided and findings thereon have to be given. After these findings are given on matters mentioned in Sections 18, 19 and 20, the Collector then is in a position to find out the matters specified in Section 21 and that is the final declaration which is made appealable under Section 33. In an appeal under Section 33, the person aggrieved may challenge all the matters given under Section 21 if he is aggrieved by all of them or only some of these matters by which he feels aggrieved. The result of the enquiry made under Section 18 is merely a finding and not the final decision. The final decision is the declaration made under Section 21. No appeal has been provided against the findings in an enquiry under Section 18 of the Ceiling Act. Section 21 itself provides that after the Collector has first considered the matters referred to in Section 18 and the questions, if any, under sub-section (3) of Section 20 and as soon thereafter as may be, has to make a declaration on the matters referred to therein. The enquiry, therefore, which is made under Section 18 ultimately results in the declaration which is given under Section 21 and forms part of the declaration under Section 21. If and when a declaration is made by the Collector and an appeal is filed against such a declaration, it would be open to the person aggrieved not only to challenge the decisions given in the declaration, but also the findings which precede such declaration as in Section 18 of the Act. I am, therefore, of the opinion that no appeal lies against the mere findings given in Section 18 and the appeal can only lie after the declaration has been given under S. 21. In this case, what is challeng-

ed is not the declaration as contemplated by Section 21, but the findings given under Section 18. The Revenue Tribunal therefore, was correct in holding that the appeal was not maintainable.

9. The petition, therefore, fails and is dismissed. But in the circumstances, there will be no order as to costs.

HGP/D.V.C. Petition dismissed.

AIR 1969 BOMBAY 221 (V 56 C 38)
(AT NAGPUR)
DESHMUKH J.

Kedarnath Gangagopal Misra, Appellant v. Sitaram Narayan Moharil, Respondent.

Second Appeal No. 309 of 1966 with Civil Revn. Appln. No. 220 of 1967, D/-2-2-1968, against decision of Dist. J. Nagpur in Appeal No. 266 of 1965 and 2nd Joint Civil J., and Jr. Dvn., Nagpur, D/-6-5-1967, Respectively.

Contract Act (1872) Ss. 28, 2(d) and (e) — Decree for eviction — Execution — Decree-holder accepting representation of tenant not to pursue remedy by way of appeal if time granted to vacate — Agreement reduced to writing — Agreement held not hit by S. 28 — It was a good consideration — Tenant, held, not entitled to prosecute appeal filed in contravention of agreement — Evidence Act (1872), S. 115.

Where parties evaluate circumstances, make a compromise and actually derive benefit under it, they cannot be permitted, after the benefit is enjoyed, to turn round and plead bar of Section 28 of the Contract Act. (Para 7)

Where at the time of execution of a decree for eviction the landlord decree-holder accepted the representation of the tenant judgment-debtor that he would not pursue any further remedy by way of second appeal provided one month's time is given to vacate and the agreement was reduced to writing on the reverse side of the warrant for execution;

Held, that the agreement incorporated on the reverse side of the warrant was not affected by the provisions of Section 28 of the Contract Act and was a valid and enforceable agreement, and the tenant would not be entitled to prosecute the appeal filed in contravention of the agreement. The Contract Act conceives of agreement for which consideration could be for something done in the past or being done at present or to be done in the future. There was no illegality in the agreement arrived at between the judgment-debtor and the decree-holder. (1875-77) ILR 1 All 267

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(FB); (1870-72) 14 Moo Ind App 203 (FC); (1882) ILR 8 Cal 455, Rel. on.

If the judgment-debtor has gained breathing time for finding alternate accommodation and has put off the evil day by one month, that could be considered a good consideration for such a contract. (Para 10)

Cases Referred: Chronological Paras
(1882) ILR 8 Cal 455=10 Cal LR
443, Protab Chunder Dass v.

Arathoon 9
(1875-77) ILR 1 All 267 (FB), Anant

Das v. Ashburner & Co. 8

(1870-72) 14 Moo Ind App 203=9

Beng LR 460 (FC), Munshi Amir

Ali v. Maharani Inderjit Koer 9

D. K. Khamborkar, for Appellant;
N. S. Munshi, for Respondent.

JUDGMENT: The respondent in this appeal is the landlord plaintiff and the appellant is the defendant tenant. A decree for eviction, rent and mesne profits was obtained by the respondent in the trial Court on April 30, 1965. The tenant appellant filed an appeal against the decree in the District Court which came to be dismissed on August 22, 1966. As soon as decree in the trial Court was obtained the respondent filed petition for execution. Execution was stayed because of the stay order obtained from the appellate Court. Immediately the appeal was dismissed, a decree was produced and execution was revived.

2. On August 31, 1966, plaintiff-decree-holder accompanied by the bailiff of the Court and the warrant for execution went to the doors of the present appellant. The plaintiff decree-holder had all the means at that time to throw out the appellant and obtain physical possession of the premises. After some negotiation, it appears that appellant assured the respondent plaintiff that he would not pursue any further remedy by way of Second Appeal provided one month's time is given to vacate. It is alleged that respondent accepted this representation and agreement was reached between the parties. It was reduced to writing on the reverse side of the warrant for execution at the instance of the bailiff. With this arrangement being done, decree-holder plaintiff returned and the warrant was lodged back in the Court.

3. During that month which was obtained by the appellant as breathing time, he filed Second Appeal No. 309 of 1966. He also applied for stay. As soon as notice of the interim stay of execution was received by the respondent plaintiff he rushed to this Court and made civil application No. 194/1967. By that application it is urged that the appellant defendant having agreed not to file the appeal and having obtained the advantage

of sending back the warrant and the bailiff and having further obtained the time of one month, he cannot file the appeal. The appeal is incompetent and should be dismissed as such.

4. This application is opposed by the appellant. He urged that the plaintiff respondent gave him one month's time under the warrant, without any representations by the judgment-debtor. That was an act of grace of the decree-holder and it was not a part of any contract. Having given him time and having made an endorsement to that effect, the bailiff and the decree-holder went away. They returned after some time and then demanded the second part of the writing on the warrant from the appellant. Under threat and force he was made to write that part, by which he stated that he would not file any appeal. The giving of one month's time by the decree-holder and the appellant's agreement not to file the appeal are two independent and distinct events. Since this plea was raised, I passed an interim order by framing an issue which was sent down for recording evidence and certifying the same. In respect of that issue, the trial Court certified that the two parts of the writings are the result of a single transaction of agreement between the parties. The plaintiff decree-holder's plea has been accepted as it is supported by the bailiff and another witness Arvind Khandekar. The defence of the judgment-debtor has been rejected. When the papers reached the appellate Court, learned District Court heard the Counsel on both sides and confirmed the findings given by the trial Court. In this manner, the appeal along with the application has now come up again for hearing.

5. Only two points arise for my consideration. Shri Khamborkar, appearing for the appellant urged that the finding given by the two Courts below should not be accepted. He read out to me a portion of the bailiff's statement. The bailiff nowhere proves the alleged terms of agreement. In the circumstances, it is urged that the allegation of the plaintiff decree-holder should not be accepted. I see no force in this argument. The bailiff may not have heard the discussion between the parties. The point on which he corroborates the plaintiff decree-holder fully is that both the parts of the writing on the reverse of the warrant took place at one and the same time. Both the writings of the decree-holder as well as the judgment-debtor are a result of a single transaction of agreement between the parties. If this is so, it obviously means that the decree-holder agreed to accommodate the judgment-debtor by giving him one month's time to remove his kit and to find alternate

accommodation. He gave this accommodation because the judgment-debtor agreed not to file any appeal. This is, therefore, a case where a decree-holder could have thrown out the judgment-debtor along with his kit. Nothing prevented him in law from doing so. Even then knowing how litigation can be protracted the decree-holder seems to have made peace with the judgment-debtor by giving him one month's time to vacate. In the circumstances, I agree with the findings given by the two Courts below and hold that there was an agreement reached between the judgment-debtor and decree-holder which is reflected in the writings of the two parties. The agreement was that the judgment-debtor shall not file any appeal in the High Court against the decree of the District Court on the consideration of getting one month's time for vacating the premises.

6. The second point that arises for consideration is whether such an agreement is legal and valid. If it is a valid agreement, then the appellant shall not be allowed to proceed with his remedy of this appeal. Shri Khamborkar in that behalf relies upon the provisions of Section 28 of the Indian Contract Act. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, is declared void. Shri Khamborkar urges that the judgment-debtor had a right in law to prosecute his further remedies under the Code of Civil Procedure. The right of appeal, against the decree of the District Court, could be exercised by him at his volition. However, by the contract made with the decree-holder he is prevented from filing any such appeal. This is a contract in contravention of Section 28 and cannot be enforced.

7. It is not possible to accept this argument. In fact, this is not strictly a contract by which the appellant has agreed not to follow legal remedies by usual legal proceedings in the ordinary tribunals of the land. The circumstances under which the agreement came to be effected and the nature of that agreement must be noted, in order to understand the real implication of that agreement. This was a simple suit between landlord and tenant, where the landlord had already obtained the permission of the Rent Controller for terminating the tenancy. The suit had resulted in a decree in the two Courts below. Undoubtedly, the appellant had a right to file an appeal in this Court. Whether any success would be obtained in the appeal or not is at best a matter of guess work at that stage. For ought we

know, the appeal may be dismissed in limine at the motion hearing. A warrant for possession was already issued and the bailiff was standing in the door along with the decree-holder. If nothing was done at that time, the judgment-debtor stood the prospect of being thrown out from the premises with his bag and baggage. From the evidence led it appears that there were some other persons living with the judgment-debtor. The prospect of being thrown out along with those persons and the personal effects was obviously serious. When decrees are passed in Courts, it is common knowledge that compromises are effected out of Court or adjustments are made in the decrees which are got certified from Courts. These are valid contracts. Even though a person has got a right of appeal, he is not obliged to file an appeal against the decree. If no appeal is filed during the period of limitation, the decree becomes final. In the circumstances, if the judgment-debtor has gained breathing time for finding alternate accommodation and has put off the evil day by one month, that could be considered a good consideration for such a contract. This is not a contract which is affected by Section 28 of the Indian Contract Act. A distinction has to be made between contracts which are opposed to public policy or contracts which are in absolute suppression of legal remedies and contracts which are in the nature of bona fide settlement of a dispute or claim. Where parties evaluate circumstances, make a compromise and actually derive benefit under it, they cannot be permitted, after the benefit is enjoyed, to turn round and plead bar of Section 28 of the Contract Act.

8. Shri Munshi, for the respondent, has relied upon several judgments, but it would be enough to refer to a few of them. The first judgment relied upon is a Full Bench decision of the Allahabad High Court in the case of Anantdas v. Ashburner and Co., (1875-77) ILR 1 All 267 (FB). Plaintiff Ashburner and Co. had obtained a money-decree against Anantdas. The judgment-debtor agreed with the decree-holder that he would not file an appeal against the decree provided the time stipulated by the agreement was given to him for making payment. Accordingly, time was granted. In spite of this agreement, Anantdas filed an appeal. It was objected by the respondent that the appeal was incompetent in view of the agreement arrived at between the parties. On behalf of judgment-debtor, Anantdas, it was sought to be argued that the contract was vitiated by the provisions of Section 28 of the Indian Contract Act. The Full Bench of the Allahabad High Court negated this contention by pointing out that the

agreement was not prohibited by Section 28 of the Indian Contract Act and that the appellate Court was bound by the rules of justice, equity and good conscience to give effect to it and refuse to allow defendant to proceed with the appeal which he had instituted in contravention of it. The Full Bench points out that Section 28 of the Indian Contract Act incorporates a well recognised rule of English Courts which prohibits all agreements purporting to oust the jurisdiction of the Courts, but notwithstanding this rule, it was long since determined that if a person after mature deliberation enters into an agreement for the purpose of compromising a claim bona fide made to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and the agreement is valid.

9. The next judgment relied upon is a Privy Council decision in Munshi Amir Ali v. Maharani Inderjit Koer, (1870-72) 14 Moo Ind App 203 (PC). In an appeal that was pending in the High Court, the parties agreed that the High Court need confine its judgment only to one issue and they agreed to abide by the finding on that issue. No appeal would be filed against the decision. The High Court accordingly found on that issue and held the Mukhtyarnama concerned to be a forged document. Being aggrieved, and in spite of the undertaking in the High Court, the appellant appealed to Her Majesty in Council. On a preliminary objection being raised that such an appeal does not lie, their Lordships of the Privy Council upheld that objection. Their Lordships of the Privy Council pointed out that by confining the decision of the High Court to genuineness of the Mukhtyarnama, the appellant was really substituting a non suit for an adverse verdict, leaving it open to Baboo Bischen Singh and the appellant himself, if he can get a new and genuine document in his favour to bring a fresh suit. It was, therefore, held that this was a good consideration and the contract was valid. The appeal was, therefore dismissed on that preliminary ground alone. The ratio of both these judgments has been followed in the Division Bench decision of the Calcutta High Court in Protab Chunder Dass v. Arathoon, (1882) ILR 8 Cal 455. The facts of that case show that a judgment-debtor against whom decree was obtained was arrested and brought before the Court. He then made an application by which he agreed not to file an appeal against the decree and claimed some time for making payment of the decree. The plaintiff decree-holder agreed to his proposal and gave him time to make payment of the decree.

On this agreement being reached, which the Court accepted, the judgment-debtor was released from arrest. In spite of it, the judgment-debtor filed an appeal and a preliminary objection was raised that such an appeal was incompetent. Following the principle laid down in the above two cases, Calcutta High Court says that the judgment-debtor having induced the decree-holder to believe, and having expressly undertaken that he would not prefer an appeal, and having by this representation and undertaking procured his own release from arrest, was estopped from acting contrary to his deliberate representation and undertaking.

10. Shri Khamborkar argued before me that the endorsement made by the judgment-debtor relates to a future undertaking not to file an appeal. I do not see any substance in this argument. The Contract Act conceives of agreement for which consideration could be for something done in the past or being done at present or to be done in the future. There is no illegality in the agreement arrived at between the judgment-debtor and the decree-holder. In the circumstances discussed above, I am satisfied that the agreement incorporated on the reverse side of the warrant is not affected by the provisions of Section 28 of the Indian Contract Act and is a valid and enforceable agreement. I would, therefore, hold that the present appellant is not entitled to prosecute the appeal. The appeal itself is to be held incompetent and dismissed as such with costs.

11. In view of this judgment in the main appeal, Counsel agree that Civil Revision Application No 220 of 1967 becomes infructuous and should be dismissed as such. There shall be no order as to costs in that revision application.

LGC/D V C. Appeal and revision dismissed.

AIR 1969 BOMBAY 224 (V 56 C 39)
PATEL AND WAGLE, JJ.

K. Lakshminarayanan, Petitioner v Deputy Chief Controller of Imports and Exports, Madras and another, Respondents.

Special Civil Applns Nos. 2108 and 2109 of 1968, D/- 11-10-1968

(A) Imports and Exports (Control) Act (1947), S. 3 — Imports (Control) Order (1955), Pre. and S. 3 — Validity — Neither S. 3 of the Act of 1947 nor Imports (Control) Order (1955) is beyond legislative competence of Central Legislature — Constitution of India, Art. 246 — Government of India Act (1935), Section 100, List 1, Entry 19.

LL/AM/G443/68

Neither S 3 of the Imports and Exports (Control) Act, 1947 nor the Imports (Control) Order, 1955 is beyond the legislative competence of the Central Legislature. AIR 1963 SC 1470, Rel. on.

Section 3 deals with the question of imports and exports. It enables the Government by order to prohibit, restrict or otherwise control the import and export. There is no doubt that when Entry No 19 in List I of Government of India Act (1935) enables the Central Legislature to legislate in respect of import and export, it would necessarily include the power to completely prohibit or limit the import of goods, and in fact by Section 3 this power has been taken for the purpose of the subordinate legislation. As the whole tenor of the Act shows, it was not dealing in any manner with any transactions of commerce or trade in a province. It cannot be said that the Government is bound to permit the imports freely. In order to see that foreign exchange is not wasted, control of imports is necessary. As a corollary it must follow that those who import goods do not take advantage of the consumers' needs. It is necessary therefore to regulate the disposal for that limited purpose only and that is what is intended by the said Order and the conditions of the licence. The Act and the Order do not purport to legislate with respect to commerce or trade. They merely incidentally affect the goods imported under the licence. (Para 8)

(B) Constitution of India, Pre. & Article 246 — Construction of Articles and Lists of Constitution — Rule of pith and substance — Civil P. C. (1908), Pre. — Interpretation of Statutes.

Rules regarding construction of Articles and the Lists of the Constitution are well settled. One is that liberal construction should be placed on the articles and the Lists of the Constitutional provisions and secondly that the Court should determine the pith and substance of the matter and if it finds that essentially the legislation is with respect to a matter which falls within the jurisdiction of the particular legislature, the Court ought not to declare its invalidity on the ground merely that it incidentally encroaches in some measure upon the jurisdiction of another Legislature entitled to frame laws with respect to another matter 1937 AC 863 and AIR 1947 PC 60 and AIR 1960 SC 424, Rel. on. (Para 6)

Cases Referred Chronological Paras
(1963) AIR 1963 SC 1470 (V 50)=
1963 Cri LJ 403, Abdul Aziz v. State of Maharashtra 6
(1960) AIR 1960 SC 424 (V 47)=
(1960) 2 SCR 362, Chaturbhai M. Patel v. Union of India 6

(1951) AIR 1951 SC 318 (V 38)=52
 Cri LJ 1361, State of Bombay v.
 F. N. Balsara 7
 (1947) AIR 1947 PC 60 (V 34)=74
 Ind App 23, Prafulla Kumar
 Mukherjee v. Bank of Commerce
 Ltd. Khulna 6
 (1937) 1937 AC 863=106 LJPC 161,
 Gallagher v. Lynn 6
 K. Srinivasan with V. N. Gadgil, for
 Petitioner in both.

PATEL, J.—The petitioner in both these petitions alleges that he is a partner of a dissolved firm named Bangalore Stores in Salem District. The firm was manufacturing and exporting handloom fabrics and its then partners were the petitioner, K. Damodaran, K. Govindarajan and O. V. Krishnaswami Chettiar. The said firm obtained licences for import of silk yarn for the purposes of its business from the Chief Controller of Imports and Exports with certain terms attached to the licences. Later investigation apparently showed that the said partnership had committed breaches of the terms of licence, particularly the term that the said goods after import shall be used for its own manufacture. After this was discovered, the Deputy Chief Controller of Imports and Exports filed two complaints in the Court of the Additional Chief Presidency Magistrate at Bombay on July 5, 1968 alleging that the said firm and its partners had committed breaches of the terms of the licences issued to them. The firm in fact never received any of the goods but only the licences appeared to be sold. According to him, offences punishable under Section 5 of the Imports and Exports (Control) Act, 1947, read with Clause 5 of the Imports (Control) Order, 1955, were committed.

2. The petitioner has filed these two applications raising several points but except one all the rest are questions of fact and at best mixed questions of fact and law. As to these questions which require ascertainment of facts, it would be impossible to exercise the jurisdiction of this Court. All facts will be disclosed at the trial and could very well be answered by the trial Court after all the evidence is before the Court. We have therefore heard Mr. Shrinivasan only on the constitutional question that is raised before us.

3. Only two sections of the Imports and Exports (Control) Act, 1947, are relevant. Section 2 defines "import" and "export" to mean respectively bringing into, and taking out of India by sea, land or air. Section 3 reads as follows:

"The Central Government may, by order published in the Official Gazette, make provision for prohibiting, restricting or otherwise controlling, in all cases

or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order,—

(a) the import, export, carriage coast-wise or shipment or ships' stores of goods of any specified description;

(b) the bringing into any part or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried."

The rest of it is not material for the present discussion.

4. Under the powers given by this Act, the Central Government issued an order called Imports (Control) Order, 1955. By Section 3 of the Act import was prohibited except as otherwise provided in the said Order in respect of goods specified in Schedule I, except under and in accordance with a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II.

Sub-section (2) provides for certain consequences in the case of import of goods if found to be different or not conforming to the description of the goods given in the licence including the one regarding the taking of action under the Sea Customs Act, 1878. Clause 5 of the Imports (Control) Order, 1955, relates to the imposition of conditions in the licence which is as follows:

"5. Conditions of Licence: (1) The licensing authority issuing a licence under this Order may issue the same subject to one or more of the conditions stated below.

(i) that the goods covered by the licence shall not be disposed of, except in the manner prescribed by the licensing authority, or otherwise dealt with, without the written permission of the licensing authority or any person duly authorised by it;

(ii) that the goods covered by the licence on importation shall not be sold or distributed at a price exceeding that which may be specified in any directions attached to the licence;

(iii) that the applicant for a licence shall execute a bond for complying with the terms subject to which a licence may be granted.

(2) A licence granted under this Order may contain such conditions, not inconsistent with the Act or this Order, as the licensing authority may deem fit."

Sub-clause (3) of Clause 5 goes on to provide implied conditions of the licence. Sub-clause (4) requires the licensee to comply with all the conditions imposed or deemed to be imposed under this clause. The other powers are ancillary to the carrying out of the provisions of restrictions. The combined effect of the Act and this Order is

that if any of the terms of the licence granting the permit to import is broken or contravened by the licensee, he renders himself liable to prosecution and punishment provided by Section 5 of the Act.

5. The contention of Mr. Shrinivasan is that the provisions of Section 3 and the Order are beyond the legislative competence of the Central Legislature inasmuch as they travel beyond the limits of Entry No 19 in List I of Government of India Act, 1935, and the corresponding Entries of the Constitution. Section 100 of the Government of India Act reads as follows:

"100. (1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the 'Federal Legislative List').

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').

(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List').

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof."

The corresponding Article in the Constitution is Article 246. As it is similarly worded it need not be reproduced. Under these two provisions the Legislature at the Centre is empowered to enact laws with respect to any of the matters in List I and the Provincial Legislature is entitled to legislate with respect to any of the matters falling within List II.

6. Rules regarding construction of Articles and the Lists of the Constitution are well settled. One is that liberal construction should be placed on the articles and the Lists of the Constitutional provisions and secondly that the Court should determine the pith and substance of the matter and if it finds that essentially the legislation is with respect to a matter which falls within the jurisdiction of the particular legislature, the Court ought not to declare its in-

validity on the ground merely that it incidentally encroaches in some measure upon the jurisdiction of another Legislature entitled to frame laws with respect to another matter.

This has been decided in a large number of cases, such as *Gallagher v. Lynn* 1937 AC 863; *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd.*, *Rhulna*, 74 Ind App 23. (AIR 1947 PC 60) and *Chaturbhai M. Patel v. Union of India*, (1960) 2 SCR 362: (AIR 1960 SC 424).

7. In the present case the argument is that the Legislature by enacting Section 3 of the Imports and Exports (Control) Act, 1947 went beyond its legislative competency inasmuch as it took upon itself power much wider than the power of merely controlling the imports and exports and it is under these powers that the subsequent order I.e. Imports (Control) Order, 1955, has been framed. In this connection Mr. Shrinivasan cited before us the decision in *State of Bombay v. F. N. Balsara*, AIR 1951 SC 318. The Court there was concerned with considering the validity of the provisions of *Bombay Prohibition Act*. While dealing with the question of prohibition, it prohibited the possession and sale of any liquor except in the exercise of the Act and the Rules framed thereunder. A contention was raised on behalf of the respondent that the subject of import and export being within the competence of the Central Legislature and as the word "import" included within its ambit the subsequent dealing with the imported goods, the Provincial Legislature had trespassed upon the powers of the Central Legislature. This contention was negatived by the Supreme Court, the Court holding that *prima facie* there was no real conflict between the two Entries. Mr. Justice Fazl Ali in paragraph 7 said:

"If we forget for the time being the principles which have been laid down in some of the American cases, it would be difficult to hold that the word 'import' standing by itself will include either sale or possession of the article imported into the country by a person residing in the territory in which it is imported." On the footing of this observation it is argued that the Supreme Court gave a very narrow meaning to the word "import" in Entry 19 in List I while the word "import" used in Section 3 of the Act has a wider meaning and this meaning has been given in the decision in *Abdul Aziz v. State of Maharashtra*, AIR 1963 SC 1470. This case also related to import of goods under licence to which certain conditions were attached. The appellant committed breaches of those terms and he was consequently

prosecuted. His conviction was confirmed by the High Court and he appealed to the Supreme Court. In the appeal, relying upon Balsara's case, AIR 1951 SC 318 it was argued that the word "Import" has got a limited meaning and if that limited meaning is given to the words in Section 3 of the Imports and Exports (Control) Act, there was no power in the Central Government to impose conditions in the licence restricting the disposal of the goods. This contention was repelled saying that this observation cannot be applicable to the interpretation of the words "import and export" in the Act in the present case. In this case the real question before the Supreme Court as is made clear in the later part of the judgment was, whether the order issued by the Central Government was ultra vires the powers contained in Section 3; the Court was not actually considering the question as to what was the precise meaning of the word "import". Section 3 regulated the import and as a necessary corollary to the regulating of the import it would be entitled to impose conditions, and Section 3 has been so framed as to enable the Government to impose conditions in this regard. But that does not mean that the Supreme Court decided the question of validity of the Order not on the basis of the provisions of Section 3 of the Imports and Exports (Control) Act, 1947, taken as a whole, but only on the meaning of the word "import". As we have already said, the subsequent portion of the judgment clearly indicates that their Lordships considered the terms of Section 3 as a whole and affirmed its validity. Let us see now what is the pith and substance of Section 3.

8. Section 3 deals with the question of imports and exports. It enables the Government by order to prohibit, restrict or otherwise control the import and export. There is no doubt that when Entry No. 19 in List I enables the Central Legislature to legislate in respect of import and export, it would necessarily include the power to completely prohibit or limit the import of goods, and in fact by Section 3 this power has been taken for the purpose of the subordinate legislation. As the whole tenor of the Act shows, it was not dealing in any manner with any transactions of commerce or trade in a province. It is not argued and cannot be argued that the Government is bound to permit the imports freely. In order to see that foreign exchange is not wasted, control of imports is necessary. As a corollary it must follow that those who import goods do not take advantage of the consumers' needs. It is necessary therefore to regulate the disposal for that limited pur-

pose only and that is what is intended by the said order and the conditions of the licence. The Act and the Order do not purport to legislate with respect to commerce or trade. They merely incidentally affect the goods imported under the licence. Under the circumstances we are satisfied that neither Section 3 of the Act nor the Order impugned is beyond the legislative competence of the Central Legislature.

9. In the result, the applications must be dismissed as of no merit.
LGC/D.V.C. Applications dismissed.

AIR 1969 BOMBAY 227 (V 56 C 40)
VIMADALAL, J.

Keshavsingh Dwarkadas, Petitioner v. M/s. Indian Engineering Co., Respondents.

Arbitration Petn. No. 49 of 1968,
D/- 17-10-1968.

(A) Arbitration Act (1940), S. 8 (1)
(b) — Word "appoint" — Meaning —
Consent is not an ingredient.

Section 8 (1) (b), which provides the mode of filling a vacancy in the appointment of arbitrator or umpire, comes into play if any appointed arbitrator or umpire, refuses to act. Acceptance of the appointment is not a necessary ingredient for the appointment. The plain meaning of the word 'appoint' is to "ordain or nominate to an office." There is no reason to import the idea of consent into the plain meaning of the word "appoint". Therefore, it cannot be said that when there is no acceptance by the arbitrator or umpire as such, there is no appointment at all, to bring into play S. 8 (1) (b). (1889) 13 Bom LR 826 (PC), Foll. (Para 2)

(B) Arbitration Act (1940), Ss. 3, 8 (1) (b) and Sch. I, R. 4 — Two contingencies mentioned in R. 4 — Arbitration agreement clause incorporating only one of contingencies in R. 4 — Other contingency is not necessarily excluded.

Merely because one of the contingencies in R. 4 is reference to umpire on Arbitrators not agreeing is incorporated in a clause of the Arbitration Agreement, it cannot be said that "a different intention is expressed therein," within the meaning of the terms of Section 3 of the Arbitration Act, and that the express intention of the parties was to exclude the other contingency in R. 4 i.e. reference to umpire on expiration of time without making award. Hence mere inclusion of one of the contingencies of R. 4 in Arbitration Agreement does not exclude the operation of the

other contingency in R. 4. (Para 3)
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 Fayazuddin v. Aminuddin
 (1889) 13 Bom LR 826=10 Mad
 LT 173 (PC), Mirza Sadik
 Hussain v Musammatt Kaniz
 Zohra Begam 2
 (1863) 15 CB (NS) 173=33 LJCP, 2
 25, Ringland v. Lowndes
 M. H. Shah with A. N. Mody, for
 Petitioner; A. H. Mehta with M. B. Rele,
 for Respondents.

ORDER.— This is a petition under Section 33 of the Indian Arbitration Act, 1940, for the determination of the existence and/or validity of the Arbitration Agreement and/or the effect of the purported Reference to Arbitration between the parties, and for a declaration that there is no valid or proper agreement to refer and the decision of the purported appointment of the Umpires is inoperative, ineffective and void and the Umpire has no right to decide or proceed to decide the disputes between the parties. It is not necessary to refer to the facts of the case. Suffice it to say, that the disputes between the parties arose out of certain selling agency agreements in respect of aluminium and copper wires manufactured by the petitioner. Disputes arose between the parties and claims for damages were made which disputes and claims were, under an Arbitration Agreement dated 26th April 1967 (a copy of which is annexed to the petition and marked 'A'), referred to the Arbitration of two learned Counsel of this Court, Mr. H. G. Advani and Mr. J. M. Gandhi, with summary powers. Clause 2 of that Arbitration Agreement provided that the Arbitration proceedings were to be governed by the provisions of the Arbitration Act 1940, and clause 5 laid down that the Arbitrators had to make and publish their Award within four months from the date of their entering upon the reference. Clause 6 which is very material for the purpose of the present petition must be quoted. It is in the following terms:—

"6. The said Arbitrators shall before proceeding with the Arbitration appoint an Umpire and in the event of any difference arising between them, they shall refer the matter to the Umpire for his decision and Award."

The Arbitrators held their first meeting on the 12th September 1967 at which they made the appointment of an Umpire in the following terms:—

"Mr Porus Mehta falling him Mr. Murzban Mistry appointed Umpire." Some meetings were thereafter held and the pleadings completed in the proceedings before the Arbitrators. It is common ground that on the 11th of January, 1968

the time laid down by CL 5 of the Arbitration Agreement between the parties expired. On the 14th of February 1968, the respondents wrote a letter to the petitioner to the effect that the necessary extension of time should be obtained, but there was no reply by the petitioner to that letter. On 27th May 1968 the Umpire Mr. Mehta held a meeting before him which, however, was adjourned to the 17th of June 1968 on which date he gave certain directions in regard to the proceedings before him. Preliminary objections to his right to decide or proceed to decide the said matter having been raised before him were rejected by him at the meeting held on the 12th and 13th of July 1968. The meeting fixed for the 20th of July 1968 was, however, adjourned as the Umpire was informed that the petitioner proposed to file the present petition, which he did on the 29th of July 1968 for the reliefs already set out by me above. The Petitioner claimed those reliefs on the grounds set out in paragraph 7 of the petition, but it may be stated that grounds (b) and (c) therein were not argued before me at all and must be treated as given up. The argument before me was based only on the grounds mentioned as (a) and (d) in the said paragraph 7 of the petition, and they are as follows:—

(i) That the consent of the Umpire not having been obtained to his appointment as such before proceeding with the Arbitration, there was in effect no appointment of the Umpire at all (ground (a) of para 7),

(ii) that Clause 6 of the Arbitration Agreement excludes the operation of Paragraph 4 of Schedule 1 of the Arbitration Act by reason of the provisions of Section 3 of that Act, and the Umpire could, therefore, enter upon the reference only in the event of a difference arising between the arbitrators viz. on their disagreement. It is contended that no difference having arisen between the arbitrators in the present case when the time for making the Award expired, the Umpire had no right, to enter upon the Reference (ground (d) of Paragraph 7 of the petition); and

(iii) that under Clause 6 of the Arbitration Agreement the Umpire had no right to enter on the Reference unless the arbitrators referred the matter to the Umpire (also ground (d) of Paragraph 7 of the petition).

2. As far as the first ground mentioned above is concerned, Mr Shah has contended that Section 8 (1) (b) of the Arbitration Act, which provides the mode of filling a vacancy in the appointment of arbitrators or umpire, comes into play only if the arbitrator or umpire refuses to act after having accepted the

appointment, but that if there is no acceptance by the arbitrator or the umpire as such, then there is no appointment at all and no question of resorting to the procedure under Section 8 (1) (b) of the said Act arises at all. I see no reason whatsoever to restrict the full import of the word "refuses" in the manner suggested by Mr. Shah. Mr. Shah's contention that there is no appointment unless there is acceptance of the appointment is not founded on anything contained in the Arbitration Act itself. That Act does not anywhere lay down that requirement as being necessary to constitute a valid appointment, either of an arbitrator or of an umpire. Mr. Shah's contention in that behalf is founded only on what, he submits, should be read into the connotation of the word 'appoint'. As far as that is concerned, it may, however, be mentioned that the plain meaning of the word 'appoint', in the sense in which it is being considered for the purpose of the present case, is, "to ordain or nominate to an office" (Murray's Oxford English Dictionary 1961). There is, therefore, no reason to import the idea of consent into the plain meaning of the word 'appoint'. It is not unusual to find a man refusing an appointment to a post or office which has already been made in his favour. Mr. Shah has placed reliance on a decision of the Allahabad High Court in the case of *Fayazuddin v. Aminuddin*, (1909) 1 Ind Cas 354 (All) and on the statement that is to be found in Russel on Arbitration (17th edn.) pp. 160 and 214-215. It is stated in Russel that acceptance of the office by an arbitrator appears to be necessary to perfect his appointment, and the decision in the old English case of *Ringland v. Lowndes* (1863) 15 CB (NS) 173 is cited in support of that proposition. The same position is stated in Russel in regard to an umpire also, in support of which another English case is cited therein. I am, however, bound by the view expressed by the Privy Council in another case, which happily coincides with the view which I have taken, apart from authority, on this point, and that is the case of *Mirza Sadik Hussain v. Musammat Kaniz Zohra Begum* (1889) 13 Bom LR 826 at p. 832-833 (PC). The facts of that case were that one Mirza Agha Hasan Khan died leaving him surviving, as heirs, his widow the 1st respondent, his daughter the 2nd respondent and his son the appellant. Disputes having arisen between the appellant and the two respondents as to their shares, the respondents filed a suit in the Court of the Subordinate Judge in Lucknow claiming administration of the estate of the deceased, but after the written statement was filed in that suit, the parties arrived at a compromise which provided inter

alia for a reference to the arbitrators named therein. One of those arbitrators, however, refused to accept office as such, or to act. The District Judge made order of reference to arbitration, whereupon the respondents applied to the court to withdraw the order of reference and to deal with the matter itself or to appoint a commissioner for the purpose. The appellant objected to that course and insisted that the respondents should nominate a new arbitrator. The respondent having declined to appoint another arbitrator the District Judge made an order that he would scrutinise the matter himself and, on his having done so, he passed an Order allotting certain properties to the respondents. On appeal from that order to the Court of the Judicial Commissioner of Oudh, the decision of the District Judge was affirmed. The appellant thereupon appealed to the Privy Council. Reference was made in the judgment of the Privy Council to Section 510 of the Code of Civil Procedure 1882, which dealt with the same situation as Section 8 of the present Arbitration Act 1940 and also used the expression "refuses or neglects" in regard to the same. It was stated that courts in India had construed the said section as meaning that it could only apply to an arbitrator who refused, after having accepted office before refusing. It was observed in the judgment of the Privy Council that what had actually happened in the said case was that, after the arbitrator had been appointed, he refused to accept office as such, or to act. The Privy Council took the view that the construction that had been placed upon Section 510 by the courts in India till then was not a proper construction of that Section, and that

"when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he had performed the first action of all, viz. to take up the office by signifying his assent to his appointment."

The Privy Council, therefore, adopted the view that the course adopted by the lower court was erroneous and the appeal was, therefore, allowed. It is clear from the decision of the Privy Council in the case which I am now considering, that this very question arose before them, though in another context, and that the Privy Council has taken the view that there is no distinction between "refusal to act" and "refusal to accept" his nomination for the purpose of Section 8 of the Arbitration Act. In fact, the observations of the Privy Council clearly show that the view taken in that judgment was that

there was appointment, and that the subsequent refusal of the arbitrator to accept office was nothing else but a refusal to act after having been nominated and it is only on that basis that the Privy Council held that Section 510 of the Code of Civil Procedure, 1882 was applicable. I respectfully agree with the view taken by the Privy Council in the said case and I, therefore, hold that there has been a valid and proper appointment of Mr. Mehta as Umpire in the present case, notwithstanding the fact that his consent had not been obtained prior to his appointment as such.

3. The next ground on which the present petition has been supported by Mr. Shah raises an interesting question. Section 3 of the Arbitration Act, 1940, enacts that arbitration agreements must be deemed to include the provisions set out in the First Schedule to the said Act, "unless a different intention is expressed therein". Para 4 of the said Schedule provides that the umpire is to enter on the reference in lieu of the arbitrators in two contingencies: (a) if the arbitrators have allowed their time to expire without making an award; or (b) have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree. Clause 6 of the Arbitration Agreement dated 26th April 1967, however, provides for a reference to the umpire only in the event of the latter of those contingencies. The former contingency is not mentioned in it at all. It is the contention of Mr. Shah for the Petitioner that the said clause therefore evinces a clear intention to exclude the operation of para 4 of the First Schedule to the Arbitration Act and the result is that there can be no reference to the umpire in the present case, if the time fixed for making the award has been allowed to expire, but the arbitrators have not actually disagreed. In short, according to Mr. Shah the operation of para 4 of the First Schedule is excluded by the terms of clause 6 of the Arbitration Agreement in the present case, in view of the provisions of Section 3 of that Act. I am afraid I cannot accept that contention of Mr. Shah. Merely because one contingency is mentioned in clause 6 of the Arbitration Agreement it cannot be said that "a different intention is expressed therein" within the meaning of the terms of Section 3 of the Arbitration Act, unless what is expressed in that clause is inconsistent with or repugnant to para 4 of the First Schedule to the said Act. In my opinion, that cannot be said to be the position here. What has happened is that, in clause 6, whilst providing for the appointment of the umpire, the parties have referred to the most obvious thing viz. a difference arising between the arbitrators,

but it cannot be said that, in doing so, their express intention was to exclude the other contingency which is provided for in para 4 of the First Schedule of the said Act. I, therefore, hold that clause 6 does not exclude the operation of para 4 of the First Schedule to the Act.

4. If I am wrong in the view which have taken above on this point, I would not accept the argument of Mr. Mehta that the mere expiry of time fixed by clause 5 of the Arbitration Agreement must be regarded as a disagreement between the arbitrators. Mr. Mehta relied upon a statement to that effect which is to be found in Russell on Arbitration (17th Edn.) p. 154, but if one looks at the cases that have been cited by Russell in support of that proposition on this page, and also to the cases cited on p. 1 as well as pages 220-221, it is clear that each of those cases there was material to show that the arbitrators were in disagreement or, at any rate, that they were not inclined to agree, and it is on those facts and in those circumstances that an inference of disagreement was drawn in those cases. I cannot help feeling that the proposition which Russell has formulated on the strength of those decisions is too wide as, in my opinion, it is not in every case of arbitrators merely allowing time to expire that an inference of disagreement between the arbitrators can be drawn. If I am wrong in the view which I have taken that clause 6 of the Arbitration Agreement in the present case does not exclude the operation of para 4 of the First Schedule to the Act, I would, therefore, come to the conclusion that the umpire had no jurisdiction to enter upon the Reference and would hold that the proper procedure in this case is to have fresh arbitrators appointed under Section 8 (1) (b) of the Act, as the failure of the arbitrators to make their award within the time fixed for it would, in my opinion, fall within the word 'neglects' in clause (b) of sub-section (1) of that section. Mr. Shah has sought to contend that there may be cases where the arbitrators may use the utmost diligence in proceeding with the Reference and there may be no element of neglect at all and yet they may fail to make the award within the time fixed. It is, however, important, in this connection, to bear in mind that the Arbitration used in Section 8 (1) (b) of the Arbitration Act, 1940, is, not 'negligence', but 'neglect' and the word 'neglect' must take its colour from the context in which it is used. If the expression used were 'falls or neglects,' the word 'neglects' in that context might convey the idea of negligence as the antithesis would then be between mere failure and negligence. Where, however as in the present case, the

expression used is 'neglects or refuses' the antithesis between the two terms would show that the word 'neglects' is meant to cover all cases other than those of positive refusal, and is not confined to cases of negligence alone. If the arbitrators in such a case fail to make the award within the time fixed, it can, as a matter of plain language, be said that they have neglected to do what they had undertaken viz. to make the award within the time fixed, and the provisions of Section 8 (1) (b) of the Arbitration Act, would, in that event, apply.

5. As far as the third ground urged by Mr. Shah is concerned, there is no substance in the same. Clause 6 of the Arbitration Agreement in the present case provides for the Umpire entering upon the Reference on the matter being referred to him by the arbitrators because the said clause deals only with the contingency of a disagreement between the arbitrators. That requirement cannot possibly have any application to a case like the present one in which the arbitrators have allowed the time fixed to expire without making the award. I must, therefore, reject this contention of Mr. Shah also.

6. The result is that, if I had taken the view that clause 6 of the Arbitration Agreement does exclude para 4 of the First Schedule of the Act, I would have held that the Umpire had no jurisdiction to proceed with the Reference and that the proper remedy was to proceed by way of an application under Section 8 (1) (b) of the Arbitration Act. In the view which I have taken, however, by virtue of the provisions of para 4 of the First Schedule to the Arbitration Act, the Umpire had rightly entered upon the Reference, and I so determine under prayer (a) of the petition, and decline to grant the relief sought in prayer (b) of the petition. The petitioner having failed, must pay the respondents' costs of this petition.

7. In view of the agreement between the parties which is recorded by the Umpire at the meeting held before him on the 20th of July 1968, by consent of parties, I order that the time for the Umpire to make his award be extended to 31st December 1968. The parties before me are agreed that this will be without prejudice to the respondents' right to file an appeal, or any other proceeding, from this order, if so advised, and that the Umpire will not proceed with the Reference for a period of two weeks from to-day for the purpose of enabling the respondents to consider their position in regard to the same. In the event of an appeal being filed, the directions of the appellate

court will have to be obtained in the matter.

MVJ/D.V.C.

Order accordingly.

AIR 1969 BOMBAY 231 (V 56 C 41)
VIMADALAL, J.

Belapur Co., Ltd., Plaintiffs v. Maharashtra State Farming Corporation, Defendants.

Suit No. 610 of 1967 and Misc. Petn. Nos. 664 and 615 of 1967 D/-22-8-1968.

(A) Evidence Act (1872), Ss. 91 to 98 — Terms of document — Construction — Extrinsic evidence — Admissibility.

It is well established that when the terms of a contract have been reduced to writing, extrinsic evidence as to what transpired subsequent to the contract is not admissible for ascertaining the terms. In view of provisions of Section 91 of Evidence Act no extrinsic evidence, oral or documentary can be admitted to prove the terms of a contract, grant or other disposition of property, except the document itself or secondary evidence of its contents when admissible under the relevant provisions of that Act, and the court must find out the expressed intention of the parties. The fundamental rule of construction is to ascertain the intention from the words used in the document which is considered to be the written declaration of the mind of the author. If the words are clear in expressing that intention and the language applies to existing facts, extrinsic evidence is not admissible for construing the deed or for ascertaining the real intention of the parties e. g. surrounding circumstances cannot be considered with a view to holding that a document which is, on the face of it, a sale deed was intended to operate as a mortgage. If, however, the words are such that one may suspect that they do not convey the intention correctly, or in other words, there is some doubt as to what the words mean or how they are to be applied to the circumstances of the writer or to the facts existing at the time when the document was executed, extrinsic evidence is admissible, both under proviso (6) to Section 92 of the Evidence Act as well as in English law. In such cases extrinsic evidence is admissible for the purpose of finding out the meaning of the words which have actually been employed, or what is the same thing, in order to translate the language of the document by a definite meaning to terms capable of such explanation or by connecting them with the proper sub-

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ject-matter, or in other words, for the purpose of throwing light on the meaning of the words used with a view to arrive at the true effect of the transaction to which the document relates. The whole object in such cases is to place the court, as near as may be, in the position of the parties to the document. The subsequent conduct of the parties is, however, not relevant or admissible for the purpose of construing a written document. If the language employed in the document is ambiguous, the question of the admissibility or otherwise of extraneous evidence would be regulated by the provisions of Sections 93 to 98 of the Evidence Act. In view of Section 92 of the Evidence Act, oral evidence can, in no event, be admitted to contradict, vary, add to or subtract from the terms of the document, as far as the parties to that document are concerned. (1900) ILR 22 All 149 (PC) & AIR 1925 PC 75 & AIR 1925 Bom 501 & AIR 1954 SC 345 & AIR 1960 SC 301 & AIR 1951 SC 139 & AIR 1929 PC 34 & AIR 1947 Bom 98 & AIR 1959 SC 24 & AIR 1964 SC 859 & AIR 1958 SC 448 & AIR 1965 SC 1288 & AIR 1961 SC 1285 & 1932 All ER (Reprint) 494 & 1914 AC 71 & AIR 1950 SC 15 & AIR 1947 Bom 293 & 1900 AC 260, Dist. (Paras 23, 24)

(B) Words and Phrases — "Ambiguous" — Word ambiguous means obscure or of double meaning. (Para 24)

(C) Civil P. C. (1908), Pre. — Precedents — Case in the English Courts of Chancery have no application to the law of India as laid down in the Evidence Act. (Para 24)

(D) Evidence Act (1872) S. 92, proviso (6) — Scope — Proviso is of exceptional nature and is of a substantive nature itself — It is not an exception to the rule laid down in the main part of the section.

Proviso 6 to Section 92 of the Evidence Act is of an exceptional nature, in so far as it is not an exception to the rule laid down in the main part of the section that no evidence of any oral agreement or statement can be admitted for the purpose of contradicting, varying, adding to or subtracting from the terms of a written document. It is a substantive provision itself laying down the law relating to the admissibility of extrinsic evidence as an aid to the construction of a document in cases in which it is necessary to find out how the document is related to existing facts. It has nothing whatsoever to do with the question of contradicting, varying adding to or subtracting from the terms of the document with which the main part of Section 92 deals. Proviso (6) to Section 92 does not take away or qualify anything that would, but for that proviso, have fallen within

the substantive portion of that section. It is significant that, unlike the main portion of Section 92, proviso (6) is not restricted to extrinsic evidence of an "oral agreement" or statement. Proviso (6) cannot, therefore, be construed as being an exception to Section 92 and controlled by the main part of that section, or even as being a saving clause to the substantive portion of that section since it does not purport to save anything therein contained from the applicability of the substantive portion of the section. (Para 25)

(E) Civil P. C. (1908), Preamble—Interpretation of Statutes — Proviso — Generally it is an exception to main rule in the section—There can, however, be exceptions — Proviso (6) to S. 92, Evidence Act is one of such exceptions.

Although a proviso to a section is, as a general rule, added to qualify or create an exception to what is contained in the section to which it relates, provisos are often added, not as exceptions or qualifications to the main enactment, but as saving clauses, in which case they will not be construed as controlled by the section and in exceptional cases, a proviso may not really be a proviso in the accepted sense, but may be a substantive provision itself. Proviso (6) to S. 92, Evidence Act, is of this type. AIR 1968 SC 59 (Paras 8, 11) and AIR 1961 SC 1596, Rel. on. (Para 25)

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48 Bom LR 661, Afshar Tacki v.
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503, Hillas and Co., Ltd. v. Acces
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Legge 18, 19, 20
(1900) 1900 AC 260 = 69 LJ Ch
516, North Eastern Rly. Co. v.
Lord Hastings 23
F. S. Nariman with A. B. Diwan, for
Plaintiffs (in No. 610) and for Petitioners in
Nos. 664 & 615); Advocate General with
A. M. Setalvad and T. R. Andhyarujina,
for Defendants (in No. 610) and for Res-
pondents (in Nos. 664 & 615):

ORDER: The plaintiffs to the suit and
the petitioners in both the Writ Petitions
(hereinafter, for the sake of brevity,
referred to only as "the plaintiffs") are
a company registered under the Com-
panies Act carrying on the business of
manufacturing sugar and allied products
at their factory at Harigaon in Ahmed-
nagar District since the last about 45
years. Prior to the coming into force of
the Maharashtra Agricultural Lands
(Ceiling on Holdings) Act (Maharashtra
Act XXVII of 1961) on the 26th of Janu-
ary 1962, the plaintiffs owned a large
area of agricultural lands which were
contiguous to the Plaintiffs' factory and
within a convenient distance from the
same. The plaintiffs used to cultivate
sugarcane on the said lands which was
used and consumed entirely by the
plaintiffs' sugar factory. In fact, it was

with a view to ensure an adequate and
continuous supply of raw materials of
good quality, without being subject to
fluctuations in the prices of sugarcane
that the plaintiffs were cultivating the
said lands. Under the Maharashtra Agri-
cultural Lands (Ceiling on Holdings)
Act 1961, however, all surplus lands of
the plaintiffs, i.e. lands in excess of the
ceiling fixed in the manner provided by
the Act, vested in the State Government,
subject, of course, to payment of com-
pensation as therein provided. Section
28 of the said Act which is important
for the purpose of this case and which
must, therefore, be quoted in extenso,
enacts as follows:

"28. (1) Where any land held by an
industrial undertaking is acquired by
and vests in, the State Government
under Section 21, such land being land
which was being used for the purpose
of producing or providing raw material
for the manufacture or production of
any goods, articles or commodities by
the undertaking, the State Government
shall take particular care to ensure that
the acquisition of the land does not
affect adversely the production and
supply of raw material from the land
to the undertaking.

(2) Notwithstanding anything contain-
ed in Section 27, but subject to any
rules made in this behalf, for the pur-
pose of so ensuring the continuance of
the supply of such raw material to the
undertaking, and generally for the full
and efficient use of the land for agricul-
ture and its efficient management, the
State Government

(a) may, if it is in the opinion of that
Government necessary for the purpose
aforesaid (such opinion being formed
after considering the representation of
persons interested therein) maintain the
integrity of the area so acquired in one
or more compact blocks;

(b) may, subject to such terms and
conditions (including in particular, con-
ditions which are calculated to ensure
the full and continued supply of raw
material to the undertaking at a fair
price) grant the land, or any part there-
of, to a joint farming society (or a
member thereof) consisting as far as
possible, of

(i) persons who had previously leased
such land to the undertaking,

(ii) agricultural labour (if any) em-
ployed by the undertaking on such
land,

(iii) technical or other staff engaged
by the undertaking on such land, or in
relation to the production or supply of
any raw material,

(iv) adjoining landholders who are
small holders,

(v) landless persons:
Provided that, the State Government may:

(a) for such period as is necessary for the setting up of joint farming societies as aforesaid, being not more than three years in the first instance (extendable to a further period not exceeding two years) from the date of taking possession of the land, direct that the land acquired, or any part thereof, shall be cultivated by one or more farms run or managed by the State, or by one or more corporations (including a company) owned or controlled by the State;

(b) grant to the landlord so much of the surplus land leased by him to the undertaking, which together with any other land held by him does not exceed the ceiling area (but if the landlord be a public trust and the major portion of the income from the land is being appropriated for purposes of education or medical relief, grant the entire land to the public trust) on condition that the landlord, or as the case may be, the public trust lease the land to a farm or corporation described in clause (a) aforesaid, and thereafter, in the case of a landlord (not being a public trust) that he becomes a member of the joint farming society, and in the case of a public trust, that it leases the land to a joint farming society.

(3) The State Government may provide that:

(a) for the breach of any term of condition referred to in clause (b) of sub-section (2), or

(b) if the landlord to whom the land is granted fails to lease the land to the farm or corporation or to become a member of a joint farming society; or

(c) if it considers after such inquiry as it thinks fit, that the production and supply of raw material to the undertaking is not maintained at the level or in the manner which, with proper and efficient management it ought to be maintained, or

(d) for any other reason it is undesirable in the interest of the full and efficient cultivation of the land, that the joint farming society should continue to cultivate the land, the grant shall, after giving three months' notice of termination thereof and after giving the other party reasonable opportunity of showing cause, be terminated, and the land resumed. Thereafter, the State Government may make such other arrangements as it thinks fit for the proper cultivation of the land and maintenance of the production and supply of raw material to the undertaking." Section 46 of the said Act empowers the State Government to frame Rules, inter alia, for carrying out the purposes of section 28 of that Act. The State

Government framed Rules in exercise of the rule-making power conferred upon them under section 46 of the said Act. On 24th October 1967, the State Government amended these Rules by framing Rules 12B and 12C under sub-section 2(d) of Section 46 of the Act, to the contents of which I will refer at the appropriate place later on.

2. There are, however, certain material facts relating to this case which occurred prior to the framing of Rules 12B and 12C, which must be narrated here. On the 6th of March 1963, the Maharashtra State Farming Corporation Ltd., which is the defendant to the suit and the second respondent in both the Writ Petitions, was registered under the Companies Act in accordance with the provisions of proviso (a) to section 28(2) of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act; and it is not disputed that the entire share-holding of the said company was not only owned by the State Government, but its Board of Directors consisted wholly of nominees of the State Government, the Revenue Minister for the time being, being the Chairman of the Board of Directors of the said company. On a Writ Petition (being Special C. A. No. 80 (Sic) of 1963) filed by the plaintiff company challenging the validity of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, a Division Bench of this Court, consisting of Kotwal and Mody JJ., held on the 25th of October 1963 that section 28 of the said Act was void as offending against Article 14 of the Constitution, but that the rest of the said Act, which was severable, was valid. It may be mentioned that that was a common judgment delivered in the said Special C. A. No. 800 (Sic) of 1963 filed by the plaintiffs, and in several other petitions filed by other sugar companies. Appeals were filed from the said decision of the High Court, but before the same could be heard, the 17th amendment to the Constitution came into force on the 20th of June 1964 by which the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, was placed as Entry No. 34 in the 9th Schedule to the Constitution, the legal effect of which was that by virtue of the provisions of Article 31B of the Constitution, the validity of the said Act could not be challenged on the ground that it violated any of the fundamental rights declared under Part III of the Constitution. In another matter that came before it on a Writ petition (Spl. C. A. No. 1642 of 1963 filed by the Godavari Sugar Mills Co. Ltd., a Division Bench of the High Court consisting of Chainani C. J. and H. R. Gokhale J., held on the 10th of March 1965, that the 17th Amendment to the Constitution

had put section 28 and other provisions of the impugned Act beyond challenge on the ground that they were inconsistent with or took away or abridged any of the fundamental rights guaranteed under the Constitution, a decision which was confirmed by the Supreme Court in appeal on 10th April 1963.

3. In order to complete the outline of the previous judicial decisions on the subject, it may be mentioned that, on the 27th day of February 1967, a Special Bench of eleven judges held, by a majority, in the case of *Golak Nath v. State of Punjab*, (A.I.R. 1967 S.C. 1643, paragraphs 52-53) that Parliament has no power to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein, but applying the doctrine of "prospective overruling" of its own earlier decisions, it was held that the 17th amendment and all amendments effected prior thereto by which fundamental rights were sought to be abridged were valid on the basis of earlier decisions of the Supreme Court itself. Soon after the decision of the High Court in *Spl. C. A. No. 1642 of 1963*, some time in or about April-May 1965, negotiations started between the plaintiffs' representatives and the representatives of the Government, and it is the plaintiffs' case in paragraph 24 of the plaint that, at one of those meetings, Shri D. R. Pradhan, the then Chief Secretary to the State Government and a Director of the defendants as representing the State Government and the defendants, agreed with the plaintiffs' representatives that the prices to be charged to the plaintiffs by the defendants for the sugarcane supplied from the 1966-67 season onwards would be the prices fixed by the Government of India. This agreement is denied by the defendants in paragraph 16 of the written statement. It is further stated in paragraph 24 of the plaint that the plaintiffs' representatives were assured and promised by the said Pradhan that they would be treated and given the same terms and conditions as other sugar factories which had already handed over their surplus lands. This statement is not denied in paragraph 16 of the Written Statement. Possession of the surplus lands of the plaintiff-company, admeasuring about 11,393 acres and 18.5/8 gunthas, was given by it to the State Government on the 25th of May 1965. It was at that stage that a meeting was held between the representatives of the plaintiffs on the one hand, and two of the directors of the defendants on the other, on the 20th of July 1965. The fact that such a meeting was held is not denied by the defendants, but there is difference in the

respective versions of the parties as to what transpired at the said meeting. The plaintiffs' case with regard to the same, as set out in paragraph 27 of the plaint, is that at the said meeting it was agreed between the parties that the price to be charged for sugarcane produced by the defendants on the surplus lands of the plaintiffs, all of which was to be supplied to the plaintiffs, would be governed by the notifications issued by the Government of India from time to time, and that the plaintiffs would in their turn be bound to purchase all the cane produced on the said surplus lands of the plaintiffs at those prices. This part of the averments in paragraph 27 of the plaint is not denied in paragraph 19 of the Written Statement. It is, however, further stated in paragraph 27 of the plaint that the said prices meant and were understood by the parties to mean the minimum prices fixed by the Central Government under its annual notifications, and that the said minimum prices were regarded by the parties as fair prices within the meaning of Section 28 of the Act. The first part of that averment is clearly denied in paragraph 19 of the Written Statement. As far as the second part of the said averment is concerned, though the same is not denied in paragraph 19 of the Written Statement which deals inter alia with paragraph 27 of the plaint, it has been contended by the learned Advocate-General that the same has been denied in paragraph 27 of the Written Statement, though the said paragraph no doubt deals with paragraph 36 of the plaint. There is force in this contention of the learned Advocate-General and I do not construe the second part of the said averment in the plaint as having been admitted or not denied in the Written Statement. It may be mentioned that it is further stated in the said paragraph that it was agreed that the defendants were to enter into a formal agreement with the plaintiffs for the supply of sugarcane. That has not been denied in paragraph 19 of the Written Statement. The plaintiffs by their letter dated 5th August 1965 (Ex. B.) forwarded to the defendants a copy of the Minutes of the said meeting of 20th July 1965 (Ex. C) and asked for confirmation of the same. In item No. 1 of the said Minutes which related to the prices of sugarcane to be charged by the Corporation, it was stated that it was agreed that the price to be charged for such cane was to be governed by notifications issued by the Government of India from time to time, and that the factory would be bound to purchase all such cane at those prices. It is further stated in the said item that the

Corporation would enter into a formal agreement with the company for the supply of cane. The Court is not concerned in the present case with the remaining items in the said Minutes. The managing director of the defendant Corporation by his letter dated 9th August 1965 (Ex. D) confirmed the arrangement arrived at in respect of the said Item No 1. The Board of Directors of the defendant-Corporation passed a Resolution at their meeting held on the 9th of September 1965 approving of the agreement arrived at by the said Corporation with the plaintiff-company as a result of discussions with their representatives. The material portion of the agreement approved of by the said Resolution was in the following terms:

"6. The Prices of Cane to be charged by the Corporation. — The prices to be charged for the Corporation's sugarcane shall be governed by the notifications issued by the Government of India, from time to time, and the factory shall be bound to purchase all such cane at that price. The Corporation should enter into a formal agreement with the company for the supply of cane."

A copy of the relevant portion of the Minutes of the said meeting of the Board of Directors of the defendant-Corporation is Ex. E in the present proceedings

4. A notification was issued by the Central Government on the 1st of November 1966 (Ex. H 6) under the Sugarcane (Control) Order 1966, promulgated in exercise of powers conferred on the Central Government by section 3 of the Essential Commodities Act, 1955, fixing the minimum price for the year 1966-67 (1st November 1966 to 31st October 1967) at Rs. 5.72 per quintal (Rs. 57.2 per ton) in respect of the plaintiff-company. It may be mentioned that similar notifications fixing minimum price had been issued by the Central Government from time to time ever since the enactment of the Essential Commodities Act, 1955. It may also be mentioned that in paragraph 29 of the plaint it is stated that sugarcane crop is harvested and is ready for sale from about October in each year, that in connection with the standing crop which was harvested during the crushing season 1965-66 (November-October) separate arrangements were made under an agreement dated 10th May 1965, and that the first crop of sugarcane grown and harvested by the defendants on the surplus lands of the plaintiffs was for the crushing season 1966-67 (November-October). Each one of these statements has been admitted in paragraph 20 of the Written Statement to be correct. It

is also common ground that sugar has, at all material times, been a controlled commodity, and that the maximum price of sugar has been fixed from time to time by the Central Government by notifications issued under the Essential Commodities Act. It is also an undisputed fact that the price of sugar is linked to the price of sugarcane by reason of the fact that the cost of sugarcane forms about 60% of the cost of producing sugar. A further fact which is not disputed is that partial decontrol of sugar was brought into force with effect from the 1st of October 1967, from which date sugar manufacturers were free to sell 40 per cent of their production in the free market.

5. On the 11th of November 1966, the managing director of the defendant-Corporation addressed a letter (Ex. G1) to the plaintiff-company and to all other sugar companies stating that it was no longer economic to charge prices for its sugarcane at the minimum rate announced by the Government of India under the Sugarcane Control Order, and that an increase to the extent of 25 per cent over the minimum price of sugarcane announced by the Government of India, which was reasonable and justifiable, had been decided to be charged for sugarcane harvested during the crushing season of 1966-67. The plaintiffs by their letter dated 15th November 1966 (Ex. G2), however, declined to agree to any increase in the price of sugarcane. What ultimately happened was that the defendant-Corporation supplied sugarcane and made out a bill for the crushing season 1966-67 with an increase of 25 per cent over the minimum price fixed by the Central Government, but the plaintiffs paid for the said supply only at that minimum price.

6. With regard to the next crushing season viz. 1967-68 the defendant-Corporation addressed a letter dated 23rd August 1967 (Ex. G3) to the plaintiffs and to all other sugar companies that, without prejudice to any adjustments that might be (arrived) at by mutual consultation, it had been decided by the Corporation that all its sugarcane would be supplied to factories during the said season at the rate of Rs. 120 per ton. It was further stated in the said letter that the defendant-Corporation would supply sugarcane to the plaintiffs' factory during the said crushing season 1967-68 only if the plaintiffs agreed to pay for it at that rate. By its letter dated 8th September 1967 (Ex. G4) the defendant-Corporation sent a reminder in that behalf to the plaintiffs and other sugar companies, in which it was further stated that if confirmation was not received from the plaintiffs and

other companies by the 15th of September 1967, it would be presumed that the plaintiffs were not interested in purchasing the defendant-Corporation's sugarcane and the defendant-Corporation would proceed to make alternative arrangements for its disposal. There was further correspondence between the parties in the course of which the plaintiff-company stated that they were definitely interested in purchasing all the sugarcane grown on the farms of the defendant-Corporation which were attached to the plaintiff's factory, that under no circumstances was the defendant-Corporation at liberty to make any alternative arrangements for its disposal, and that the defendant-Corporation was bound to supply the same to the plaintiffs at the prices notified by the Government of India in respect of the plaintiff's factory. By its notification dated 25th September 1967 (Ex. H8), the Central Government fixed the minimum price of sugarcane in respect of the plaintiff-company for the year 1967-68 (1st October 1967 to 30th September 1968) at Rs. 8.33 per quintal (Rs. 83.3 per ton).

7. It was at that stage that the State Government proceeded to amend the Rules framed by it under S. 46 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, and invited objections from the companies concerned. As the defendant-Corporation had, in the course of the said correspondence, threatened to sell away the sugarcane grown on the surplus farms of the plaintiffs to others, after giving the requisite attorney's notice, the plaintiffs filed the present suit (Suit No. 610 of 1967) on the 16th of October 1967 against the Maharashtra State Farming Corporation, and obtained an interim injunction on the same day restraining the defendant-Corporation from disposing of the sugarcane produced on the surplus land of the plaintiffs to any party other than the plaintiffs. The Notice of Motion on which that interim order was obtained was thereafter adjourned from time to time. As the State Government against whom also an injunction was necessary has not been made a party to the said suit by reason of the fact that there was no time to give a statutory notice under Section 80 of the Code of Civil Procedure, and in view of the statutory bar to the filing of a suit contained in Section 41 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, Miscellaneous Petition No. 615 of 1967 was filed by the plaintiffs on the 19th of October 1967, to which both the State of Maharashtra as well as the Maharashtra State Farming Corporation were made parties, for appropriate writs, directions and orders under Article 226 of the Constitution. In the meantime, on the 24th

of October 1967 the State Government published the amendments effected by it in Rules framed under Section 46 (2) (d) of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, whereby the following two Rules, which have already been referred to by me earlier, were added as Rules 12B and 12C:—

"12B. Arriving at fair price of raw materials — Where in pursuance of the provisions of Sec. 28, any land held by industrial undertaking is granted to a person or a joint farming society, or is directed to be managed by a Corporation (including a company), then in arriving, from time to time at the fair price at which the full and continued supply of raw material produced from such land during any period is ensured to the undertaking, the State Government shall have due regard to the cost of production of the raw material: the prevailing market price of the raw material and of the goods, articles or commodities manufactured therefrom; the price (if any) fixed under any law for the time being in force in respect of the raw material (including any minimum price fixed therefor), or of the goods, articles or commodities manufactured therefrom; a reasonable return to the supplier of the raw material; and any other relevant factors:

Provided that, the State Government may for the purpose of arriving at the fair price of any raw material, be advised by a committee, consisting of not more than five persons of whom one may represent the interest of the undertaking and one of the joint farming society, or as the case may be, the Corporation, and two persons who in the opinion of the State Government have special knowledge of, or experience in, the industry. The Committee shall submit its recommendations to the State Government within fifteen days from the date on which a reference is made to it. If the Committee fails to advise the State Government during the period allowed or such additional period, if any permitted by the State Government, the State Government may arrive at the fair price having regard to all the relevant materials before it."

"12C. Prohibition against sale of raw material in excess of fair price.—No person, joint-farming society, or corporation, shall sell to the undertaking any raw material at a price in excess of the fair price as arrived at in the matter aforesaid."

The State Government then proceeded to act under the said Rules with, what may be called unusual promptitude or perhaps indecent hurry. By its Resolution D/- 1st November 1967, it appointed the Advisory Committee contemplated by Rule 12B, of which one G. J. Ruparel, a Director of the Kolhapur Sugar Mills Ltd. was ap-

pointed a member along with others, and it is the case of the State Government that he was appointed as the representative of all the sugar mills and not as a representative of the Kolhapur Sugar Mills Ltd. alone. The said Advisory Committee held a meeting at Poona on the 6th of November 1967, and another meeting, which was the final meeting at Bombay, on the 8th of November 1967, and the said G. J. Ruparel, after lodging a strong protest, left the said final meeting. This fact appears from a letter dated 7th December 1967 subsequently addressed by the said G. J. Ruparel to the Secretary to the Government of Maharashtra, Revenue and Forests Department, which has been tendered and marked Ex. A in Misc. Petition No. 664 of 1967. The Advisory Committee however, proceeded to make its Report on the same day and a copy of that Report which, it may be mentioned, was under the circumstances stated above, not signed by the said G. J. Ruparel, is annexed to the affidavit of J. C. Karandikar dated 29th Feb 1968 filed in reply to Misc. Petition No. 664 of 1967. On the very next day i. e. 9th November 1967, the State Government passed a Resolution fixing the fair price of sugarcane to be supplied by the defendant Corporation to the plaintiff during the crushing-season 1967-68 at Rs. 125.44 per ton and that Resolution was released to the press on the 10th of November 1967. In view of the framing of Rules 12B and 12C and the passing of the said Resolution fixing fair price by the State Government, the plaintiff company filed another writ Petition (being Misc. Petition No. 664 of 1967) on the 13th of November 1967 against the State of Maharashtra and the Maharashtra State Farming Corporation Ltd. On the 29th of November 1967, a Consent Order was passed on the Notice of Motion taken out by the plaintiffs in the suit (Suit No. 610 of 1967) and the hearing of the suit itself was directed to be expedited. By the said Consent Order, the interim injunction that had been granted was replaced by a working arrangement under which sugarcane was to be supplied by the defendant Corporation to the plaintiffs during the crushing season 1967-68 on payment by the plaintiffs of an additional ad hoc sum of Rs. 10/- per tonne over the minimum price fixed by the Government of India and on their furnishing a bank guarantee for the balance, if any, that may be finally found due by the Court.

8. The plaintiffs' case in the suit as well as in Misc. Petitions Nos. 615 and 664 of 1967 is that there was contract between the plaintiffs and the defendant Corporation under which it was agreed between the parties that the defendant Corporation would, on the one hand, sup-

ply sugarcane to the plaintiffs at a price which would be governed by notifications issued by the Government of India from time to time, and that the plaintiffs would on the other hand, be bound to purchase all the sugarcane produced on their surplus lands at those prices. This case is to be found set out in para. 27 of the plaint in which it is further stated that the prices so agreed were meant and understood by the parties to mean the minimum prices fixed by the Central Government under its annual notifications and the said minimum prices were regarded as the fair prices within the meaning of Sec. 28 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961. It is also the case of the plaintiffs in paragraphs 34 and 36 of the plaint that the minimum prices of sugarcane fixed by the Central Government under its annual notifications were, in fact the fair prices, and that the unilateral and wrongful increase in prices sought to be effected by the State Government was contrary to its statutory obligations. The plaintiffs have, therefore, filed the said suit for specific performance and/or enforcement of the defendants' obligations under the contract as well as at law. The learned Advocate-General has referred me to the averments in paragraph 38 of the plaint, and to the latter part of prayer (c) of the plaint, and has submitted that the same would justify the court fixing a reasonable price for the supply of sugarcane under Section 9 of the Sale of Goods Act, in the event of its coming to the conclusion that the price thereof has not been fixed in the contract itself. The plaintiffs, as petitioners in Misc. Petition No. 615 of 1967, have sought a declaration that the State Government as well as the State Farming Corporation are bound to supply the entire sugarcane produced from the surplus lands of the petitioners to the petitioners, and a further declaration that both the respondents are bound to ensure that the production and supply of sugarcane from the surplus lands of the petitioners is not adversely affected, and have prayed for appropriate writs, directions and orders in that behalf.

9. The case of the Maharashtra State Farming Corporation as appearing from the written statement filed by it, and of the State Government as appearing from the Affidavits filed in Reply to Misc. Petitions Nos. 615 and 664 of 1967, is that though there was a contract between the parties for the supply of sugarcane by the Maharashtra State Farming Corporation to the plaintiffs, that contract did not provide for supply being made at the minimum price fixed from time to time by the notifications issued by the Central Government, and that the Maharashtra State Farming Corporation was entitled

to be paid fair prices for the supply of such sugarcane. It is further the case of the State of Maharashtra as well as the Maharashtra State Farming Corporation that the State Government was entitled to fix the fair price for the supply of sugarcane, and had done so in exercise of its power under Rule 12B of the Maharashtra Agricultural Lands (Ceiling on Holdings) Rules, 1962.

10. In view of these rival contentions of the parties, the following issues were framed by me in the suit (Suit No. 610 of 1967):—

(1) Whether the State of Maharashtra is a necessary party to the suit and in its absence the suit is bad for non-joinder as alleged in para 1 of the Written Statement.

(2) Whether there is any cause of action against the defendants which survives, in view of the resolution dated the 9th November 1967 of the Government of Maharashtra determining the fair price at which the defendants are to supply sugarcane to the plaintiffs as alleged in para 2 of the Written Statement.

(3) Whether in view of the determination of fair price by the Government resolution dated 9th November 1967, this Hon'ble Court has jurisdiction to determine the fair price at which the defendants have to or are to supply sugarcane to the plaintiffs as alleged in para 3 of the Written Statement.

(4) Whether the price of controlled sugar fixed by the annual notifications of the Central Government is arrived at on the basis of the cost of sugarcane at the minimum price fixed by the Central Government for sugarcane as alleged by the plaintiffs in paragraph 18 of the plaint.

(5) Whether prior to the execution of the agreement dated the 10th May 1965 Shri D. R. Pradhan representing the defendants agreed with the plaintiff's representatives that the price to be charged to the plaintiffs by the defendants for sugarcane for the season 1966/1967 onwards would be the price fixed by the Government of India as alleged in para 24 of the plaint.

(6) Whether it was agreed and understood between the parties that the entire production of sugarcane produced on the surplus lands of the plaintiffs would be sold by the defendants to the plaintiffs at the minimum price fixed by the Central Government as alleged by the plaintiffs in paras 27, 28 and 37 of the plaint.

(7) Whether at the meeting held on 20th July 1965 between the plaintiffs and the defendants it was clarified that the prices of sugarcane would be governed by the notifications issued by the Government of India from time to time and that they would not be the same as the mini-

mum prices fixed by the Government of India from time to time as alleged in para 14 of the written statement of the defendants.

(8) Whether the minimum prices fixed by the Government of India from time to time are fair prices for the growers of sugarcane within the State of Maharashtra including the defendants as alleged in para 36 of the plaint.

(9) Whether the plaintiffs are entitled to any reliefs, and if so, what?

(10) Generally.

11. On the 22nd of July 1968, Mr. Nariman stated that he did not desire to lead any oral evidence on issue No. 5 in view of the fact that the agreement pleaded in paragraph 2 of the plaint had not been denied in the Written Statement of defendants. Mr. Nariman also stated on that day that, as far as issue No. 8 was concerned, he did not desire to lead any oral evidence with regard to the same, but relied only upon a construction of the relevant statutory provisions and orders to which he had referred in the course of his arguments. As far as issue No. 9 relating to the reliefs claimed in the plaint is concerned, Mr. Nariman stated that he reserved the right of leading evidence in regard to prayers (c) and (d), in the event of the Court holding against the plaintiffs with regard to the question as to what was the contract between the parties, and the learned Advocate-General agreed that that was the proper course to be adopted. I, therefore, directed that evidence, if any, in regard to these prayers will stand reserved till I have delivered judgment on the other issues in the case. With the remarkable fairness that is characteristic of him, learned Advocate-General Mr. Seervai, however, made certain statements which have been extremely useful in narrowing down the arena of conflict between the parties. On the 17th of July 1968 he made a statement that the other sugar factories which had already handed over their surplus lands to the State Government without contest, were supplied sugarcane by the defendant-Corporation from their respective farms for the seasons 1964-65 and 1965-66 at the prices shown against their respective names in the notifications issued by the Government of India on 30th October 1964 and 4th November 1965. That statement was, of course, made by the learned Advocate-General entirely without prejudice to the defendant's contention that the facts stated therein are not admissible for interpreting the contract between the parties. It was made with a view to make it unnecessary for the plaintiffs to lead evidence to prove these facts which the defendants do not dispute. On 23rd July 1968, the learned Advocate-General stated that on further consideration he had come

to the conclusion that issue No. 7 did not arise and that he would give up the same. The learned Advocate-General further stated, at the end of his argument, that he also gave up issue No. 1 framed by me. On 26th July 1968 a statement was recorded by me that the parties were agreed that a policy had been announced by the Central Government on the 16th of August 1967 whereby a quantity equal to 60 per cent of the production achieved from the 1st of October 1966 to the 30th of September 1967 would be procured from the sugar factories from their production from 1st October 1967 to 30th September 1968 at a fixed levy price; that factories would be free to sell the balance production anywhere in India at the free market price, subject to releases from factories sanctioned by the Government of India, that the entire stock of sugar from the production upto 30th September 1967 would continue to be controlled as on the 16th of August 1967 and releases would be made on the basis existing at that date till November 1967; and that the levy scheme would commence after the production of the year 1966-67 had been exhausted. Parties were further agreed that the said policy had in fact existed from 1st Oct. 1967 to 30th September 1968, with some modifications to which it was unnecessary to refer. The said statement was made by the parties and recorded by me with a view to make it unnecessary to prove the same by leading evidence, oral or documentary, in that behalf.

12. Though issues are not ordinarily framed in the trial of Writ Petitions, it was, by consent of parties, thought advisable by me, in view of the complicated and important questions that were sought to be canvassed in Miscellaneous Petition No. 664 of 1967, to frame issues therein. Towards the end of the arguments before me Counsel on both sides were agreed that it is not necessary for me to give my findings on any of the issues framed by me in the said Petition in view of certain statements made by the learned Advocate-General in regard to this Petition on 22nd July 1968 and 29th July 1968 to which I will presently refer. Under the circumstances, I do not think it necessary to set out the issues framed by me in the said petition. On the 17th of July 1968, the learned Advocate-General made a statement in regard to Misc. Petition No. 664 of 1967 which, he submitted, would render it unnecessary for the court to go into the question as to whether the State Government had the power to frame Rules in regard to the fixation of fair price. The learned Advocate-General stated that having regard to Rule 12C of the Maharashtra Agricultural Lands (Ceiling on Holdings) Rules 1962, as amended by the notification dated 24th October 1967, the

price fixed was the maximum price and, therefore, any price fixed under Rule 12B did not come in the way of the contract between the parties, whatever be the construction of the contract adopted by the Court. On the 22nd of July 1968, the learned Advocate-General stated that he had, by then, taken instructions from the State Government and that he desired to make a statement from the Bar that having regard to the fact that before the State Government fixed the prices by its Resolution dated 9th November 1967, it did not have before it the view of one Ruparel who was a member of the Advisory Committee appointed under Proviso to R. 12B and had been appointed to represent the interests of the undertakings, he was not in a position to support the said Resolution, or the Report of the Advisory Committee dated 8th November 1967, and both of them may be set aside by this Court. The learned Advocate-General further stated on that day that the Resolution dated 1st November 1967, appointing the said Advisory Committee, may also be set aside, as the same was only appointed to determine the fair prices for the season 1967-68 and as the same had already submitted its Report and had, therefore, become functus officio. In view of the said statements made by the Advocate-General, it became unnecessary for me to decide issues Nos. 10 and 12 framed by me in regard to this petition, and though issue No. 11 was re-framed by me even the same did not survive in view of the said statements. In fact, it was stated to me by the learned Counsel on both sides, on 29th July 1968, that they were agreed that it was not necessary to determine the matters arising in Misc. Petition No. 664 of 1967, because in view of the Statement made by the learned Advocate-General on the 22nd of July 1968 the impugned Resolutions dated 1st November 1967 and 9th November 1967 were to be set aside. The learned Advocate-General further stated that, having regard to the language of Rule 12-C, it was open to the defendants to charge less than the fair price determined under Rule 12-B.

13. It was however, not thought necessary to frame issues in Misc. Petition No. 615 of 1967 as, even according to Mr. Nariman himself, the said objection survived only to the extent of considering whether or not the reliefs sought in prayers (a) and (b) of the petition should be granted, all the contentions raised therein being covered by Misc. Petition No. 664 of 1967, subsequently filed, which is the more comprehensive Petition.

14. In my opinion, it would be convenient to deal first with issue No. 6 framed by me in Suit No. 610 of 1967. The fact that there was a contract arrived at

AIR 1969 CALCUTTA 321 (V 56 C 57)
AMARESH ROY AND S. N. BAGCHI, JJ.

Raj Kishore Rabidas, Appellant v. The State, Respondent.

Death Ref. No. 6 of 1967 and Criminal Appeal No. 308 of 1967, D/-10-5-1968.

(A) Criminal P. C. (1898), Ss. 492 (2), 270, 10 (2) and 4 (1) (t) — Appointment of Public Prosecutor — Additional District Magistrate 'engaging' lawyer on behalf of State — Does not amount to appointing a lawyer as Public Prosecutor — Conduct of case by such lawyer is illegal — Trial is vitiated—Duty of Court indicated — Legal Remembrancer's Administrative Manual (West Bengal), Chap. II, Part VI, Para 9 (i) and (ii) (as amended) and Appendix 'E'.

Section 492, Criminal P. C., in both the sub-sections speaks of appointment of Public Prosecutor. Definition in S. 4 (1) (t) includes any person acting under the directions of a "Public Prosecutor". In neither of those provisions can be found any authority given either to the State Government or the District Magistrate or, for the matter of that, the Additional District Magistrate acting under sub-section (2) of Section 10, Criminal P. C., to engage a lawyer, far less to make a lawyer by such engagement a Public Prosecutor. (Paras 18 and 64)

Moreover, the power to appoint Public Prosecutor can be exercised by a District Magistrate in the absence of Public Prosecutor or where no Public Prosecutor has been appointed. That absence does not obviously include the situation when Public Prosecutor appointed in the District is not available to conduct a particular case, but can only mean that he is either on leave or by vacancy in the office. AIR 1965 Cal 79 and AIR 1968 Cal 38, Rel. on; AIR 1930 Sind 156 and AIR 1952 Cal 395, Expl.

(Paras 17 and 62)

In amended para 9 of Part VI in Chapter II at p. 32 of the Legal Remembrancer's Manual, Clause (i), provides for forming a panel of lawyers in consultation with the District Judge and Clause (ii) provides for appointing any lawyer to the panel and removal of any from the panel, after consulting the District Judge. What is significant is that the provision which spoke of District Magistrate engaging a pleader to take up duties of Public Prosecutor has been obliterated. In that amended form para 9 has no conflict with S. 492 (2) or S. 4 (1) (t), Criminal P. C., but it does not contain any authority to engage a lawyer by using the form in Appendix 'E' of the Manual.

(Paras 21, 22)

The form in Appendix E in the Legal Remembrancer's Manual may have been prescribed in the background of original text of para 9. After para 9 has been amended, that form has no relation with or basis in what appears as para 9 on the Correction

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Slip. Yet, the Form has been retained in the Manual and is being used at the teeth of the provision of the Code of Criminal Procedure. (Para 23)

In trials in Courts of Session outside the High Court in exercise of original criminal jurisdiction, S. 270, Criminal P. C., requires to be strictly adhered to. In spite of the law on the subject having clearly been laid down, the illegal practice has continued to be indulged in. The Sessions Judges appear to have ignored the illegality by neglecting the requirement of law contained in Section 270, Criminal P. C. and in the executive offices of the State there has been lack of care and caution in an important matter which is a necessity of law not only for ensuring a fair trial, but also for the legality of the trial itself in the Court of Session. (Para 24)

The persistence with which the illegal practice has been adhered to in all the districts of West Bengal makes it incumbent on the High Court to direct that all Judges presiding on Sessions trial must be alive to this aspect. If at the opening of the trial Public Prosecutor of the District is not appearing to conduct prosecution, the Judge need have to ascertain and put on the record in the order sheet the manner in which the lawyer appearing to conduct the case for prosecution has been appointed or engaged. If the appointment is not in accordance with the provision of Sec. 492, Criminal P. C., or the engagement for acting is not by the Public Prosecutor of the district for conducting prosecution by acting under the directions of a Public Prosecutor as mentioned in Sec. 4 (1) (t), Criminal P. C., then it will be the duty of the Presiding Judge not to allow prosecution to be conducted by such a person who is not properly appointed Public Prosecutor. That is a necessity for the legality of the trial as enjoined by S. 270, Criminal P. C. An omission on the part of the presiding Judge to perform that duty may itself be a reason for quashing the trial, whatever the result that may have been obtained in the trial.

(Paras 25, 65)

(B) Criminal P. C. (1898), Ss. 344 and 340 — Adjournment — Counsel for defence absent due to illness — Trial continuing in absence of defence lawyer — Propriety — Constitution of India, Art. 22 (1).

Adjourning a Sessions trial is a serious matter, but absence of defence lawyer for the reason of sudden illness is not less. Where the Sessions Judge continued trial in the absence of the defence lawyer on the ground that witnesses were present:

Held that the trial should have been adjourned and that proceeding with the trial showed lack of appreciation of the essential necessities that need be adhered to in all criminal trials in general, and more so in trials on charges of major offences like murder in particular. AIR 1951 SC 217, Ref. to.

(Paras 26, 65)

(C) Criminal P. C. (1898), S. 340 — Appointment of defence counsel by Government — Counsel appointed absent due to illness — Appointment of another counsel on same day without being furnished with brief and continuing with trial — It is negation of fair trial — Court's duty pointed out — Constitution of India, Arts. 22 (1) and 22B.

Instead of appointing a lawyer to defend the accused without furnishing him with a brief, far less any opportunity or time to prepare himself, it is much safer and better for the accused to go undefended at the trial because it may be expected that he may draw the active, watchful and energetic attention of the Presiding Judge to test prosecution witnesses by question and check prosecution counsel against any unfairness or overzealousness to introduce inadmissible or prejudicial evidence. A show of defence is not a substitute for effective defence and it is much worse than none, as it may turn out a false show and in effect tend to neutralise a stronger force that an alert Judge is expected to be. AIR 1968 Cal 38, Rel. on, AIR 1951 SC 217, and AIR 1963 Ker 54, Ref. (Para 27).

Held, the manner of continuing the trial in the absence of the defence lawyer who had the brief, by setting up another defence lawyer who had not the brief, and the characteristics appearing in the record of the depositions of witnesses examined for prosecution, heightened by omission of the trial Judge to expose by timely and proper questions the mysteries of carefully chosen technical language, in totality appeared to be a negation of a fair trial.

Per Bagachi, J.: There was in fact denial of proper and effective representation of the accused. (Para 65)

(D) Criminal P. C. (1898), S. 423—Appeal — Retrial — Prosecution unable to prove offence against accused — Materials in evidence pointing strongly to accused's innocence—Retrial not ordered as it would enable prosecution to brush up defects appearing in the evidence given in the trial—Accused acquitted. (Para 58)

(E) Criminal P. C. (1898), Ss. 290, 367 — Appreciation of evidence — Judgment should not show complete negation of presumption of innocence of accused — There is no presumption in law of absolute truthfulness of prosecution witnesses—Duty of Court to weigh the probability of prosecution evidence, pointed out—Evidence Act (1872), Ss. 3 and 114.

The judgment of the Court must show that the Judge had regard to presumption of innocence of the accused. There is no presumption in law of absolute truthfulness of prosecution witnesses. It is the duty of the Judge to weigh the prosecution evidence. AIR 1931 Cal 796, Ref. (Para 46)

Even if there was no effective cross-

examination on material points, and the trial Judge had not before him any definite defence case or criticism of prosecution witnesses, the trial Judge is not relieved of his responsibility to weigh the probability of prosecution evidence, which he has to do for arriving at the decision whether prosecution allegations have been proved by the standard laid down in S. 3 of the Evidence Act. In so weighing probability of prosecution allegations, of necessity, other probabilities also appearing from the evidence brought before the Court have to be considered for comparative assessment which of the probabilities should be accepted as fact proved. If from the evidence, any probability consistent with innocence of the accused is equally strong as the probability pointing to his guilt, then on the strength of presumption of innocence in favour of the accused, prosecution has failed to prove its allegations. Even if the probability consistent with innocence is not equally strong with other probability of his guilt, yet probability of innocence is such as would cast a doubt, then it may be a case of reasonable doubt, benefit of which must go to the accused. That being so, it is incumbent duty of the Judge to consider all the probabilities that appear from the evidence before him and he cannot afford to be credulous and not consider reasonable probabilities only because accused was undefended or defence lawyer did not make a point of such probability in cross-examining witnesses or making suggestions or when arguing the defence case. A Judge should not imagine or speculate on hypothetical defences not urged at the Bar. But that does not connote that he may neglect to consider a probable defence appearing from evidence, only because it was not put before him. As a Judge of fact he must consider evidence given in the case from all viewpoints. Per Taft C.J. in (1926) 273 US 510 (532), Ref. (Paras 47, 65)

(F) Evidence Act (1872), S. 45 — Expert evidence — Admission of evidence of expert — Fact that he was competent to give expert evidence must be proved — Law does not permit assumption without evidence on material point of competence. (Para 52)

(G) Criminal P. C. (1898), Ss. 492, 270, 288 — Public Prosecutor must be fair to Court, independent and unbiased.

A Public Prosecutor for the State is not such a mouthpiece for his client the State, to say what it wants or its tool to do what the State directs. He owes allegiance to higher cause. He must not consciously misstate the facts, nor knowingly conceal the truth. Despite his undoubted duty to his client the State, he must sometimes, disregard his client's most specific instructions if they conflicted with his duty in the Court to be fair, independent and unbiased in his views. As an advocate for the State, he may be ranked as a Minister of Justice.

equally with the Judge. AIR 1957 SC 389, Rel. on. (Para 64)

(H) Criminal P. C. (1898), Ss. 537, 492 (2) — Failure of justice — Illegal appointment of Public Prosecutor — Defence lawyer not able to carry out his duties properly — Failure of Judge to weigh prosecution evidence properly — Held, there was prejudice to accused and failure of justice — Had there been only an illegal appointment of Public Prosecutor, the irregularity would have been curable under S. 537 — (Per Bagchi J.) AIR 1948 PC 63, Ref. (Para 65)

(I) Evidence Act (1872), Ss. 3, 45 and 59 — Criminal P. C. (1898), Ss. 367, 423 (1) — Medical evidence conflicting with oral evidence of eye-witnesses — Oral evidence of eye-witnesses not corroborated in material particulars by any circumstantial evidence — Held, eye-witnesses' evidence stood discredited and Court was wrong in convicting accused on such evidence. AIR 1956 SC 425 and AIR 1952 SC 167, Rel. on. (Para 66)

(J) Criminal P. C. (1898), Ss. 90, 492, 270, 286 — Issue of summons to material witnesses — Investigating officer reporting that witness could not be found — Held, that it was duty of prosecution to pray for a warrant and proclamation for compelling production of witness and that the Public Prosecutor failed in discharging his legal function. (Para 69)

(K) Evidence Act (1872), S. 45—Medico-legal jurisprudence — Medical expert performing post-mortem examination 13 hours after death, reporting rigor mortis — No information if there was any element of cadaveric rigidity or spasm present—Cadaveric spasm occurs in cases in which death was immediately preceded by state of great nervous tension or excitement caused by terror or struggle — Cadaveric spasm is to be distinguished from rigor mortis and is not rigor mortis — Medical evidence of the expert, held, could not be relied upon — Medico-legal jurisprudence. (Para 52)

(L) Criminal P. C. (1898), Sec. 154 — Cooking up story — Nothing is more reprehensible than to cook up a story for recording an F.I.R. and attempt to improve the cooking of the story at the trial stage in any case — It is more so when it is done, to foist a charge of murder — [Their Lordships recorded emphatic condemnation of the performance of the prosecution in the case and expressed their deep disappointment at callousness of the trial Judge revealed in the record at not noting this] — Evidence Act (1872), S. 3. (Para 57)

(M) Criminal P. C. (1898), Sec. 492 (1) — Court took judicial notice of the fact that in 1966-67 there had been for the district of 24 parganas, a Public Prosecutor appointed generally by the State Government under Sec. 492 (1) — Evidence Act (1872), Ss. 56 and 57. (Para 64)

(N) Criminal P. C. (1898), Ss. 270, 492 (2), 4 (1) (t) — Assistant Public Prosecutor is unknown to law — (Per Amareesh Roy J.). (Para 14)

(O) Criminal P. C. (1898), Ss. 4 (1) (t), 492 (2), 270 — Duty of Public Prosecutor of district.

Public Prosecutor generally appointed by State for 24 parganas is in charge of all the prosecution cases, particularly sessions cases and if he engages more than one Public Prosecutors in sessions cases under trial, he has the duty to give directions in all such cases placed on trial at least before the Court of Sessions as to how the cases are to be conducted by producing material witnesses and supplying material information to the Courts in such cases in order that the cause of justice might be furthered, instead of being retarded. (Para 69)

| Cases Referred: | Chronological | Paras |
|--|---------------|--------|
| (1968) AIR 1968 Cal 38 (V 55) = | | |
| 1968 Cri LJ 40, Panchugopal v. State | | 18, 28 |
| (1965) AIR 1965 Cal 79 (V 52) = | | |
| 1965 (1) Cri LJ 150, V. K. Godhwani v. State | | 18 |
| (1963) AIR 1963 Ker 54 (V 50) = | | |
| (1963) 1 Cri LJ 175, Mohammad Kunnummal v. State of Kerala | | 28 |
| (1957) AIR 1957 SC 389 (V 44) = | | |
| 1957 Cri LJ 567, State of Bihar v. Ram Naresh | | 64 |
| (1956) AIR 1956 SC 425 (V 43) = | | |
| 1956 Cri LJ 815, Surjan v. State of Rajasthan | | 66 |
| (1952) AIR 1952 SC 167 (V 39) = | | |
| 1952 Cri LJ 863, Lachman Singh v. State | | 66 |
| (1952) AIR 1952 Cal 395 (V 39) = | | |
| 55 Cal WN 160, Anurupa Debi v. Ramlal Rajghoria | | 64 |
| (1951) AIR 1951 SC 217 (V 38) = | | |
| 52 Cri LJ 736, Janardan Reddy v. State of Hyderabad | | 26, 28 |
| (1948) AIR 1948 PC 63 (V 35) = 49 | | |
| Cri LJ 440, Adan Haji Jama v. The King | | 65 |
| (1938) AIR 1938 PC 266 (V 25) = | | |
| ILR (1938) Lah 623, Faqir Singh v. Emperor | | 64 |
| (1931) AIR 1931 Cal 796 (V 18) = | | |
| ILR 58 Cal 1095, Emperor v. Tazem Ali | | 28 |
| (1930) AIR 1930 Sind 156 (V 17) = | | |
| 31 Cri LJ 684, Emperor v. Deep Chand | | 63 |
| (1926) 273 US 510 = 71 Law Ed 749, | | |
| Tumey v. Ohio | | 65 |

Chitta Ranjan Das, for Appellant; S. N. Banerjee with Arun Kumar Mukherjee, for Respondent.

AMARESH ROY, J.: This Death Reference under Section 374 Criminal P. C. has been submitted by the learned Additional Sessions Judge, 7th Court at Alipore, Shri P. K. Banerjee and arises out of the Trial No. 1 of May, 1967, in which Raj Kishore Rabidas

was tried for an offence of murder punishable under Section 302, I. P. C., and the trial Court has sentenced him to death under that section. From that order of conviction the condemned prisoner has preferred an appeal from jail which is Criminal Appeal No 303 of 1967. The Death Reference and that appeal were heard together. The learned Deputy Legal Remembrancer Mr. S. N. Banerjee appeared for the State. The learned Advocate Mr. Chittaranjan Das has appeared on behalf of the defence before us.

2. The prosecution case is that on Amrani Bera Road, Barrackpore, Nepal Chandra Dey had a tea shop. The accused Raj Kishore Rabidas is a cobbler and used to carry on his trade at a street junction which is the junction of Amrani Bera Road and S. N. Banerjee Road. That place is near Nepal's tea shop. In that shop Subhas Chandra Bose was an employee. On the other side of the road there was another tea shop owned by one Banamali Adhikari. Amal Kumar Mukherjee who was a dealer in green vegetables used to live in that tea shop of Banamali Adhikari. Subhas and Amal were friends. The accused Raj Kishore Rabidas used to sleep in the night near Banamali's tea shop. In the night of 17th Chaitra, 1872 B. S. corresponding to 1st of April, 1966, Subhas and Amal after finishing their meals at about 11 P. M. went to see a jatra performance about a mile away from Amrani Bera Road.

3. Nepal also took his meal at about the same time with Subhas and as usual Nepal had gone to sleep on his bed spread over two benches on an open space covered by tin shed to the south of his tea shop. Subhas left the keys of the shop under his pillow and set out with his friend Amal to witness the jatra-performance. It is stated that these boys returned at about 1-30 a.m. After they had approached Amrani Bera Road from the eastern side they noticed somebody to get up from the other side of Nepal's tea shop and proceed towards the junction of Amrani Bera Road and S. N. Banerjee Road on the north. In their view that man took out something from a box hanging on the wall on the road junction and began to proceed towards Nepal's shop. That man eventually came to the open space where Nepal was sleeping. Subhas and Amal were under the impression that he was an ordinary thief. So they slowly went near him. Then they realised that the man was none other than the accused Raj Kishore. According to the prosecution, the accused had in fact brought out his chisel for the purpose of killing Nepal. Immediately he plunged the chisel into the chest of Nepal several times while Subhas and Amal looked on in amazement. When Nepal shrieked, Subhas asked the accused what he was doing. The accused then became aware of their presence and charged at them. The two boys then took to their heels. Subhas ran straight into the house of a neighbour. The accused pursued him. It is stated that Nepal, though he was fatally injured, also ran

after the accused. Amal also fled. Thereafter, according to the prosecution story, attracted by the shouts of Subash and Amal some neighbours came and they found Nepal running behind the accused and then falling down on the street. The accused hid himself in the house of Dipen Chakraborty and was apprehended by those neighbours and then was handed over to a constable attached to the police outpost nearby. In the meantime Nepal was taken to the hospital in a rickshaw by P. W. 1 Subash, where Nepal was admitted for treatment.

4. Subash after reaching Nepal to hospital went to the police station and lodged an F.I.R. which is Ext. 1/1. That information was recorded in the Titagarh Police Station at 2-30 A. M.

5. Investigation was taken up by Sub-Inspector Arabinda Kumar Ghosh and he set out at 2-30 A. M. He first went to the hospital and having learned that Nepal's condition was so serious that he could not be interrogated, he came to the place where the occurrence of stabbing had taken place, and made seizures of a yellow chaddar and a kantha which he had found spread on two benches in a tin shed having no wall. But in the seizure list the place is mentioned as open shop of Nepal Chandra Dey. That seizure is evidenced by Ext. 2/1 which bears the time 4-30 A. M. The police officer also made a rough sketch map of the surroundings, Ext. 4 in which the tin shed is marked 'A' and the tea shop of Nepal is marked 'B'. He examined several persons that very night. In the meantime injured Nepal died in the hospital at 3-16 A. M. An inquest on the dead body was made by the Investigating Police Officer himself. The dead body was sent to the morgue at 11-15 a.m. on 1st of April, 1966 and post-mortem examination was held by Dr. Braja Ballav Basak Medical Officer of the Police Case Hospital at Barrackpore (P. W. 8) at 4-30 P. M. that very day.

6. Dr. A. N. Chakraborty, S.D. M.O. who had examined and treated Nepal in the hospital found the following injuries on the person of Nepal:

Injuries: (1) One incised wound 1" x ¾" cutting the muscles ribs and intercostal spaces on left side of the chest 2" away from the mid-sternal line on 3rd and 4th ribs (mid clavicular line) with beveling inwards towards sternum, direction long axis of the chest.

(2) One incised wound 1½" x 1½" skin deep half an inch below injury No. 1.

(3) One incised wound 1½" x 1½" skin deep one-fourth inch below injury No. 2.

(4) One incised wound 1½" x ¾" muscle deep on the left side of the back, inner side of left shoulder blade 5" below the upper border of the shoulder, direction — long axis on the back with beveling towards mid-line.

7. Dr. Braja Ballav Basak (P. W. 8) who held the Post-mortem examination on the dead body of Nepal described condition of the subject as stout, rigor mortis present all

over, mouth closed, teeth and tongue intact, eyes half open, conjunctiva hazy, pupils dilated, nails anaemic, and he described the wounds as—

(1) One incised wound (punctured) 1" x 1¼" gaping x chest cavity deep of 2¼" lying obliquely at the left 3rd inter space about 1" lateral to the margin of the manubrium sternum—cut the 3rd left rib at the costo-chondran junction and then punctured the pericardium and the upper part of the anterior wall right ventricle by a slit opening of about ¼" and chest cavity was full of dark clotted blood of about 8 oz.

(2) Two small incised wounds each about ¼" x 1/6" x muscle deep at the 4th inter costal space about ½" away and below the injury No. 1.

(3) One incised wound 1½" x ¼" x muscle deep at the left infra-scapular angle.

8. At 7 A. M. on 1-4-66 the alleged weapon with which Nepal was attacked was seized from the garden near the house of Dipen Chakraborty. In the seizure list (Ext. 3/1) that weapon was described as "one chisel the iron part of which is about 5 inches long and the wooden part is about 2 inches long. The width is 1 inch, stains like blood appears at the top, found buried under earth near the garden to the south of Dipen Babu's house". That chisel is Ext. II. Some earth (control) was also seized under that seizure list.

9. That chisel (Ext. II) and earth and chaddar (cuttings) were sent to the Chemical Examiner and the report of the Chemical Examiner and the Serologist showed that blood was detected in each of those three articles, but origin of that bloodstains on chisel and earth could not be determined because of disintegration. Stains on the cuttings of the chaddar were, however, found to be human blood. That report is Ext. 5. Kantha seized was never sent to Chemical Examiner, although that was said to be bloodstained.

10. At the close of the investigation a charge sheet for alleged offence under Section 302, I. P. C., was submitted. Before the Magistrate two witnesses were examined as eye-witnesses who are Subash and Amal, P. Ws. 1 and 2 respectively. On consideration of the deposition of those two witnesses and the other relevant materials produced before the Magistrate he committed the accused to be tried in the Court of session on a charge under Section 302, I. P. C., by his Order dated 10th of April, 1967. In the Court of Session the learned Additional Sessions Judge framed the charge in these terms:

"That you, on or about the 17th day of Chaitra 1372 B. S. corresponding to 1st April 1966 at Amrani Bera Road within police station Titagarh did commit murder by intentionally or knowingly causing the death of Nepal Chandra Dey and thereby committed an offence punishable under Section 302 of the Indian Penal Code and within cognizance of this Sessions Court.

And I hereby direct that you be tried by the Court on the said charge".

11. Trial opened in the Court of Session on 10th of May, 1967. At that trial for the prosecution appeared Shri S. N. Majumdar who has been described in the order sheet as Assistant P. P. For the accused at the commencement of the trial appeared Shri Sushil Kumar Banerjee, who has been described in the order sheet as a 'Panel Lawyer'. He was engaged to defend the accused at State cost.

12. Before us Mr. Chittaranjan Das, learned Advocate who has appeared on behalf of the condemned prisoner Raj Kishore Rabidas, has drawn our attention to the representations before the trial Court for raising two points. One is based on Section 270 of the Code of Criminal Procedure which provides that in every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor. The manner of appointment of the learned lawyer who conducted prosecution in the Sessions Trial was made a point for contending that he was not a properly appointed Public Prosecutor as defined in the Code of Criminal Procedure. The other branch of this part of his argument concerns defence lawyers made available to the accused at trial. Mr. Das's contention is based on what appears from the order sheet of the trial showing that on 10-5-67, when the trial opened and also on 11-5-67 the accused was being represented by Shri Sushil Kumar Banerjee. On those two days of the trial first six witnesses for prosecution were examined. Some cross-examination was directed to P. Ws. 1, 2 and 3 but cross-examination was declined in respect of P. Ws. 4, 5 and 6. On the next day of the trial i.e., 12-5-67 the order recorded shows the circumstances in which another lawyer Shri Sourindra Mohan Bose was appointed to defend the accused. That order is in these terms:

"3. 12-5-67. Accused is produced from custody. Hearing resumed. It transpires that Shri Susil Kumar Banerjee, defence Advocate appointed by the State, is absent. He has not turned up till 11 O'clock. The P. P. wants time to contact him. Time is allowed. At 12 noon the P. P. informs the Court that Shri Banerjee is ill. He cannot come today nor there is any certainty whether he would be able to come tomorrow. Witnesses are present and the trial should proceed.

Shri Sourindra Mohan Bose, Panel Lawyer, is found in Court. He is appointed to defend the accused at State cost in place of Shri Susil Kumar Banerjee. Inform the District Magistrate, 24-Parganas.

Trial begins, the following witnesses are examined, cross-examined and discharged". On that day important witnesses including the two doctors (P. Ws. 7 and 8) and Investigating Officer (P. W. 11) were examined. Some cross-examination was made of P. W. 7 and also P. W. 8. When P. W. 11 was examined on 12-5-67, the lawyer for the defence

Shri Sourindra Mohan Bose made a request to defer cross-examination of that witness to the next day for the reason that the learned lawyer was appointed in the case only on that day. That prayer was allowed. On the next day i.e. 13-5-67 hearing was resumed and on that day only Shri Susil Kumar Banerjee returned the papers which presumably were the brief for the defence lawyer and those papers were then made over to defence lawyer Shri Sourindra Mohan Bose. In those circumstances Investigating Officer (P. W. 11) was cross-examined and it was concluded on that very day. Statement of the accused under Section 342 Criminal P. C., was recorded and arguments of both sides were heard on the same day. 19-5-67, was then fixed for delivery of judgment.

13. From these features appearing in the order-sheet of the trial and the records Mr. Das has contended that there was practically no defence of the accused at the trial because the learned defence lawyer Shri Sourindra Mohan Bose had not been put in possession of any brief when he was asked to cross-examine the two important witnesses — the doctors (P. Ws 7 and 8) and although on the day he had to cross-examine the Investigating Officer (P. W. 11) he got the possession of the brief, he had no opportunity at all to study the brief for conducting effective cross-examination of those important witnesses. In those circumstances, it is contended that the arguments also could not have been of any effect or value for raising proper defence on behalf of the accused who was being tried on a charge of murder. By raising these contentions Mr. Das has emphasised that though he is raising the point regarding representation of parties at the trial in the Court of Session as a point of law sufficiently strong in itself to vitiate the trial as a matter of law, he is not urging it as a mere technicality only but also as a point of substance on the merits of the case, because the materials brought in evidence show, according to him, that prosecution was not only not producing all the witnesses and materials before the Court but also prosecution was not eliciting materials and essential information from important witnesses who had been examined so much so that this was a case where for any effective defence the lawyer representing the accused needed sufficient opportunity and time to study the brief for not only exposing the contradictions and incongruities appearing in the prosecution evidence but also for eliciting essential information by effective cross-examination of the several important witnesses examined in the case. On the merits of the prosecution evidence appearing on the record Mr. Das also addressed arguments in support of his contention that the appellant is entitled to acquittal on merits. But that is the second branch of his argument which we will deal with after we have dealt with the first branch of his argument based on the manner of representation of the parties at the trial.

14. Taking up his point that Section 270 Cr. P. C. has been violated, Mr. Das has contended that the lawyer who conducted prosecution in the Sessions Trial Shri S. N. Majumdar was not a properly appointed public prosecutor. He has been described in the order sheet of the trial as A. P. P. Reading those abbreviations as "Assistant public prosecutor", Mr. Das has pointed out that the Code of Criminal Procedure by definition and relevant provisions speaks of 'public prosecutor' only. Assistant public prosecutor is unknown to law. He has referred to the definition of 'public prosecutor' given in Sec. 4, sub-section (1) Clause (t) of the Code and also to Section 492 of that Code for showing howsoever appointed or engaged, the designation in either of these two provisions in the Code is 'public prosecutor'.

15. To meet this contention of Mr. Das the learned Deputy Legal Remembrancer Mr. Sambhu Nath Banerjee appearing for the State has produced before us the document by which Shri S. N. Majumdar was authorised to conduct the prosecution in this trial. That document is in a form printed in Appendix 'E' of the Legal Remembrancer's Manual and bears the date 6-5-67 and is signed by the Additional District Magistrate, 24-Parganas. The material part of that document is in these terms:—

Shri S. N. Majumdar Sr. A. P. O. is hereby engaged on behalf of the State/Accused in the Court of the Sessions Judge, Alipore.... Above that recital appears the particulars of the case which can be read as—

"State v. Raj Kishore Rabidas under Section 302 I. P. C."

Taking this authority given by the Additional District Magistrate as an exercise of power of a District Magistrate under Section 10 sub-section (2) of the Code of Criminal Procedure, it can only be a purported exercise of the power given by sub-section (2) of Section 492 Cr. P. C. That is what the learned D. L. R. has asked us to hold though the document itself does not in any part mention that it was by exercise of powers under Section 492, sub-section (2), Cr.P.C.

16. On the face of it that document does not appoint the learned lawyer named in it to be Public Prosecutor. By the terms of the document we have quoted above, he was only "engaged on behalf of the State/accused". It does not, therefore, conform to the terms of sub-section (2) of S. 492 Cr. P. C. That sub-section is in these terms

"....The District Magistrate or subject to the control of the District Magistrate, the sub-divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below (such rank as the (Provincial Government) may prescribe in this behalf) to be the Public Prosecutor for the purpose of any case."

17. Moreover, that power can be exercised by a District Magistrate in the absence of

Public Prosecutor or where no Public Prosecutor has been appointed. That absence does not obviously include the situation when Public Prosecutor appointed in the District is not available to conduct a particular case, but can only mean that he is absent either on leave or by vacancy in the office.

18. Section 492 Cr. P. C. in both the sub-sections speaks of appointment of Public Prosecutor. Definition in Section 4 (1) (t) includes any person acting under the directions of a "Public Prosecutor". In neither of those provisions can be found any authority given either to the State Government or the District Magistrate or, for the matter of that, the Additional District Magistrate acting under sub-section (2) of Section 10 Cr. P. C. to engage a lawyer, far less to make a lawyer by such engagement a Public Prosecutor. The combined effect of those provisions in the Code has been clearly pointed out by a judgment of single Judge in this Court in the case of *V. K. Godhwani v. State*, reported in AIR 1965 Cal 79 at p. 82. That was pronounced in 1963. Importance of adhering to the mandatory provision in Section 270 Cr. P. C. was considered by a Division Bench of this Court in the case of *Panchugopal v. State* and judgment in that case has been reported in AIR 1968 Cal 38. The relevant part of that judgment is at paras 16 and 17; at page 42 of the Report which clearly shows the view of law that in trials in Courts of Session outside the High Court in exercise of Original Criminal Jurisdiction section 270 Cr. P. C. requires to be strictly adhered to. In the present case the authority issued by the Additional District Magistrate shown to us by the learned D.L.R. has not appointed the learned Advocate Shri S. N. Majumdar as Public Prosecutor and therefore S. 270 Cr. P. C. has not been complied with. An essential necessity for a fair trial has therefore been violated. In our view that is reason enough for quashing this trial for non-compliance with the mandatory provision of the Code which is based on the principles needed to be adhered to for fair and impartial trial, particularly in a trial on a capital charge where the accused person has not appointed a lawyer for his own defence.

19. The learned Deputy Legal Remembrancer was unable to locate in the Legal Remembrancer's Manual any particular provision under which the Form under Appendix 'E' was prescribed. In the present state of that publication no one can be expected to do so, because the main body of that useful volume has been completely lost in the forest of many Correction Slips, and yet, no one can be sure that they contain all the up-to-date corrections and amendments. By taking immense pains, however, Mr. Banerjee was able to draw our attention to Para 9 of Part VI in Chapter II at page 32 of the first volume of the Manual as a relevant provision on the subject. So we need say a few words about that para 9.

20. In its original shape in the publication of the Manual in 1930, para 9 was in these terms :—

"Whenever the Public Prosecutor of the district is not available for the purpose of conducting prosecution in Magistrate's court, the Magistrate of the district may engage any pleader of sufficient standing at the bar to take up the duties of the Public Prosecutor subject to the sanction of the Legal Remembrancer, who will settle his fees at the recommendation of the district authorities. Such sanction of the Legal Remembrancer is not necessary when the employment of the outside pleader is made for sessions cases, appeals or revisions at the usual rate of fee". That text has been amended later (date not known) when para 9 was substituted and paras 9-A and 9-B were added. Para 9 so amended reads :—

"(i) When the normal amount of work is more than the Public Prosecutor can perform, the District Magistrate may, in consultation with the District Judge, form a panel of pleaders at the headquarters for the conduct of criminal business. The number of pleaders who will constitute the panel shall be approved by the Legal Remembrancer and shall not be altered without his approval.

(ii) The District Magistrate may, after consulting the District Judge, appoint any pleader to the panel, and may remove any pleader from it with the approval of the L. R.

(iii) The rates of daily fee payable to each panel pleader shall be fixed by the District Magistrate after approval by the Legal Remembrancer. Such rate shall not exceed the rate payable to the Public Prosecutor."

This change is significant. In its original form para 9 spoke of District Magistrate engaging any pleader to take up duty of the Public Prosecutor subject to sanction of the Legal Remembrancer, though such sanction was not necessary when employment of outside pleader is made for sessions cases. That was directly in conflict with provisions of Section 492 (2) and Section 4 (1) (t) Cr. P. C. as has been explained in the two decisions of this Court referred to above.

21. In amended para 9 Clause (i) provides for forming a panel of lawyers in consultation with the District Judge and Cl. (ii) provides for appointing any lawyer to the Panel and removal of any from the Panel, after consulting the District Judge.

22. What is significant is that the provision which spoke of District Magistrate engaging a pleader to take up duties of Public Prosecutor has been obliterated. In that amended form para 9 has no conflict with section 492 (2) or section 4 (1) (t) Cr. P. C. but it does not contain any authority to engage a lawyer by using the form in Appendix 'E' of the Manual. That provision in L. R.'s Manual now enables the Public Prosecutor of the District to engage a lawyer from the panel for acting under the directions of the Public Prosecutor

to conduct prosecution in a Sessions Trial in which the Public Prosecutor cannot personally appear. By such engagement by Public Prosecutor, the panel lawyer is, and without it, he is not a Public Prosecutor by definition in Section 4 (1) (t), Cr.P.C. Adherence to that correctness is essential for compliance with the provision in Section 270, Cr.P.C. In that amended form para 9 of Chapter II of Part VI of the Manual makes it possible to adhere to Rule 1 in Chap XI of the Manual that provides that Courts should provide advocates or pleaders for defence when necessary. Thus Court should do by selecting a panel lawyer through the Public Prosecutor, and not through District Magistrate or Additional District Magistrate.

23. The Form in Appendix 'E' may have been prescribed in the background of original text of para 9. It was not a valid appointment of a Public Prosecutor at any time. After para 9 has been amended, that form has no relation with or basis in what appears as para 9 in the Correction Slip. Yet the Form has been retained in the Manual and is being used at the teeth of the provision of the Code of Criminal Procedure. Whether that Form is needed for executive use in the office of the Accountant-General for passing bills is no concern of Courts. It has no validity or force in Courts and must be rejected as an authority for any lawyer to act as a Public Prosecutor in Sessions trial.

24. We notice with great concern that although law on this subject was clearly stated in the decisions of this Court which we have mentioned above, the illegal practice has continued to be indulged in not only in the present case but also in many cases that have come to our notice in recent past. The Sessions Judges appear to have ignored the illegality by neglecting the requirement of law contained in Section 270, Cr.P.C. and in the executive offices of the State there has been lack of care and caution in an important matter which is a necessity of law not only for ensuring a fair trial, but also for the legality of the trial itself in the Court of Session.

25. The persistence with which the illegal practice has been adhered to in all the districts of West Bengal makes it incumbent on this Court to direct that all Judges presiding on Sessions trial must be alive to this aspect. If at the opening of the trial Public Prosecutor of the District is not appearing to conduct prosecution, the Judge need have to ascertain and put on the record in the order-sheet the manner in which the lawyer appearing to conduct the case for prosecution has been appointed or engaged. If the appointment is not in accordance with the provision of Section 492, Cr.P.C., or the engagement for the acting is not by the Public Prosecutor of the district for conducting prosecution by acting under the directions of a Public Prosecutor as men-

tioned in Section 4 (1) (t), Cr.P.C., then it will be the duty of the presiding Judge not to allow prosecution to be conducted by such a person who is not properly appointed Public Prosecutor. That is a necessity for the legality of the trial as enjoined by Section 270, Cr.P.C. An omission on the part of the presiding Judge to perform that duty may itself be a reason for quashing the trial, whatever the result that may have been obtained in the trial. If the State that is conducting the prosecution does not obey this warning in the future conduct of prosecutions in Sessions trials, it will do so at the peril of the prosecution and the trial itself.

26. The other part of Mr. Das's contention in this branch of his argument concerns the manner in which a lawyer was provided to the accused at the State cost. We have already mentioned that Shri Susil Kumar Banerjee a panel lawyer was engaged in the same manner in a form in Appendix 'E' of the L.R's Manual signed by Additional District Magistrate. On the third day of the trial, i.e., on 12th of May 1967, Shri Banerjee was absent. At the first sitting of the Court on that day no one had any information and the Public Prosecutor wanted time to contact him. At 12 noon of that day the Court was informed that Shri Banerjee had fallen ill and there was no certainty whether he will be able to come to Court on the next day also. In that situation the Court ruled that the trial should proceed. Only reason for that ruling appears in the order-sheet is that witnesses were present. We must say at once that we do not appreciate that reason to be sufficient or proper for insisting that the trial, which was one on a charge of murder punishable with death, should proceed in the absence of the defence lawyer, who had suddenly fallen ill. Adjourning a Sessions trial is a serious matter indeed, but absence of defence lawyer for the reason of sudden illness is no less. In the present trial it was much more important that the person on trial facing a capital charge should have the assistance of a lawyer who had opportunity to prepare the brief for proper defence by effective cross-examination, than the trouble and cost to which State would have been subjected by an adjournment of the trial. The learned Additional Sessions Judge has shown lack of appreciation of the essential necessities that need be adhered to in all criminal trials in general, and more so in trials on charges of major offences like murder in particular. We draw the attention of the learned Additional Sessions Judge to the judgment of the Supreme Court in the case of Janardan Reddy v. State of Hyderabad, reported in AIR 1951 SC 217. In that case the Supreme Court, while laying down that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated, also laid down that a Court of Ap-

peal or Revision is not powerless to interfere if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial.

27. No doubt, that the learned Additional Sessions Judge took the step of appointing another panel lawyer Shri Sourindra Mohan Bose who was found present in Court to defend the accused instantly and proceed to examine important witnesses including the two doctors (P.Ws. 7 and 8) who testified to the nature of the injuries found on the victim and the investigating Police officer (P.W. 11). But it is also clear that the learned lawyer so appointed to defend the accused could not even be furnished with brief, far less any opportunity or time to prepare himself. It has been contended in some cases that in such situation it is much safer and better for the accused to go undefended at the trial because it may be expected that he then may draw the active, watchful and energetic attention of the presiding Judge to test prosecution witnesses by questions and check prosecution counsel against any unfairness or overzealousness to introduce inadmissible or prejudicial evidence. There is much force and cogency in that argument because a show of defence is not a substitute for effective defence; and it is much worse than none, as it may turn out to be a false show and in effect tend to neutralise a stronger force that an alert Judge is expected to be. For the Prosecutor representing the State also it is improper and unfair to insist on continuation of the trial in such situation by instantly providing another lawyer to defend the accused, without giving that lawyer the papers and brief or time and opportunity to prepare the case. That often may turn out to be, and in the present case it may have been, as we will presently discuss, a booby-trap for the accused and the State has the look of hunting with the hound and masquerading to run with the hare by engaging a lawyer for defence as a mere show and useless as effective defence.

28. This Court had occasion to pronounce a judgment upon consideration of such situation in the case of AIR 1968 Cal 38. In that judgment the relevant part of the Supreme Court decisions reported in AIR 1951 SC 217 was quoted and also a passage from the Division Bench decision of Kerala High Court reported in AIR 1963 Ker 54, Mohammad Kunnummal v. State of Kerala, was quoted. We respectfully agree with the view of law expressed in that passage occurring in the judgment delivered by Anna Chandi, J., in that case in these words:—

“Before we part with the case we have to strike a note of warning against the practice of some of the Sessions Judges appointing raw and inexperienced juniors to defend the accused in capital cases. If, however,

such inexperienced advocates alone are available to defend such unfortunate accused, the Court has a primary duty to come to the aid of the accused by putting timely and useful questions and warning the advocates from treading on dangerous grounds. In this case it is really unfortunate that the Court has instead freely made use of the defects resulting from the inexperience of the advocates to build up the case against the accused.”

In the present case on careful examination of the records of the trial, we have unhappily failed to find anything to indicate that the learned Additional Sessions Judge in this trial was even aware or alive to what the learned Judge Anna Chandi J. in Kerala High Court has pointed out to be the primary duty of the Court to come to the aid of the accused by putting timely and useful questions. Unfortunately in this case also the Court has instead freely made use of the defects that resulted from unpreparedness of the lawyer who appeared to defend the accused, if not from his inexperience. Those will be revealed presently when we will discuss evidence as it appears in the records in this case. But here we unhesitatingly say what was said in the judgment of this Court reported in AIR 1968 Cal 38 that these “are characteristics which undoubtedly need be remembered by us when considering the evidence on the whole to assess its value and reliability for deciding whether or not any real prejudice has been caused to the accused or the accused was so handicapped for want of proper legal aid so much so that the proceedings against him may be said to be a negation of a fair trial sufficient to require use of the power of this Appellate Court to interfere with the conviction and sentence. The fact that there was a lawyer engaged by the State to defend the accused at the trial does not relieve the Appellate Court of the duty to examine if there was real prejudice to the accused”.

29. To that we may add that the loud feature in the manner of continuing the trial in the absence of the defence lawyer who had the brief, by setting up another defence lawyer who had not the brief, and the characteristic appearing in the record of the depositions of witnesses examined for prosecution, heightened by omission of the trial Judge to expose by timely and proper questions the mysteries of carefully chosen technical language, in totality appears to be a negation of a fair trial. That by itself and independently is sufficient in our view to require use of the power of the Appellate Court to interfere with conviction and sentence and to quash this trial.

30. Question then arises whether by quashing the trial a new trial should be directed. For ascertaining whether there is sufficient material to justify a retrial and what should be the proper order, examination of evidence given in the case is neces-

sary. So we proceed to consider the evidence.

31 to 44. [After discussing evidence, his Lordship proceeded.—]

45. We notice with regret that these features appearing in the evidence given by prosecution and revealed by little cross-examination that could be made by the defence lawyer who had no opportunity to study the brief, did not attract the notice of the learned Additional Sessions Judge for asking any timely question during examination of the witnesses in box and the paucity of material information on crucial points thereby appearing have been turned by the learned Judge against the accused in his judgment by which he has assigned the unfortunate man to the hangman's rope.

46. The undercurrent in the whole judgment of the trial Judge appears to be complete negation of the presumption of innocence of the accused which is "like a golden thread webbing throughout the texture of a criminal trial". Not only so, the judgment reveals from the beginning to end a strong presumption of absolute truthfulness of all the prosecution witnesses, particularly P.Ws. 1 and 2 who are the only two eye-witnesses. There is no such presumption in our law and that was laid down by judgments of this Court decades ago, one in the case of *Emperor v. Tazem Ali*, which was an appeal from a trial by Jury. That case is reported in ILR 58 Cal 1095 = (AIR 1931 Cal 796). Rankin, C J, delivering the judgment said at p 1101 of the report (of ILR Cal) = (at p 799 of AIR)

"In my opinion, a Jury cannot be required to make the presumption against an accused person that the particular statements of a particular witness are true, still less can it be required to make such a presumption as regards the prosecution witnesses as a body or the prosecution evidence as a whole. The Jury should be told that it is their duty to consider carefully and to say whether they are convinced by the prosecution evidence and that, if they are not convinced, there is no law which obliges them to convict. If they do in such a case convict, they stand without excuse before the law." That view of law has been followed in this Court ever since. It applies with greater emphasis to trials by Judge without the aid of Jury.

47. The learned Deputy Legal Remembrancer in the best traditions of the Bar and the accustomed fairness of a prosecutor (both of which have been always a pride of legal system of India, adopted from the Anglo-Saxon system), showed his own unhappiness about the manner in which prosecution has been conducted in the trial Court and also the glib credulity on which the judgment is based. But he said that it has been so, because there was not effective cross-examination on very material points and the learned

trial Judge had not before him any definite defence case or criticism of prosecution evidence. That may be so; but that does not relieve the trial Judge of his responsibility to weigh the probability of prosecution evidence, which he has to do for arriving at the decision whether prosecution allegations have been proved by the standard laid down in Section 8 of the Evidence Act. In so weighing probability of prosecution allegations, of necessity, other probabilities also appearing from the evidence brought before the Court have to be considered for comparative assessment which of the probabilities should be accepted as fact proved. If, from the evidence, any probability consistent with innocence of the accused is equally strong as the probability pointing to his guilt, then on the strength of presumption of innocence in favour of the accused, prosecution has failed to prove its allegations. Even if the probability consistent with innocence is not equally strong with other probability of his guilt, yet probability of innocence is such as would cast a doubt, then it may be a case of reasonable doubt, benefit of which must go to the accused. That being so, it is incumbent duty of the Judge to consider all the probabilities that appear from the evidence before him and he cannot afford to be credulous and not consider reasonable probabilities only because accused was undefended or defence lawyer did not make a point of such probability in cross-examining witnesses or making suggestions or when arguing the defence case. A Judge should not imagine or speculate on hypothetical defences not urged at the Bar. But that does not connote that he may neglect to consider a probable defence appearing from evidence, only because it was not hurled at him. As a Judge of fact he must consider evidence given in the case from all viewpoints.

48. Necessity for assessing the reliability of the two eye-witnesses (P.Ws. 1 and 2) by probabilities appearing for the prosecution evidence that was given at the trial was most pronounced because of the nature of the medical evidence given through the two doctors (P.Ws 7 and 8). P.W. 8 Dr. Braja Ballav Basak, M.O. of the Police Case Hospital at Barrackpore, held the post-mortem examination. In describing the first wound in his deposition he has given the information that it was incised wound (punctured), chest cavity deep of 2¼ inches long obliquely at the left interspace about 1 inch lateral to the margin of the manubrium sternum. It had cut the third left rib at the costo-chondran junction and also made a slit opening of about ¼ inch in the anterior wall of the right ventricle, obviously of the heart. Although these informations were given regarding that injury, he has not expressly mentioned the direction of the wound. From the fact, however, that the weapon had entered at the third intercostal

space and cut the third left rib and then through the pericardium it reached the heart causing injury to the right ventricle, give unmistakable indication that the journey of the weapon inside the chest cavity was downwards, though not exactly vertical, but obliquely. The other major injury described as the third injury by this doctor mentions only the location of the incised wound at the left infra-scapular angle. Obviously, it was in the back, but the doctor has not said so expressly, nor has he given any indication about the direction of that injury. Leaving the direction of those two injuries so vague and by omitting to say that the third injury was on the back, in his examination-in-chief, Dr. Basak (P.W. 8) expressed his opinion that all the injuries were on the chest of the man and the man must have been lying on his back while injuries were dealt. In cross-examination, however, Dr. Basak had to admit that injury No. 3 was on the back side and that injury could be caused either from the backside or from the left side of the victim. That admission was directly in conflict with the opinion expressed by this witness in his examination-in-chief that the man must have been lying on his back when this injury also was inflicted. Neither this loud incongruity in the testimony of the Medical Expert nor the astonishing vagueness about the directions of the two major injuries appearing in his deposition attracted the notice of the learned trial Judge. This was an instance where a fair prosecutor should have asked questions in examination-in-chief. It was also an instance where timely question by the presiding Judge was a necessity. Yet we see that both the prosecutor and the Judge failed to do their duty.

49. In the deposition of the other doctor P.W. 7 Dr. A. N. Chakraborty, Sub-Divisional Medical Officer of the hospital mentioned the direction of both the major injuries to be long axis of the chest in one case and long axis on the back in the other. That other injury Dr. Chakraborty (P.W. 7) clearly mentioned to be on the left side of the back. The direction of both the major injuries being almost vertically downwards along the axis of the chest, slightly oblique and one being on the front of the chest and the other on the back, question inevitably arises whether that was consistent with the version of the two alleged eye-witnesses (P.Ws. 1 and 2) that they saw those stab injuries being inflicted when the victim Nepal was lying on his bed spread on the two benches. Unfortunately that question had not arisen in the mind of the defence lawyer who cross-examined the two Medical Experts (P.Ws. 7 and 8) on a day when he was not even in possession of the brief and so had not the opportunity of studying the injury report and the post-mortem examination report on which the testimony of the two doctors was based. The learned Additional Sessions Judge also has completely neglected that

important aspect both at the time when the witnesses were being examined before him and in his judgment delivered more than a week after the close of the evidence. The admission of Dr. Basak (P.W. 8) that the injury on the back could not have been inflicted when the victim was lying on his back, which admission is fully supported by the position and direction of that injury described by Dr. Chakraborty (P.W. 7) belies not only the glib opinion of Dr. Basak expressed in his examination-in-chief, but also completely negatives the story of P.Ws. 1 and 2 that they saw the accused to plunge the chisel into the body of Nepal when he was asleep in his bed. In that posture described by P.Ws. 1 and 2, which Dr. Basak (P.W. 8) sought to support in his examination-in-chief, would most probably, if not inevitably, give the direction of the injury No. 1 inwards and backwards. Even if after that first injury was inflicted, the victim turned on his side, the injury on the back if inflicted in that posture was only likely to be also inward and forward, because it was on the back. But none of the two Medical Experts have supported that direction of the two major injuries. On the contrary, the direction expressly mentioned by Dr. Chakraborty (P.W. 7) and appearing from the testimony of Dr. Basak (P.W. 8), though he did not say so expressly, is almost vertically downwards in both the major injuries. That direction is only consistent with the probability that those two injuries could not have been inflicted when the victim was lying on bed, either on chest or on his back, and that those were inflicted when he was in a standing posture.

50. The two other injuries minor in nature have been described by both the doctors (P.Ws. 7 and 8), one being only half inch below injury No. 1 and the other being $\frac{3}{4}$ inch below that other minor injury. Both the minor injuries are incised wounds about $\frac{1}{5}$ th inch by $\frac{1}{5}$ th inch by skin deep. Being skin deep, these two injuries cannot be stabbing blows inflicted by the sharp weapon like the chisel (Ext. II). Each of them has the look of a drawn injury and both are on the front of the chest. That characteristic of those two injuries very strongly support the probability that after the first major injury was inflicted in the course of struggle and the assailant was manoeuvring the weapon to deliver the other major injury on the back, the sharp edge of the weapon had brushed against the body of the victim in the front in course of that struggle. That is the only probability which is consistent with the total effect of the description of the injuries given by both the doctors, though in vague language, and their location and direction. That is enough for complete disbelief of the two eye-witnesses that they saw the injuries being inflicted by this accused, Raj Kishore in the manner described by them.

51. Before we leave the subject of medical evidence we need also mention a serious doubt that we very unhappily entertain if the vagueness and omissions we have mentioned above were intentional or unintentional. The degree of vagueness is not so much in the deposition of Dr. Chakraborty (P.W. 7) who had examined the injured man in the hospital before investigation started. But vagueness and omissions are most pronounced in the deposition of Dr Basak (P.W. 8) who held the post-mortem examination of the dead body after investigation had started. Is that difference in degree of vagueness between the two doctors referable to the injury report in case of P.W. 7 and post-mortem report in case of P.W. 8 by reference to which each of them must have deposed in Court? Post-mortem report made by P.W. 8 has been kept on record and printed in the Paper Book, but injury report or hospital papers of P.W. 8 have not been included in record and is not available to us for aid to understanding the deposition of the doctor.

52. Another feature in the deposition of P.W. 8 who held the post-mortem examination barely 13 hours after the death of the victim is that it mentions that rigor mortis was present all over. But no information has been vouchsafed to enable the Court to ascertain if there was any element of cadaveric rigidity or spasm present in what was being described as rigor mortis. It is well known that cadaveric spasm occurs in cases in which death was immediately preceded by a state of great nervous tension or excitement caused either by terror or struggle. Both struggle and terror and also excitement were implied in prosecution case itself, because P.W. 2 spoke of shouts Nepal saying "Bachao, bachao" and he ran after the assailant even after receiving mortal injuries. Indeed, we have no material in evidence if P.W. 8 Dr Basak was qualified in medical science to distinguish cadaveric spasm which is not rigor mortis. In his deposition besides saying that he is M.O., Police Case Hospital, he does not even say that he is a medical graduate, far less does he mention his qualifications and experience in anatomy, physiology or surgery. The lawyer for prosecution has not elicited any fact that may show that he is an expert whose opinion will be admissible in evidence under Sec 45 of Evidence Act. The learned trial Judge has completely neglected that absence of evidence on that provable fact. Both of them have assumed too much in favour of prosecution on that essential point of fact. Law does not permit any assumption without evidence on material point of competence of the witness who offers opinion for consideration against an accused.

53. The other witnesses—P.Ws. 3, 4, 5 and 6—all came on hearing the shouts of P.Ws. 1 and 2 and heard the story from those two witnesses. It is no wonder that those persons who arrived on hearing shouts

followed the lead of P.Ws. 1 and 2 to think that Raj Kishore was the assailant and arrested him. Of those P.Ws. 3 and 4 have already been discussed in the earlier part of the judgment. P.W. 3 saw Subhas running followed by the accused and Nepal. It is quite consistent with the probability that Subhas may have been the assailant and Raj Kishore was chasing to catch him. P.W. 4 arrived at a later stage and heard the story given out by P.Ws. 1 and 2. He proved nothing against Raj Kishore except arrest. P.W. 5 Ram Charan Ram who is a person mentioned in the First Information Report and also occurs very loudly in the testimony of P.Ws. 1 and 2 proves nothing at all. He only saw that Nepal was lying in front of his house with bleeding injuries. P.W. 6 is the constable Sachindra Nath Pal to whom the accused Raj Kishore was made over after his arrest. He also does not prove any material fact to implicate Raj Kishore with the alleged offence.

54. The learned Additional Sessions Judge has made a loud point against the accused by the fact that he had hid himself. If hiding themselves by P.Ws. 1 and 2 in the manner they have spoken of is probable, then in the reversed position that Raj Kishore instead of being the assailant was chasing the assailant, hiding of Raj Kishore must equally be probable. That Raj Kishore is a cobbler and the weapon produced is a cobbler's chisel is of no significance at all, because, according to the prosecution, that weapon was taken from a box hanging on the wall outside from where any one could have taken. Moreover, although the witnesses have said that they have seen Raj Kishore using such weapon, none of them has definitely identified it as the weapon either belonging to or used by Raj Kishore. We had the weapon produced before us. It is astonishingly new, so much so that the paint on the wooden handle is looking very fresh and the top of that wooden portion where no paint was put, even today has a look of freshly chiseled wood. It bears no mark of having been put to use either in the cobbler's trade or in any manner at all. This was the weapon that was seized not at the time when Raj Kishore was arrested, not at the time when the investigating officer first appeared on the scene soon after 2-30 a.m., not at the time when the investigating officer had seized the kantha and chaddar at 4-30 a.m., but long hours after, at 7 a.m. On 1st of April, daylight was available from 5 a.m. at least. The time-lag does not rule out the possibility of the weapon being lodged by somebody else other than Raj Kishore. The exact place of its find we have already discussed remains uncertain as is the place from where Raj Kishore was arrested by the neighbours. Find of blood on the wooden handle of this weapon also does not lead to anywhere in fixing the guilt on Raj Kishore, because from the wounds of Nepal much blood must have flowed as would give

opportunity of smearing the weapon with blood, if one wanted to.

55. To crown all such neglect of materials in evidence that should have been considered in favour of the accused and also of omissions and incongruities that should have been considered against the prosecution, we have to notice that in the first paragraph of the narration in F.I.R. (Ext. 1/1) along with full name of the accused, who was produced, his father's name, all details of village, police station and district of which he is a native have been mentioned as part of statement of Subhas (P.W. 1) who lodged that information at 2-30 a.m. on 1st April, 1966.

Those astonishing details of parentage and native address of the cobbler Raj Kishore do not at all fit with the prosecution version that this F.I.R. was lodged and recorded at 2-30 a.m. on the information of Subhas (P.W. 1), because it is not at all probable that he could have had ready all those informations about the accused Raj Kishore at that hour immediately after the occurrence. Those informations were obviously ascertained afterwards in course of investigation by Police. Inclusion of these details unmistakably shows that some time after police had taken up investigation, carefully drafted narration was recorded including in it informations gathered by investigation and giving a version of the happenings according to the understanding of the investigating Police officer at that stage of investigation. That explains why the episode involving a man named Samaresh and barking puppies disturbed by Raj Kishore finds so prominent a place in the F.I.R. (Ext. 1/1) but has completely vanished in his deposition in Court, as has also the story of arrest of Raj Kishore by a man named Gour and another person with the help of Subhas (P.W. 1), Amal (P.W. 2) and Jaladhar occurring in F.I.R. Careful comparison of testimony of P.W. 1 with the story in F.I.R. shows clearly that it was not the narration of Subhas (P.W. 1) alone that has been recorded in Ext. 1/1, but a made-up and edited version of what may have been collected from several persons, many of whom have not even been examined as witnesses in the trial.

56. At the trial a changed version of the story has come according to the understanding of the prosecutor or those of the investigating Police officer at that stage. The witnesses examined were endeavouring to narrate a new story and because it was new, between the versions of different witnesses, not only substantial differences have appeared on many points, but also direct contradictions are seen even in the essentially material parts of the story.

57. Nothing is more reprehensible than to cook a story for recording an F.I.R. and attempt to improve the cooking of the story at the trial stage in any case. It is more reprehensible when it is done to foist a charge of murder. Many of the features in

evidence we have discussed above bear unmistakable testimony of that crude cooking. We must record emphatic condemnation of the performances of prosecution in the case and express our deep disappointment at callousness of the trial Judge revealed in the record.

58. This state of evidence has led us to the conclusion that upon the evidence produced by prosecution at the trial despite the handicap to which defence had been subjected at the trial, not only the prosecution has failed to prove the offence against Raj Kishore by any reliable evidence, but also there are materials in the evidence which very strongly point to his innocence. In such circumstances there is no reason for sending the case back for retrial because that would only open the door for the possibility of prosecution endeavouring to brush up the defects so loudly appearing in the evidence given in this trial. On the strength of the prosecution evidence itself Raj Kishore is entitled to be acquitted.

59. We, therefore, allow the appeal, set aside the order of conviction and sentence and acquit Raj Kishore.

60. As we are acquitting Raj Kishore by setting aside the sentence of death passed against him, the Reference made by the learned Additional Sessions Judge for confirmation of the death sentence passed by him must necessarily be rejected. We do so.

61. BAGCHI, J.: I entirely agree with the judgment rendered by my Lord in the case under appeal, and with the order passed in the Death Sentence reference case, rejecting the reference acquitting the accused Raj Kishore of the charge under Section 302 of the Indian Penal Code, upon setting aside his conviction under that section. I would, however, add a few words of my own to follow up the points upon which my Lord has given judgment.

62. Section 4, sub-section (1), Clause (t) of the Code of Criminal Procedure, 1898, herein referred to in this judgment as 'Code', defines 'Public Prosecutor'. Public Prosecutor is one who is so appointed under S. 492 of the Code and is also one, who is acting under the directions of the Public Prosecutor in any case in Courts other than the High Court in exercise of its original Criminal Jurisdiction.

Section 492 of the Code provides by sub-sections (1) and (2) for appointment of Public Prosecutor.

Section 492 (1).—The Central Government or the State Government may appoint generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

Section 492 (2).—The District Magistrate, or, subject to the control of the District Magistrate, the Sub-Divisional Magistrate may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not

being an officer of police below such rank as the State Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case.

In any local area, generally, or in any case, or for any specified class of cases, the Central or the State Government, as the case may be, may appoint one or more officers to be called "Public Prosecutors" Sub-s (1), therefore, empowers only the Government alone to appoint 'Public Prosecutor'. In absence of the Public Prosecutor or Prosecutors appointed under sub-section (1), or where no Public Prosecutor has been appointed by the Government under sub-section (1), the District Magistrate, or the Sub-Divisional Magistrate, subject to the control of the District Magistrate, may appoint 'any other person' to be Public Prosecutor for the 'purpose of any case'. It is to be noted that the Government may appoint Public Prosecutor or Prosecutors generally, or in any case, or for any specified class of cases for any local area, but the District Magistrate or the Sub-Divisional Magistrate may, under sub-section (2) of Sec. 492 of the Code, appoint any person other than the Public Prosecutor or Prosecutors appointed under sub-section (1) to be the Public Prosecutor for the purpose of any case, but not generally, or for specified class of cases, and either of the two aforesaid authorities, therefore, can appoint any person to be Public Prosecutor only for the purpose of any case if and when the Public Prosecutor or Public Prosecutors appointed under sub-section (1) of Section 492 of the Code are either absent, or no such Public Prosecutor has been appointed by the Government under sub-section (1) of the Code, but not under any other situation. Now, Public Prosecutor, or Public Prosecutors, appointed under sub-sections (1) and (2) of Sec. 492 of the Code then become 'Public Prosecutor' within the definition as under Sec. 4 (1) (t) of the Code. Situations may, and often arise where the Public Prosecutor, or Public Prosecutors, appointed either under sub-section (1) or sub-section (2) may not, for various compelling reasons, appear personally as Prosecutor in a case for the State, but can still direct any person acting as Prosecutor in such case for the State. Such person so acting under the direction of a Public Prosecutor of either of those two categories is also a Public Prosecutor, but he need not be appointed a Public Prosecutor either under sub-section (1) or under sub-section (2) of Section 492 of the Code. So, a Public Prosecutor appointed either under sub-section (1), or sub-section (2) of S. 492, and a person acting as Prosecutor for the State in any case under the direction of a Public Prosecutor, appointed either under sub-section (1) or sub-section (2) of S. 492 come within the definition of 'Public Prosecutor' as under Section 4 (1) (t) of the Code. Any person acting as Prosecutor for the State in any case under the direction of any

person, appointed Public Prosecutor under Section 492 of the Code, need not, therefore, be appointed a Public Prosecutor in such case either under sub-section (1) by the Government or under sub-section (2) by the District Magistrate or the Sub-Divisional Magistrate. If and when the District Magistrate or the Sub-Divisional Magistrate, as the case may be, appointed any person to be a Public Prosecutor in any case under sub-section (2) of Section 492 of the Code what must have had happened in such a situation was either that there had been no appointment of Public Prosecutor by the Government under sub-section (1) in the case or generally for the local area, or that if appointed, he was absent in the sense that he was not in a position even to direct any person acting as Prosecutor for the case on behalf of the State, being either away from the local area of his appointment, or being so ill, as made him incapable for giving such person direction for acting as Prosecutor in the case for the State. The sub-section (2) of Section 492 of the Code, therefore, contemplates either of the two situations on the happening of which only the District or the Sub-Divisional Magistrate, as the case may be, may appoint a Public Prosecutor, but not under any other situation.

63. In a case before the Sind Chief Commissioner's Court, *Emperor v. Deep Chand*, AIR 1930 Sind 156, a trial came near its conclusion. At that stage, the case was transferred to a Court situated in another local area, for trial. Before transfer the case was conducted for the State by the Public Prosecutor appointed for the local area within which the Court was situated under Section 492 (1) of the Code by the Government. For the local area where the Court on transfer was trying the case, no Public Prosecutor had been appointed by the Government under Section 492 (1) of the Code. The District Magistrate in such a situation appointed a Sub-Inspector of Police under Section 492 (2) of the Code to conduct the case for the State before the transferee Court. The appointment was thus held to be valid.

64. In the present case we take judicial notice of the fact that in 1966-67 and even to this day, there has been for the district of 24 Parganas, a Public Prosecutor appointed generally by the State Government under Section 492 (1) of the Code. So, we cannot accept that during 1966-67 there had been no appointment of Public Prosecutor generally for 24 Parganas district by the State Government. So, one of the two situations as envisaged by Section 492 (2) of the Code, being non-appointment of Public Prosecutor, generally for 24 Parganas, did not and could not arise in 1966-67 when the trial of the accused before the learned Additional Sessions Judge had been held. So, there must have had arisen the other situation as contemplated by Section 492 (2) of

the Code, being that the Public Prosecutor appointed generally for 24 Parganas by the State Government under Section 492 (1) of the Code, must have had been absent in the sense that he was either away from the local area of 24 Parganas or, being present in the local area was so circumstanced that he was not even in a position to direct any person acting as prosecutor in the case, being thereby notionally absent, whereof engagement had to be made of A.P.P., Shri Mazumdar as Public Prosecutor in the case by the Additional District Magistrate, 24 Parganas, under Section 492 (2) of the Code. The A.P.P. Shri Mazumdar, without being appointed a Public Prosecutor by the Additional District Magistrate under Section 492 (2) of the Code, could have functioned as Public Prosecutor as defined under S. 4 (1) (t) of the Code in the case, if only he was directed by the Public Prosecutor, appointed generally for 24-Parganas by the State Government under Section 492 (1) of the Code, to act in the case in question as prosecutor for the State. But as Shri Mazumdar was engaged as public prosecutor in the case by the Additional District Magistrate under Section 492 (2) of the Code, the Public Prosecutor for 24-Parganas appointed generally by the State Government must have had been either away from the local area, or had been so circumstanced that even being physically present in the local area, had neither the physical ability, nor the mental capacity and alertness to direct any person to act as prosecutor for the State in the case, necessitating thereby for the appointment of Shri Mazumdar as a Public Prosecutor in the case by the Additional District Magistrate under Section 492 (2) of the Code. The learned Deputy Legal Remembrancer Mr. Banerjee produced before us a printed form, duly filled in, and signed by Additional District Magistrate, 24-Parganas without scoring out the superfluous and irrelevant words, wherein it appears that Shri Mazumdar A. P. P. is engaged on behalf of the State/accused in the Court of Sessions Judge, Alipore in the case the State v. Raj Kishore Rabidas. The abbreviation A. P. P. may conceivably mean either Assistant Public Prosecutor, or Additional Public Prosecutor or Associate Public Prosecutor. The abbreviation "A. P. P." may connote that Shri Mazumdar was already one of the Public Prosecutors having had been so appointed by the State Government under Section 492 (1) of the Code, since the State Government may generally, or in any case, or in specified class of cases appoint, for any local area, one or more officers to be called 'Public Prosecutors'. Accordingly, there could then be no scope for his further appointment by the Additional District Magistrate as Public Prosecutor in the case under Section 492 (2) of the Code. If Shri Mazumdar was not already appointed as an 'A.P.P.' what was then he, when he had been engaged in the case by the Additional District Magistrate? He was, as Paras. 9-A and 9-B of the

Legal Remembrancer's Administrative Manual enjoin (quoted by my Lord elaborately in his judgment) a member in the panel of pleaders at Head Quarters of 24-Parganas for conducting the State's Criminal Business. Therefore, he was in the category of any person, eligible under the administrative arrangement, set up by the State Government for acting under the direction of the Public Prosecutor, so appointed under Section 492 of the Code, within the clause 'and includes any person acting under the direction of the Public Prosecutor' as occurring in Section 4 (1) (t) of the Code. In such a situation, the Additional District Magistrate had no legal authority to issue the engagement slip, quoted in my Lord's judgment, engaging senior A. P. P. Shri Mazumdar in the case, presumably under the provisions of Section 492 (2) of the Code. If Shri Mazumdar was a senior member enlisted in the administrative panel of lawyers, he was then in the category of any person eligible for acting as a prosecutor for the State in the case, and that only under the direction of the Public Prosecutor appointed under Section 492 of the Code, provided of course, the Public Prosecutor, appointed generally for 24-Parganas had not been, at the relevant time of engagement of Shri Mazumdar, absent in the sense I have already explained. The learned Deputy Legal Remembrancer, Mr. Banerjee, however, could not and did not tell us while producing the engagement slip before us that the Public Prosecutor, appointed generally for 24-Parganas by the State Government under Section 492 (1) of the Code was absent, at the time when Shri Mazumdar's engagement had to be made, in the sense I have already explained hereinbefore. So, if Shri Mazumdar was at the time of his engagement in the category of 'any person' within Section 4 (1) (t) of the Code having had been enlisted administratively in the panel of eligible lawyers, he could be engaged for acting in the case as 'Public Prosecutor' within the provisions of Section 4 (1) (t) of the Code, if and when he was so directed by the Public Prosecutor to act as such for the State in the case before the learned Additional Sessions Judge, 24-Parganas. But his engagement for acting as public prosecutor in the case does not appear to have had been directed by the Public Prosecutor appointed generally for 24-Parganas by the State Government under Section 492 (1) of the Code. So, Shri Mazumdar's engagement for acting, as he had acted, as Public Prosecutor in the case on the authority of the engagement slip made and signed by the Additional District Magistrate, 24-Parganas, can neither be accepted as valid under Section 4 (1) (t) of the Code nor under Section 492 (2) of the Code. A Division Bench of this Court in the case of Anurupa Debi v. Ramlal Rajghoria reported in AIR 1952 Cal 395, had to consider a very peculiar circumstance surrounding the appointment of a public prosecutor in a case. The complainant in the case applied to the Additional District

Magistrate of 24-Parganas for appointment of a gentleman of his choice as public prosecutor in the particular case. The Additional District Magistrate appointed the nominee of the complainant as a public prosecutor in the case on fees to be paid by the complainant. Sometime after the order of appointment the Legal Remembrancer of the State Government appointed that very gentleman as a public prosecutor in the case on fees to be paid by the Government. The Sub-Divisional Magistrate who was in seisin of the case was moved by the complainant for appointment of the gentleman who had already been appointed a public prosecutor in the case by the Additional District Magistrate for conducting that particular case as the prosecutor but the learned Sub-Divisional Magistrate refused to comply with such prayer and engaged the Court Sub-Inspector to act as public prosecutor in the case. In the revisional proceedings before this Court, the Division Bench had to set aside the order of the Sub-Divisional Magistrate, observing that the Sub-Divisional Magistrate had no jurisdiction to ignore the order of appointment of public prosecutor in the case, made by the Additional District Magistrate under Section 492 (2) of the Code. But, it would not appear from the judgment that the Division Bench found the order of appointment of public prosecutor passed by the Additional District Magistrate, under Section 492 (2) of the Code, a valid order under the law. It does not also appear from the judgment that there was either no public prosecutor, appointed under Section 492 (1) of the Code, or if appointed, was absent in the sense I have already explained in this judgment within the scope and content of the expression "in absence of the public prosecutor, or where no public prosecutor has been appointed", as occurring in Section 492 (2) of the Code. The judgment on the other hand shows in clear and unmistakable terms that at the request of the complainant, the Additional District Magistrate had appointed a nominee of the complainant, an Advocate of Alipore, a public prosecutor in the particular case on fees to be paid by the complainant. So, that was not a case where there was no public prosecutor appointed under Section 492 (1) of the Code, nor was it a case where public prosecutor so appointed was absent in the sense I have already explained in this judgment earlier. But, in this case, the public prosecutor appointed generally for 24-Parganas by the State Government under Section 492 (1) of the Code could not be found by us to have been absent in the sense I have already explained, when Shri Mazumdar a senior A. P. P. was engaged in the case by the Additional District Magistrate. So, in this case it was the public prosecutor appointed generally for 24-Parganas who alone was competent to direct Shri Mazumdar for acting as public prosecutor in the case and the Additional District Magistrate had no statutory authority under Section 492 (2) of the Code to engage

Shri Mazumdar as public prosecutor in the case. The Division Bench in Anurupa Debi's case, AIR 1952 Cal 395, had not to consider such situation as has arisen in the present case within the scope and contents of the provisions of Section 4 (1) (t) of the Code. Therefore, that decision is not an authority for the proposition now before us. If Shri Mazumdar was an enlisted lawyer as Paragraphs 9-A and 9-B of the Legal Remembrancer's Manual contemplate, he could be engaged for acting as public prosecutor in the case only under the direction of the public prosecutor, 24-Parganas appointed generally by the State Government under Section 492 (1) of the Code. In that case Shri Mazumdar's acting as prosecutor in the case for the State would have made him a public prosecutor under Section 4 (1) (t) of the Code. Shri Mazumdar did not, however, come within the conditions laid down in Section 4 (1) (t) of the Code read with Section 492 (2) of the Code. If and when a person is a public prosecutor within the definition as in Section 4 (1) (t) of the Code, he gets certain privileges and protections such as those under Ss 493 and 494 and other sections of the Code as discussed hereunder.

Section 493.— The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions.

Section 494:— Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, and, upon such withdrawal,

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences,

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences.

Section 270 of the Code empowers only the public prosecutor to conduct prosecution at the trial before a Court of Sessions in the mofussil but none else. It is only the public prosecutor lawfully appointed that can open the prosecution case and examine the prosecution witnesses at the Sessions trial before the Sessions Judge (Section 286 of the Code), but none else. Against the order of acquittal the State Government may direct a public prosecutor to present appeal to the High Court from the original and the appellate order of acquittal (Section 417 (1) of the Code). It is only a public prosecutor lawfully appointed may with the consent of the Court

withdraw from the prosecution but none else. (Section 494 of the Code). How grave and inalienable are the duties and responsibilities of the public prosecutor in the matter of applying for withdrawal from prosecution has been emphasised in the two decisions of highest authorities in India. In the case of *State of Bihar v. Ram Naresh* reported in AIR 1957 SC 389, his Lordship Jagannadhadas, J., held as follows :

“The judicial function, therefore, implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the public prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. In this context it is right to remember that the Public Prosecutor though an executive officer as stated by the Privy Council in AIR 1938 PC 266, is, in a larger sense, also an officer of the Court and that he is bound to assist the Court with his fairly considered view and the Court is entitled to have the benefit of the fair exercise of his function.”

In the case of *Faqir Singh v. Emperor* reported in AIR 1938 PC 266 at p. 269 Lord Wright, J., held as follows :

“Section 494 gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds, one of which no doubt is that the person in respect of whom the charge is withdrawn may be willing to give evidence”.

The Court is required to see while giving consent to the withdrawal from prosecution at the initiative of the public prosecutor, that the public prosecutor appointed according to law was applying for withdrawal from prosecution in fair exercise of his function, not only as an executive officer representing the State as prosecutor in the case, but also as an officer of the Court, bound as he is to assist the Court with his fair views in every case where he is appearing for the State. It would be, therefore, apposite to say that a public prosecutor for the State is not such a mouth-piece for his client the State, to say what it wants or his tool to do what the State directs. He owes allegiance to higher cause. He must not consciously misstate the facts, nor knowingly conceal truth. Despite his undoubted duty to his client, the State, he must sometimes, disregard his client's most specific instructions if they conflict with his duty to the Court to be fair, independent and unbiassed in his views. As an Advocate for the State, he may be ranked as a minister of justice equally with the Judge.

65. When any person appears before any inferior criminal Court for representing the State as public prosecutor in the case it is highly desirable, as has been observed in the judgment of my Lord, that the Court should ascertain from such person so appear-

ing the circumstances under which he comes to represent the State as public prosecutor and should put on the record the circumstances so ascertained by the Court regarding the authority of the person appearing as public prosecutor for the State Government in the case, since the public prosecutor is not required by Section 493 of the Code to file any vakalatnama or power of attorney while appearing as public prosecutor in a case, provided of course, such public prosecutor has been lawfully appointed under Sec. 492 of the Code, or acting lawfully under the direction of the public prosecutor, appointed under Section 492 of the Code, within the meaning of Section 4 (1) (t) of the Code. My Lord as Judge-in-Charge of the English Department of the High Court would be pleased to draw the attention of the inferior criminal Courts in the State as to the desirability of placing facts in the record of a case indicating the legal authority of any person other than the public prosecutor appointed under Sec. 492 (1) of the Code appearing as public prosecutor in the case representing the State, so that in this Court, in a situation as has arisen in this case, and had arisen in several other cases in one of which I had the pleasure of associating myself with the judgment rendered by my Lord, much of the arguments of lawyers could be spared economising time and labour and the matter could be adequately dealt with from the materials appearing in the record of the cases. In the present case, the learned Deputy Legal Remembrancer came to our great assistance in solving a very naughty problem relating to the engagement of Shri Mazumdar a “panel lawyer” as public prosecutor in the case. Without his assistance we could not delve deep into the mysteries of engagement of “A. P. P.’s” as public prosecutor in the moffusil criminal Courts, particularly in Court of Session. In the present case, apart from the illegal appointment of Shri Mazumdar as public prosecutor, which could have been condoned as a curable irregularity under Section 537 of the Code on the authority of the decision of the Privy Council in the case of *Adan Haji Jama v. The King*, reported in AIR 1948 PC 63, the very unfairness in the representation, not only of the State by the public prosecutor but also of the condemned prisoner by the lawyer, engaged by the State at the expense of the State at the trial had entered as a vice into the carriage of the proceedings at the trial before the Court of Session as has been elaborately discussed by my Lord in his judgment. So, the illegality of the appointment of the public prosecutor and his management of the case for the prosecution and the manner of performance of his duties by the learned defence lawyer under adverse circumstances before the Court of Session, contributed to the unfairness of the trial prejudicing the prisoner at bar and leading to the failure of justice. A person accused of an offence, under Article 22 (1) of the Constitution of India has a right to be defend-

ed by a lawyer of his choice. Sec. 340 (1) of the Code enjoin that in any proceeding before a criminal Court the accused, as of right, may be defended by a pleader. My Lord has pointed out that the learned Additional Sessions Judge engaged one 'panel lawyer' present in Court during trial to defend the condemned prisoner who was unbriefed and as such thoroughly unprepared. My Lord has pointed out the circumstances under which the learned Advocate Mr. Bose was appointed to defend the condemned prisoner, and how much handicapped he was in presenting the case for the accused before the Court at the trial. There was in fact denial of proper and effective representation of the accused at the murder trial before the learned Additional Sessions Judge. The learned Judge also failed in his duty by not eliciting out facts from the prosecution witnesses which would have turned the scale in favour of the accused. The entire trial, therefore, was infected with the virus of 'unfairness'. The philosophy of fairness at the trial found expression in a memorable judgment of Taft, C. J. of the Supreme Court of America. The learned Judge expressed himself in the words, which I cannot help quoting here:

"Every procedure which would offer a possible temptation to the average man to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law".

(*Tumey v. Chio*, (1928) 273 US 510, at p 532 per C. J. Taft). My Lord has pointed out how unfairness at the trial made the learned Judge even forget the fundamental principles which he had to follow, such as the presumption of innocence of the accused and the burden of proof on the prosecution to establish the guilt of the accused beyond reasonable doubt. Therefore, not only the illegality of the appointment of the public prosecutor and the manner of appointment of the defence lawyer and his performance before the Additional Sessions Judge affected the fairness of the trial but had entered as a vice in the proceedings of the trial before the Court of Session, whereof the condemned prisoner was materially prejudiced, thereby causing failure of justice. So, as has been observed by my Lord unfairness at the trial would have been the sufficient ground for this Court to set aside the conviction and sentence and to acquit the prisoner of the charge.

66. As regards the medical evidence my Lord has been pleased to point out that the medical evidence directly conflicts with the oral evidence of the alleged two eye-witnesses — P. Ws. 1 and 2. In a decision in the case of *Surjan v State of Rajasthan* (see observation at p. 422 (432?)) reported in AIR 1958 SC 425, their Lordships have been pleased to lay down that when medical evidence is in conflict with the oral testimony of eye-witnesses, it gets better of the evidence of eye-witnesses and discredits the eye-witnesses.

My Lord has observed and with which I fully agree that the two eye-witnesses P. Ws 1 and 2 have been totally discredited by the evidence of the medical expert. Such a salient feature of weakness in the prosecution evidence was lost sight of by the learned trial Judge. Therefore, the medical evidence as adduced by two experts clearly established that the manner in which the deceased Nepal was struck allegedly by the condemned prisoner could not have been seen at the place, time and in the manner as alleged by P. Ws. 1 and 2. The learned Judge forgot while weighing and appreciating the evidence of the two alleged eye-witnesses, P. Ws. 1 and 2 that even though they claimed to be eye-witnesses, the circumstances that appear in evidence particularly in Expert's opinion to which my Lord has made copious reference in his part of the judgment, needed as a rule of prudence, corroboration of the evidence of such alleged eye-witnesses, and for authority of such a proposition, I may refer to a decision of the Supreme Court in *Lachman Singh v. State* reported in AIR 1952 SC 167. In that case, the evidence of the medical expert ran counter to the evidence of the eye-witnesses; as in this case, and instead of corroborating the evidence of eye-witnesses, the medical expert's opinion contradicted the same. The learned Judge in this case failed to weigh and appreciate the oral evidence in its total perspective, and did not find whether the oral evidence of the alleged eye-witnesses had corroboration in material particulars from other direct or circumstantial evidence. In such a context as that appearing in this case, their Lordships in *Lachman Singh's case*, AIR 1952 SC 167 (Supra) laid down that it would be proper for the appellate Court not to rely upon the oral evidence of eye-witnesses implicating the particular accused unless there is some circumstantial evidence to support it. We respectfully accept such principle, which should have been followed by the learned trial Judge in this case. What was necessary was that the testimony of the alleged eye-witnesses should have corroboration in material particulars from such circumstances as would have lent assurance to the evidence of the alleged eye-witnesses before the Court to establish beyond reasonable doubt that the accused was really concerned in the offence charged. The learned trial Judge took the alleged conduct of the condemned prisoner such as his hiding as a circumstance pointing to his guilt. My Lord has already pointed out that the hiding of the accused could not be a circumstance consistent only with his guilt, but could also be a circumstance equally consistent with his innocence. Such a situation brings a reasonable doubt as to the guilt of the accused for the offence charged. Therefore, the learned Judge made a complete error in weighing and appreciating the evidence of the two alleged eye-witnesses, when the only circumstance upon which the learned Judge relied as a piece of corroboration of the evidence

of the alleged eye-witnesses could be consistent not only with the guilt of the accused but also equally with his innocence. The learned Judge, however, overlooked the contradiction between the evidence of two Medical Experts and the oral testimony of two alleged eye-witnesses — P. Ws. 1 and 2. Accordingly there looked reasonable doubt as to the veracity of the two alleged eye-witnesses.

67-68. I would now point out some of the other circumstantial features of negative character in the evidence which would clearly show that if anyone else could be involved in the murder it was not the condemned prisoner. (His Lordship after going through these features, proceeded).

69. The merits of the case as appearing in evidence have been discussed threadbare by my Lord. My analysis of some features in the evidence also leads me to justify a finding that, if anybody murdered Nepal, it could not be the condemned prisoner. The place wherefrom the chisel Ext. II was recovered even now remains a mystery. The seizure list opens with the words "seized from the garden of D. Chakravorty". The last line of the seizure list says "near the garden of D. Chakravorty". According to P. W., D. Chakravorty, the prisoner was arrested at a place at the back of his house near the gate. He never speaks of a garden. The Investigating Officer comes and says in his evidence that he recovered the chisel Ext. II from the place where the accused was arrested. So, there is a reasonable doubt as to spot wherefrom the chisel was recovered. As I have already pointed out, P. W. 1 said that he heard Samaresh crying aloud "Look here, Raj Kishore was teasing the puppies". While lodging First Information Report P. W. 1 turned his face away from that part of the story in his evidence when he said that he saw an unknown man taking out a chisel from a box hanging on the wall of the house of the first floor of the verandah on which Samaresh was standing, crying aloud. The chain of circumstances, leading to the recovery of the chisel Ext. II if could be linked from the time of the alleged taking out of the chisel from the box, right upto the alleged finding of it, near the garden, could possibly have roped the prisoner provided of course, the P. Ws. would have identified the chisel Ext. II having had been used as his tool of his trade by the prisoner. P. Ws. 1 and 2 gave a picture before the trial Judge to indicate as if the chisel Ext. II was a cobbler's chisel used as such. My Lord has pointed out, and we have all seen the chisel Ext. II in this Court. It would look as if it had been purchased very recently from a shop and could never be used by a cobbler even for a day. Now, P. W. 1 came to rope in Raj Kishore who is a cobbler saying he saw an unknown man taking a chisel from a box hanging on the wall of a house but I have already pointed out that such a box was never looked for, nor recovered by the Investigating

Officer. So, a chisel that was in the box, and the box at least could have been recovered and identified to be the box of the prisoner, containing tools of the craft, there could be, then, possibly, a link between the prisoner and the chisel Ext. II, provided of course, the P. Ws. would have identified the chisel, Ext. II as had been used as his tool by the prisoner. But that link was not established by any of the prosecution witnesses. The Investigating Officer spoke nothing of the box, nor the Investigating Officer brought any witness of the locality other than P. Ws. 1 and 2 who could have said whether or not the chisel Ext. II was ever seen by any one of them at any time being used by the cobbler prisoner, who was a daily visitor to the tea shop of Nepal and his associates and who used to reside very close to Nepal's tea shop keeping the tools of his craft, as alleged, in a box hanging from the wall of a house on the first floor of which the mysterious Samaresh cried out to P. W. 1 "Look here, Raj Kishore was teasing the puppies". That mysterious Samaresh was attempted to be served with the summons as a witness by the Investigating Officer. Was that due performance of his duty by the Public Prosecutor? The evidence of Daroga is "I attempted to serve summons on Samaresh but could not find him". That was spoken of in the judgment of the learned Judge as sufficient proof for the prosecution's inability to produce such a material witness. How he was material? In the first information, it was stated by P. W. 1 though he did not speak it out in evidence, that Raj Kishore's name was first called out and he was recognised by Samaresh who shouted "Look here, Raj Kishore was teasing the puppies", thereby revealing in that statement that one Samaresh was the first man who identified the man, who is now the condemned prisoner Raj Kishore before us. Did the prosecution do its duty by simply communicating through the Investigating Officer an information that he attempted to serve summons on Samaresh but could not find him? But Ganga, P. W. 3 gave out that he did not know the whereabouts of Samaresh. He had no business to volunteer that statement. It was the duty of the Investigating Officer to find out the whereabouts of Samaresh, and it was the duty of the prosecution to pray for a warrant and a proclamation to be issued by the Court for compelling production of Samaresh, a material witness. My Lord has pointed out in his judgment how the prosecution failed in its primary duty, in not exhausting all available legal processes for causing production of Samaresh who could have greatly helped the cause of justice. This is one of the instances indicating the failure of the Public Prosecutor in discharging his legal function. The most material witness Samaresh was to have been produced by the prosecution and a mere attempt to serve summons upon him should not have persuaded the trial Judge to hold that the prosecution had proved its inability for sufficient cause to produce

Samaresh. It is he who first, as P. W. 1 gave out, called out the name of the condemned prisoner. The entire chain of circumstances narrated by P. W. 1 pivoted on the story "Look here, Raj Kishore was teasing the puppies" If in the witness box Samaresh would have said that he was nowhere near about the scene and had not called out saying "Look here, Raj Kishore is teasing the puppies", the whole prosecution story would have then at once fallen down like a house of cards. Accordingly, the learned Judge while holding that the prosecution proved the reason for non-production of Samaresh before the Court as a witness failed to note that the prosecution made no attempt whatsoever to have before the Court the evidence of Samaresh who was a very material witness in the case. Such failure of the prosecution to bring such a material evidence may be due to the failure of the Public Prosecutor of 24-Parganas to give proper directions to the A. P. P. in conducting the case, which he could have given had he had engaged the A. P. P. to act as a Public Prosecutor in the case under his directions, as required by Section 4 (1) (i) of the Code. The Public Prosecutor generally appointed for the State for 24-Parganas is in charge of all the prosecution cases particularly sessions cases, and if he engages more than one Public Prosecutors in Sessions Cases under trial he has the duty to give directions in all such cases placed on trial at least before the Court of Session as to how the cases are to be conducted by producing material witnesses and supplying material information to the Courts in such cases in order that the cause of justice might be furthered, instead of being retarded, as had happened in the present case.

70. Finally, I would say that in the present case there had been a complete failure of justice at the trial and the prosecution failed to prove beyond reasonable doubt that it was the condemned prisoner and none else that had committed the alleged murder of the deceased Nepal.

VGW/D.V.C.

Appeal allowed.

AIR 1969 CALCUTTA 340 (V 56 C 53)

T. P. MUKHERJI, J.

Debendra Nath Ray, Petitioner v. The State, Opposite Party.

Criminal Revn. No. 186 of 1967, D/-20-3-1967.

(A) Criminal P. C. (1898), Ss. 83, 84, 101 — Court receiving search warrant for execution — Not required to decide its legality.

(Para 5)

(B) Criminal P. C. (1898), Ss. 99, 83, 101 — Removal of seized articles to issuing Court — Within discretionary power of the Court executing search-warrant — Refusal to send certain articles not sufficiently identified — Valid.

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It is for the Magistrate receiving the things that were seized on the basis of the search warrant endorsed by him, who has to authorise their removal to the Court issuing the warrant unless there be good cause to the contrary. Section 99 empowers the Magistrate endorsing the search-warrant for execution, to exercise his discretion in the matter of authorising the removal of the goods concerned to the issuing Court. He has discretion to exercise in the matter and he can very well refuse to execute the search warrant in respect of the properties which are not properly described and certainly when goods seized are produced before him, he is to be satisfied as to their identity with reference to the description in the search warrant before he authorises their transfer to the Court issuing the warrant.

(Para 10)

Where the description of items in the list of articles accompanying the search warrant is sufficient for identification of some items but not all, the Magistrate executing the warrant has discretion to send only those articles to the issuing Court which can be sufficiently identified, AIR 1940 Bom 397, Disting.

(Para 10)

(C) Criminal P. C. (1898), Ss. 83, 537 — Issuing Court putting the name of executing Court in the form of search warrant — Mere technical irregularity — Warrant valid.

When a search-warrant is sent to another Court for execution, that Court is required to endorse its name thereon and forward it to the police station concerned for execution. Where the issuing Court puts in the form of warrant the name of the Court to which it is sent for execution, it is a technical irregularity which does not affect the validity of the warrant that is received by the Court executing it, when it is also endorsed by that Court.

(Para 7)

Cases Referred: Chronological Paras
(1940) AIR 1940 Bom 397 (V 27) =

42 Bom LR 904, In re, Sagarmal

Khemraj

8

A. K. Dutta and Tarak Nath Banerjee, for Petitioner; D. P. Choudhury, for the State.

ORDER: This Rule is directed against an order of the Chief Presidency Magistrate, Calcutta, whereby he has ordered that certain properties seized under a search warrant forwarded to him by the Presidency Magistrate, 21st Court of Bombay be sent to the Court wherefrom the warrant had emanated.

2. In connection with a complaint under Sections 494, 495 and 420 Indian Penal Code filed in the Court of Presidency Magistrate at Bombay by one Smt. Raksha alias Rekha Rathindra Nity Roy against her husband Dr. R. N. Roy, a search warrant was prayed for, for recovery of movables comprising gold and silver ornaments, utensils and clothes etc., from the house of Dr. R. N. Roy's father at Calcutta. In pursuance of the prayer the learned Presidency

Magistrate of Bombay issued a warrant and forwarded the same to the Chief Presidency Magistrate, Calcutta, for execution. The learned Chief Presidency Magistrate, Calcutta, on receipt of the warrant endorsed it in favour of the officer-in-charge of the local police station and that officer accompanied by the brother of the complainant went to the house of Sri D. N. Roy, father of Dr. R. N. Roy and on the identification, the identifier seized a number of ornaments, utensils and clothes on preparing a search list and produced them before the Court of the learned Chief Presidency Magistrate, Calcutta.

3. Before the learned Chief Presidency Magistrate Shri D. N. Roy filed an application stating that the goods seized belonged to his wife and daughters and as such were not liable to be seized under the search warrant issued by the Bombay Court. The learned Chief Presidency Magistrate appears to have been of the view that he was not competent to decide on the question as to whether the movables have been rightly seized. As the warrant issued showed that the goods seized were to be forwarded to the issuing Court, the learned Chief Presidency Magistrate thought that he was not in a position even to accede to the request of the petitioner before him that he be permitted to retain the goods on condition of his producing the same to the issuing Court. It is against this order that the petitioner moved this Court and obtained the present Rule.

4. Mr. Dutta, appearing in support of the Rule, contended first that the search warrant is not a legal warrant in view of the fact that the issuing Court could not have issued the same on the allegation made in the petition of complaint; secondly, that the search warrant was not properly forwarded to the Chief Presidency Magistrate, Calcutta, as required by the law; thirdly, that the search warrant that was received by the Chief Presidency Magistrate was not a proper one in view of the fact that items mentioned therein lack specific descriptions which might be considered sufficient for the purpose of their identification; and lastly, that the Chief Presidency Magistrate fell into an error in coming to his finding that he was not competent to adjudicate on the question of identification of the seized articles with reference to the articles mentioned in the search warrant.

5. So far as the petition of complaint that was filed in the Bombay Court is concerned, it cannot be said that there are no averments whatsoever therein in support of a charge under Section 420, Indian Penal Code. There are allegations therein of deception having been practised on the complainant and on her parents and the accused in the case having had fleeced them all of valuable belongings. In the application for search warrant there were allegations that

some property had been carried away to Calcutta by accused No. 2. Whether these allegations were sufficient for the purpose of issuing a search warrant is a different matter. The Court receiving a search warrant in accordance with the provisions of Criminal Procedure Code has no materials before it for the purpose of adjudicating as to whether the warrant is legal or not and it is not required to enter into the question on the responsibility for the warrant is that of the issuing Court. In my view, the Court receiving the warrant for the purpose of execution is not required to enter into this question of legality of the warrant that is received.

6. On the question as to whether the warrant in this case was forwarded to the Chief Presidency Magistrate, Calcutta, in accordance with the requirements of the law, Mr. Dutta refers to the provisions of Secs. 83 and 84 of the Code of Criminal Procedure which by virtue of S. 101, are attracted to search warrant. The former section provides that a Court issuing a warrant for execution outside its local limits may direct the same to a police officer or forward the same by post or otherwise to any Magistrate within the local limits of whose jurisdiction it is to be executed and that it is for the Magistrate receiving the warrant to endorse his name thereon and cause it to be executed in accordance with law. Section 84 provides that if a warrant is directed to a police officer for execution beyond the local limits of the jurisdiction of the Court issuing the same, it is the duty of the police officer to take it to a Magistrate or to a police officer within the local limits of whose jurisdiction the warrant is to be executed and the Magistrate or the police officer concerned shall endorse his name on the warrant and such endorsement shall be the authority for its execution.

7. The warrant in this case was forwarded to the Chief Presidency Magistrate, Calcutta, with a forwarding letter but the warrant also was addressed to the Chief Presidency Magistrate. The printed form of the warrant that was used shows that it is a form meant for a direction to "All constables and other His Majesty's officers of the peace for the town of Bombay". This part of the printed form in the circumstances of the case was meant to be penned through but was apparently not penned through by mistake. The warrant was addressed to the Chief Presidency Magistrate as stated above and the Chief Presidency Magistrate endorsed his name thereon and forwarded it to the police station concerned for execution. Strictly under Sec. 83 of the Code the warrant that was sent should not have been directed to anybody for execution by the issuing Court. The name of the authority for actual execution of the warrant should have been left to the Court to which the warrant was sent for execution. This, however, is a technical matter

which, in my view, did not affect the validity of the warrant that was received by the Chief Presidency Magistrate.

8. The list of articles that accompanied the warrant contained description of the things concerned in some cases and no description in others. As a matter of fact, even in respect of some of the items which did contain some description, the description was so vague as to make the same useless. But the description of some of the items was sufficient in the nature of the thing concerned and there need have been no difficulty in identification of those particular items Mr. Dutta refers in this connection to the case. In re, Sagarmal Khemraj, reported in AIR 1940 Bom 397. That case arose out of a warrant of arrest sent from Calcutta to Bombay and the question that arose was whether the warrant was legal or valid. It was addressed to the O./C. concerned and was forwarded to Third Presidency Magistrate. The two persons to be arrested were only named and no further particulars of them were mentioned. It was held that the warrant was not properly directed to the police officer concerned and that it was not also properly forwarded to the Court. The description of the persons to be arrested not being given that also detracted from the validity of the warrant.

9. In the present case, there was no question of addressing the warrant or directing it to any police officer. It was a warrant forwarded under Section 83 of the Code to the Chief Presidency Magistrate, Calcutta. Particulars of some of items of the properties to be seized are sufficient in the circumstances of the case and in the case of others the particulars are wholly insufficient. The warrant thus in respect of particulars was valid in part and invalid in respect of the rest. The learned Magistrate receiving the warrant would in the circumstances of the case not have been justified in refusing to execute the same. There was ample jurisdiction of his to execute the warrant in respect of the identifiable properties and to refuse to execute it in respect of the properties which were not capable of identification. This brings us to a discussion of Section 99 of the Code of Criminal Procedure.

10. This section deals with disposal of things found on search beyond the jurisdiction of the Magistrate issuing the warrant. When the things sought to be seized on the strength of the warrant are found, these together with the seizure list are required to be forwarded immediately either to the issuing Court or to the Court within whose jurisdiction the seizure is made if the place searched is nearer to that Court. It is for the Magistrate receiving the things that were seized on the basis of the warrant endorsed by him who has to authorise their removal to the Court issuing the warrant unless there be good cause to the contrary. This

provision empowers the Magistrate endorsing the warrant for execution, to exercise his discretion in the matter of authorising the removal of the goods concerned to the issuing Court. If he has a discretion to exercise in the matter, he can very well refuse to execute the search warrant in respect of the properties which are not properly described and certainly when goods seized are produced before him, he is to be satisfied as to their identity with reference to the description in the search warrant before he authorises their transfer to the Court issuing the warrant. The learned Chief Presidency Magistrate in this case was not correct in his view that as the warrant shows that the goods seized are to be forwarded to the issuing Court forthwith he had no discretion in the matter of refusing to forward the goods seized or any of them.

11. In view of the above, the Rule must be made absolute. The order passed by the learned Chief Presidency Magistrate directing that the goods seized in the case be sent to the Court issuing the search warrant is set aside and he is directed to hold an enquiry on the objection filed by the petitioner in this case and come to his finding as to whether first, good cause is shown by the petitioner that the goods or any of them should not be forwarded to the Bombay Court and secondly, whether the goods seized are identifiable with reference to the description thereof in the seizure list itself.

The records be sent down as expeditiously as possible,
DVT/D.V.C. Rule made absolute.

AIR 1969 CALCUTTA 342 (V 56 C 59)

P. B. MUKHARJI, J.

Mac. Laboratories Private Ltd., Appellant v. American Home Products Corporation and another, Respondents.

A.F.O.O. No. 61 of 1965, D/-14-5-1968.

(A) Trade and Merchandise Marks Act (1958), Ss. 56 and 109 — Trade Marks Rules, R. 121—Limitation for filing appeal is three months — Application for rectification dismissed on 7-12-1964 — Order sent by post by registry on 22-12-1964 and received by appellant on 26-12-1964—Certified copy applied for on 1-1-1965 and obtained on 21-1-1965 — Appeal filed on 25-3-1965 — Delay of 18 days condoned.

(Para 5)

(B) Trade and Merchandise Marks Act (1958), S. 56 (2) — Expression "any person aggrieved" has to be liberally construed — Expression includes persons who are in some way or other substantially interested in having the mark removed and also includes those who are substantially damaged or prejudiced if mark remains on the regis-

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ter. AIR 1958 Bom 56 and (1904) 21 RPC 617; (1903) 20 RPC 803; and (1894) 11 RPC 4 and (1943) 60 RPC 29, Rel. on.

(Paras 10, 13, 14)

(C) Trade and Merchandise Marks Act (1958), Ss. 18 (1), 45, 48 — Proprietor of a mark has to establish that the trade mark is used or proposed to be used by him — Exceptions to this section are those contained in S. 45 and S. 48. (Para 26)

(D) Trade and Merchandise Marks Act (1958), Ss. 48 and 46 (1) (a) — Expression "trafficking in trade marks" — Scope — Bona fide intention to use must be of the person registering — Difference between English and Indian Law stated. (1898) 2 Ch 432 and (1913) 2 Ch 291 and (1899) 16 RPC 411 and (1928) 1 Ch 405 and (1944) 61 RPC 31, Rel. on.

(Paras 29, 30, 48, 53, 81)

Cases Referred: Chronological Paras
(1967) 1967 RPC 265, Pussy Galore Trade Mark 60, 61, 63, 64, 67.

(1965) AIR 1965 SC 40 (V 52) = (1964) 6 SCR 885, Tata Engineering and Locomotive Co. Ltd. v. State of Bihar 62

(1965) AIR 1965 SC 980 (V 52) = 1965-1 SCR 737, Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories 78

(1963) 1963 RPC 183, Bostitch's Trade Mark 18, 24, 54, 55, 57, 58, 64

(1958) AIR 1958 Bom 56 (V 45) = ILR (1957) Bom 702, Ciba Ltd. v. Rama Lingam 11

(1950) 67 RPC 265, Pussy Galore's case 24

(1945) 1945 AC 68 = 1945-1 All ER 34, Aristoc Ltd. v. Rysta Ltd. 66

(1944) 61 RPC 31, John Taylor Peddie's Applications 49

(1944) 61 RPC 148 20, 72, 74, 75

(1943) 60 RPC 29, George Angus Co. Ltd. case 13

(1929) 1929-1 Ch 113 = 97 LJCh 353, In re, Ducker's Trade Mark 49

(1928) 1928-1 Ch 405, In re, Ducker's Trade Mark 45, 49

(1928) 45 RPC 397 = 97 LJCh 353, Re Ducker's Trade Mark 64

(1913) 1913-2 Ch 291 = 82 LJCh 414, In re, Neuchatel Asphalte Co.'s Trade Mark 48, 44

(1913) 30 RPC 580, In re, Bowden Wire Ltd. Trade Marks 54, 65

(1906) 23 RPC 774, Pianotist Co.'s Application 78

(1904) 21 RPC 617, In re, Ellis and Co.'s Trade Mark 13

(1903) 20 RPC 803, Neostyle Mfg. Co. Ltd. Trade Mark case 13

(1899) 16 RPC 411, In re, John Batt and Co. 44, 64

(1898) 1898-2 Ch 432, Re. Batt (John) and Co.'s Registered Trade Mark; Re. Carter's Application 39, 45

(1894) 11 RPC 4, Re, Powell's Trade Mark 11

I. P. Mukherji, Sankar Ghose and N. B. Zavari, for Appellant; B. Das, P. Ginwalla and Rajat Ghose, for Respondents; S. D. Banerjee and B. Basak, for Registrar.

JUDGMENT: This is a Trade Mark Appeal under Section 109 of the Trade and Merchandise Marks Act, 1958. The appellant is Mac Laboratories Private Ltd., a company with limited liability and incorporated under the Indian Companies Act and having its office at Great Social Building, 60, Sir Pherozeshah Mehta Road, Bombay. The respondents are the American Home Products Corporation, a corporation incorporated in the United States of America having its office at 22, East 40th Street, New York, United States of America and the Registrar of Trade Marks having his office in Calcutta.

2. The appeal arises out of the appellant's application made to the Registrar for removal of the trade mark 'Dristan' registered under No. 186511 in Class 5 from the register of trade marks. This mark 'Dristan' belongs to the American Company mentioned above. The application of the appellant before the Registrar was made under Section 56 of the Trade and Merchandise Marks Act, 1958.

3. The grounds on which the appellant made this application for removal of the trade mark 'Dristan' may be briefly stated. In the first place, the appellant's contention is that the trade mark 'Dristan' was registered without any bona fide intention on the part of the American Company for registration that it should be used in relation to their medicinal preparations for symptomatic treatment of respiratory ailments and that there has in fact been no bona fide use in India of the trade mark 'Dristan' in relation to the said goods by the American company up to a date one month before the date of the application of the appellants. The appellant's application for removal of the trade mark 'Dristan' was dated the 10th April 1961 and filed before the Registrar on the 13th April 1961. The other grounds are that the trade mark 'Dristan' was registered in contravention of Section 11 of the 1958 Act which corresponded to Section 8 of the Trade Marks Act, 1940. Thirdly, it is also said that 'Dristan' "was not a distinctive mark" and could not be registered and it offends against the provisions of Section 11 of the Trade Marks Act, 1958. It has also been alleged as a ground for removal of the trade mark 'Dristan' that it is deceptively and confusingly similar to another trade mark 'Bistan' registered under No. 122391 in Class 5 in the name of Messrs. Prof. Gajjar's Standard Chemical Works Ltd., Bombay, and such trade mark 'Bistan' had been and was being used by its proprietors for several years past and in fact since the 4th June 1946. Finally, it is also a ground of the appellant that the trade mark 'Dristan' is decep-

tively similar to the trade mark "Tristine" which the appellant alleged to have been using since October, 1960 in respect of their medicinal preparations

4. In fact, three marks are involved in this appeal. One is "Tristine" of the appellant, the second is "Dristan" of the American Company, the third is "Bistan". All these three marks are invented marks and are, therefore, *prima facie* distinctive. All these three marks are in respect of Class 5 of medicinal preparations for symptomatic treatment of respiratory ailments. The mark 'Bistan' was the earliest to be registered in the name of Gajjar's Standard Chemical Works Ltd., on the 4th June 1946. The mark 'Dristan' of the American Company was registered on the 18th August 1958 in India. The appellant's application for registration of the mark "Tristine" before the Registrar was dated the 31st May 1960.

5. Two preliminary points have been urged against this appeal by Mr. B. Das, learned counsel for the American Company. The first point is that the appeal is barred by limitation. The second point is that the appeal is not competent on the ground that the appellant is not an "aggrieved person" under Section 56 of the Trade Marks Act. Neither of these preliminary points appears to me to have any substance. I shall deal with them briefly. Regarding the first preliminary point that the appeal is barred by limitation as having been filed beyond time, the facts are these. The judgment and order of the Registrar of Trade Marks dismissing the appellant's application for rectification under Sec. 56 of the Trade Marks Act were delivered on the 7th December 1964. It is said that the last date for filing the appeal under Trade Mark Rule 121 was the 7th March 1965. It is contended that in fact the appeal was filed on the 25th March 1965 which is said to be a delay of eighteen days. In the application for admission of the appeal and the grounds thereof before the High Court and in paragraphs 6 and 7 of the petition of the appellant before this Court it is stated that the copy of the order and decision of the Registrar of Trade Marks dated the 7th December 1964 was sent under cover of a letter dated the 22nd December 1964 from the office of the Trade Marks Registry and was received by the Bombay Advocate of the appellant on the 26th December 1964 which was the first intimation to the appellant about the order and decision of the Registrar. It is also said there that the appellant applied for a certified copy of that order and decision on the 1st January 1965 and obtained the same on the 21st January 1965. The notice of appeal was received by the American Company on the 27th April 1965 and they entered appearance through Messrs Orr Dignam and Co., a firm of Solicitors on the 13th July 1965. Thereafter diverse

proceedings have been taken on this appeal. Draft index of paper-book was prepared on notice to the parties. Settlement of index was prepared on notice to the parties. But at no stage any objection with regard to limitation or delay was taken by the respondent American Company, nor was the statement of dates made in paragraphs 6 and 7 of the petition of the appellant for admission of appeal in this Court denied at these subsequent appearances by the respondent. Rule 121 of the Trade Mark Rules provides as follows —

"An appeal to a High Court from any decision of the Registrar under this Act or the Rules shall be made within three months from the date of such decision or within such further time as the High Court may allow."

In the first place, if the facts alleged by the appellant in the admission of appeal petition are admitted, as they must be, then there is no delay at all. Even if there is a delay it is at best a delay of eighteen days which in the circumstances and on the facts is such that the High Court will condone and were it necessary, I would do so. Therefore, I shall hold that the appeal is competent and not barred by limitation.

6. The second preliminary point is that the appellant is not competent to make this application under Section 56 of the Trade and Merchandise Marks Act on the ground that the appellant is not an "aggrieved person". Section 56 (2) of the Act provides *inter alia* as follows —

"Any person aggrieved by the absence or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, may apply in the prescribed manner to a High Court or to the Registrar, and the Tribunal may make such order for making, expunging or varying the entry as it may think fit."

7. Therefore, it is said that the person who can make an application under this provision must be a "person aggrieved".

8. The American Company contends that the appellant is not an "aggrieved person" because the appellant has not yet registered his mark "Tristine" whereas the American Company has already registered its mark "Dristan". The mark Dristan was registered after following the procedure laid down in the Trade and Merchandise Marks Act inviting opposition. There was no opposition either by the appellant or by proprietor of Dristan at the time when the American Company's mark was registered. It is, therefore, contended that the appellant is not a "person aggrieved" who can apply for rectification of a register and for removal of the American Company's registered trade mark "Dristan".

9. On behalf of the appellant it is contended that they have filed an application,

being Application No. 196241, for registration of a trade mark consisting of the word Tristine in respect of medicinal and pharmaceutical preparations. This application of the appellant for registration of the mark Tristine was opposed by the American Company on the ground that it was deceptively similar to the mark 'Dristan'. It is said by the American Company that as a counterblast of their opposition, the appellants have filed this application for rectification and not really as a "person aggrieved" or who has any genuine or bona fide grievance.

10. The words "person aggrieved" under Section 56 (2) of the Trade and Merchandise Marks Act, 1958, should not be too narrowly and too artificially construed. This expression "any person aggrieved" is a well-known expression in Trade Mark Law. The consistent trend of decisions is in favour of a liberal construction of the expression "any person aggrieved". On the authorities as I find and as I read them, this expression "any person aggrieved" under Section 56 (2) of the Trade and Merchandise Marks Act, 1958, includes persons who are in some way or other substantially interested in having the mark removed and includes persons who are substantially damaged or prejudiced if the mark remained on the register. The registration of the mark "Dristan" is likely to prevent the registration of the appellant's mark "Tristine" on the ground of similarity or deception. In fact, that is the ground of American Company's objection to the registration of appellant's mark "Tristine". Then the appellant is an "aggrieved person" in the sense that if the mark "Dristan" should not have been in the register at all, then the appellant's mark "Tristine" would have a better chance of being registered. It is in my judgment, a sufficient interest which brings him within the category of "aggrieved person" within the meaning of S. 56 (2) of the Trade Marks Act. The fact that Dristan has opposed registration of Tristine does not make the application for removal of Dristan on the ground that it infringes the requirements of the law under the Trade Marks Act anytheless bona fide. If it is a legal right, then the appellant is an "aggrieved person".

11. The authorities that I have in view in coming to that conclusion, are the observations of Chagla C. J. in Ciba Ltd. v. Rama Lingum, AIR 1958 Bom 56 at p. 60. In fact, Lord Herschell in In re Powell's case, reported in (1894) 11 RPC 4 at p. 7, made the following observations which are directly relevant on the points made in this appeal:—

"Wherever it can be shewn, as here, that the applicant is in the same trade as the person who has registered the trade mark, and wherever the trade mark, if remaining on the register, would, or might, limit the legal rights of the applicant, so that by

reason of the existence of the entry on the register he could not lawfully do that which, but for the existence of the mark upon the register, he could lawfully do, it appears to me he has a locus standi to be heard as a person aggrieved."

12. In that case Lord Watson made similar observation by pointing out as follows:—

"In my opinion, any trader is, in the sense of the statute "aggrieved" whenever the registration of a particular trade mark operates in restraint of what would otherwise have been his legal rights. Whatever benefit is gained by registration must entail a corresponding disadvantage upon a trade who might possibly have had occasion to use the mark in the course of his business."

13. On the facts, the appellant has certainly a very practical grievance and is an aggrieved person within the meaning of the Act. It is not on the facts of this case a mere sentimental grievance such as is illustrated by the Quaker case in Re. Ellis and Co., (1904) 21 RPC 617. See also the authority of Neostyle Mfg. Co. Ltd.'s Trade Mark case, (1903) 20 RPC 803. The other decision relevant on the point supporting the view I am taking is George Angus and Co. Ltd.'s case reported in (1943) 60 RPC 29.

14. I am, therefore, bound to hold that the appellant is a person aggrieved and has locus standi to file the appeal and also to present the application under Section 56 (2) of the Trade and Merchandise Marks Act.

15. A word here may not be inappropriate to state the facts of certain proceedings in Bombay. The Assistant Registrar of Trade Marks in Bombay came to the conclusion that the words 'Dristan' and 'Tristine' were not deceptively similar. An appeal was taken to the Bombay High Court. K. K. Desai J., allowed the appeal. The appellant filed an appeal to the Division Bench of the Bombay High Court from that decision. A Division Bench of the Bombay High Court with Tarkunde and Vimadala, JJ., on the 19th April 1968 allowed the appeal with this direction that the appellant's application be amended from the mark "Tristine" to "Tristinu" and setting aside the order of K. K. Desai, J. A part of the direction of the Division Bench of the Bombay High Court was upon the Registrar to consider whether in his discretion the amended application of the applicant should or should not be advertised. The present parties before me were also parties in the Bombay High Court proceedings. In any event, whether it is the mark 'Tristine' or 'Tristina', the appellant continues to be a "person aggrieved" within the meaning of the word used in Section 56 (2) of the Trade and Merchandise Marks Act and in the light of the decisions construing that expression.

16. The main point of merit in this appeal is the appellant's contention that the

mark 'Dristan' was registered without any bona fide intention on the part of the registered proprietor, viz., the respondent American Company to use it in relation to the goods in respect of which it had been registered. It is also contended by the appellant that there had in fact been no bona fide use of the mark 'Dristan' in relation to these goods prior to the appellant's application for rectification.

17. The respondent American Company contests this argument in support of its case that it had the bona fide intention to use the mark 'Dristan' in relation to the goods in respect of which the mark was registered and that there has in fact been such bona fide use of the mark in relation to these goods prior to the appellant's application for rectification. It has used certain affidavit evidence. An analysis of that evidence shows the following facts in support of the respondent American Company. 'Dristan' was adopted by the American Company in January 1956 and medicinal preparations bearing that trade mark were introduced in the United States and many other countries of the world. It appears from the affidavit of the Vice-President of the respondent American Company that some time in 1957 it was decided to introduce this trade mark in India. The facts on which the American Company relies are (1) that these medicinal preparations under their trade mark should be introduced in India through a company called 'Geoffrey Manners and Co. Ltd.', which is an Indian Company incorporated in India under the Indian Companies Act but in which the respondent American Company holds a substantial shareholding interest to the extent of about 40 per cent, (2) that this Geoffrey Manners and Co. Ltd., was to be registered as registered users of the trade mark, (3) in fact the registered users' agreement between the respondent American Company and Geoffrey Manners and Co. Ltd., was executed on the 18th October 1961, and (4) on the basis of this arrangement Geoffrey Manners and Co. Ltd., obtained necessary licence from the Government of India and commenced manufacture in India of these goods under the trade mark 'Dristan' from the 23rd October 1961 in accordance with the formula supplied by and in conformity with the standards and specifications prescribed by the respondent American Company. The agreement between Geoffrey Manners and Co. Ltd., and the respondent American Company is that the former undertakes to manufacture in India these medicinal preparations under the trade mark 'Dristan'. On the 23rd September 1960 Geoffrey Manners and Co. Ltd., made an application to the Ministry of Commerce and Industry, Government of India for a licence under the Industries (Development and Regulation) Act, 1951. In fact a licence was issued by the Government of India on the 19th January 1961. On the 23rd January

1961 Geoffrey Manners and Co. Ltd., applied to the Drugs Controller, Bombay for a licence under the Drug Rules and such licence was granted on the 10th February 1961. It is the case of the respondent American Company that on the 22nd October, 1961 Geoffrey Manners and Co. Ltd., introduced into the market in India these medicinal preparations under the trade mark 'Dristan'. From these facts the Registrar came to the conclusion that since 1957 the respondent American Company was making efforts to introduce the mark 'Dristan' in India and that at the time when they applied for registration of the mark they had bona fide intention to use the mark in India.

18. The reasons which found favour with the Registrar of Trade Marks in coming to the conclusion that the respondent American Company had bona fide intention to use the mark 'Dristan' in India may now be briefly stated. He comes to the conclusion that the law on this point does not mean that the applicant for the registration of a mark should intend to manufacture the goods himself and apply the trade mark to such goods, or that an applicant should be regarded as having no intention to use the mark himself if he proposed to get the goods manufactured and sold under his mark by some one on his behalf under a contract or some other arrangement and under his strict control. In coming to this conclusion on this particular branch of the controversy and upon this point, the Registrar relied on the decision of Lloyd Jacob, J. in "Bostitch's" case (1963) RPC 183. Following that decision the Registrar holds that the mere fact that at the time of making the application for registration the respondent American Company's intention to introduce the mark in India through Geoffrey Manners and Co. Ltd., by entering into an agreement with the latter for manufacture and sale of goods under their mark was no ground for holding that the respondent American Company had no bona fide intention to use the mark by themselves. The Registrar also rejected the argument on behalf of the appellant that the fact that the respondent American Company intended to register Geoffrey Manners and Co. Ltd., as registered user of the mark did not prejudice the respondent American Company in their contention. According to the Registrar there is no reason why the registered proprietors should be regarded as having no bona fide intention to use the mark themselves merely because they had an intention to employ a registered user for the mark. He came to the conclusion that the intention to use the mark by the registered proprietors themselves and the intention to license the mark are two different matters and they were not mutually exclusive. He quotes the inscription on the carton of Geoffrey Manners and Co. Ltd., in these terms:

"Made in India by Geoffrey Manners and Co. Limited, Magnet House, Dougali Road, Bombay, for the proprietors Whitehall Laboratories, New York, N.Y., U.S.A."

19. Therefore, the Registrar came to the conclusion that Geoffrey Manners and Co. Ltd., were described only as the makers of the goods for the proprietors and not as a licensee.

20. The other branch of the logic of the Registrar rested on the submission of the appellant, which he rejected, that there has been no bona fide use of the mark 'Dristan' in India prior to the application for rectification and that the use of samples for the particular limited purpose in the facts of this case did not amount to user in the normal trade channels. For this the Registrar relied on the Notes of Official Rulings, reported in (1944) 61 RPC 148.

21. On these two major reasons the Registrar of Trade Marks held that the appellants had failed to make out a case under Section 46 (1) (a) of the Trade and Merchandise Marks Act for the removal of the respondent American Company's mark 'Dristan' from the register.

22. The Registrar also dealt with the third point of submission made on behalf of the appellant. That contention was that as the Whitehall Laboratories were shown as proprietors of the mark on the carton quoted above, the respondent American Company, American Home Products Corporation, could not claim to be the true proprietors of the mark 'Dristan'. The Registrar rejected that contention because, (1) it was a point not taken in the application for rectification, and (2) because the carton in question was admittedly issued after the application for rectification was filed. He also came to the finding that Whitehall Laboratories were an operating division of the respondent American Company, American Home Products Corporation, and not a separate corporate entity. There is some correspondence on the record with the Home Products International Limited, which the Registrar found to be a wholly owned subsidiary of the respondent American Company, American Home Products Corporation.

23. This in brief is the reason for the Registrar's decision for dismissing the appellant's application for rectification. He, however, made a correction in the entry by the variation which he directed amending the registered proprietors' name to read as "American Home Products Corporation (a Corporation organised under the laws of the State of Delaware, United States of America), trading as Whitehall Laboratories". It is against the entire decision of the Registrar that the present appeal has been filed before this Court.

24. Certain fundamental questions of importance in trade mark law have been raised in this appeal. They relate to the problem of bona fide intention to use the

trade mark by an applicant for registration of the trade mark and the question that use by Geoffrey Manners and Co. Ltd., in this case is not use by the registered proprietors, the American Home Products Corporation. The problem acquires a larger significance because "Bostitch's case, (1963) RPC 183, on which the Registrar relied, has lost considerably its authority by the subsequent recent decision in Pussy Galore's case, reported in (1950) 67 RPC 265. Incidentally, this appeal also raises the question of the nature of the use of samples which could be considered as normal use for the purpose of trade channel. Lastly, this appeal raises the question how far agency operates in the trade mark law.

25. The opening words of Section 18 (1) of the Trade and Merchandise Marks Act, 1958, are, inter alia, as follows:

"Any person claiming to be proprietor of a trade mark used or proposed to be used by him, who is desirous of registering it shall apply in writing to the Registrar in the prescribed manner".

The question is that the person claiming to be the proprietor has to establish that the trade mark is used or proposed to be used by him. The words 'by him' in Section 18 (1) are the crucial words in deciding the controversy in this appeal. It is the contention of the appellant that the respondent American Company, the American Home Products Corporation, did not use or propose to use itself that mark 'Dristan'. The attempted user of the mark 'Dristan' by Geoffrey Manners and Co. Ltd., by allowing them to manufacture under a licence in India with the permission of the Government and then use the trade mark 'Dristan' upon such manufactured goods was not a kind of permitted user or agency justified by the Trade and Merchandise Marks Act, 1958.

26. This argument of the Appellant is supported by certain major considerations. The only agency or substitute for the registered proprietor recognised by the Trade Mark Law in India is first under Sec. 45 (1) of the Trade and Merchandise Marks Act which permits proposed use of trade mark by a company to be formed. It says an application for registration of a trade mark will not be refused only on the ground that the applicant does not use or propose to use the trade mark if the Registrar is satisfied that a company is about to be formed and registered under the Companies Act 1956 and that the applicant intends to assign the trade mark to that company with a view to the use thereof in relation to those goods by the company. Section 45 of the Trade and Merchandise Marks Act 1958 is therefore, in fact, one exception to Sec. 18 of the Act so far as the limitation of the expression "by him" is concerned in Sec. 18 (1) of the Act. The second exception is in Sec. 48 of the Act which provides inter alia that "a person other than the registered proprietor of a trade mark may be registered

as the registered user thereof in respect of any or all of the goods in respect of which the trade mark is registered otherwise than as a defensive trade mark". By this Sec 48 the Central Government has control and can impose conditions for preventing "trafficking in trade marks". This permitted use of a trade mark by the registered user under Sec. 48 of the Act is expressly deemed to be user by the registered proprietor by virtue of the clear terms of Sec. 48 (2) of the Act.

27. The expression "trafficking in trade mark" under Sec 48 (1) of the Act appears to indicate that the law is jealous and strict in permitting the use of the mark by persons other than the registered proprietor thereof on the ground that to be law (sic) on that point would be to permit trafficking in trade marks. The whole procedure for registered user is so strict that the real decision to permit registered user rests with the Central Government and not with the Registrar of Trade Marks under the Indian Act. Section 49 of the Trade Marks Act makes it quite clear. In the first place, it requires that there should be a joint application between the registered proprietor and the proposed registered user in writing to the Registrar in the prescribed manner. In the second place, it requires that such application should give certain particulars about the agreement subject to the conditions or restrictions with respect to the characteristics of the goods, to the mode or place of permitted use or to any other matter. The Registrar upon receiving such an application under S 49 (1) of the Act forwards the application together with his report and all relevant documents to the Central Government under Section 49 (2) of the Act. Thereafter the Central Government records all the circumstances of the case and the interests of the general public and the development of industry, trade or commerce in India. Upon a consideration of these factors, the Central Government may direct the Registrar to refuse the application or to accept the same absolutely or subject to conditions, it being no doubt provided that if the application is refused the applicant should be given an opportunity of being heard. All this will be clear from Section 49 (3) of the Trade Marks Act. Finally, when the Central Government has issued such direction either to refuse or to accept as above, the Registrar is directed to dispose of the application in accordance with the directions issued by the Central Government. This is a peculiar procedure adopted under the Indian Statute. What the Registrar does in the case of the registered user is to function more or less as a post office carrying out the behest of the Central Government. It is a jurisdiction very different from the jurisdiction exercised normally by the Registrar of Trade Marks. This jurisdiction is also non-appealable so far as this Court is concerned because Section 109 of the Trade Marks Act

expressly provides inter alia that "no appeal shall lie from any decision, order or direction made or issued under this Act by the Central Government or from any Act or order of the Registrar for the purpose of giving effect to any such decision, order or direction".

28. The Trade Marks Rules made under the Act make elaborate provisions for dealing with application for registration as registered user. They are to be found under Rules 82 to 93 of the Trade Marks Rules. Under Rule 85, one of the first considerations which the Central Government has to take into account is whether the permitted use, if allowed, by the registered user would contravene the policy of the Act which is to prevent "trafficking in trade marks".

29. "Trafficking in trade marks" is therefore one of the anxious concerns of the Trade Mark Law. It is one of the major concerns of the Trade Marks Act not to permit trafficking in trade marks not only in the interests of the persons directly affected but also for the larger interests of the public and the punty of the Trade Marks Register in such public interest. The whole doctrine of "Trafficking in Trade Marks" is therefore a guard against unauthorised, spurious and miscellaneous user of a trade mark by a person or authority or institution other than the registered proprietor thereof.

30. Although the Indian Trade and Merchandise Marks Act 1958 has used the U. K. Act largely as its model, yet there are important differences. There is a very important difference on this particular point in this discussion of Ss. 18, 45 and 48 of the Indian Act. It will be necessary to notice that distinction because that will be material for understanding and applying certain case law in the present appeal. Section 45 (1) is broadly comparable with Sec. 29 (1) (a) of the British Trade Marks Act 1938. But the provision of Sec. 29 (1) (b) of the British Trade Marks Act, 1938, has not been enacted in Sec. 45 of the Indian Act. The Indian section relating to registered user in S 48 of the Indian Act has certain broad points of comparison with Sec. 28 of the British Act.

31. What follows from this is that under Section 29 of the British Act no application for registration of a trade mark shall be refused on the ground only that it appears that the applicant does not use or proposes to use the trade mark in the two cases mentioned there under sub-clauses (a) and (b). Sub-clause (a) refers to the company about to be formed. Sub-clause (b) refers to the case of a registered user of the trade mark. Sub-section (2) of Section 29 of the British Act clearly provides that Sec 28 of the British Act dealing with the removal from register and imposition of limitation on grounds of non-use shall have effect on the trade mark register under power conferred by sub-section (1) of Section 29 of the Act

as if the proprietor was substituted by a reference to the corporation or registered user, as the case may be. The whole procedure for registered user as laid down in Section 49 of the Indian Act is different from the British Act.

32. In order to appreciate this distinction, which will be relevant to bear in mind in applying the law to the facts of this appeal, a short reference will be necessary to explain why this distinction was made in India. The Trade Marks Enquiry Committee's Report, 1954 recommended certain amendment of the old Section 39 of the previous Indian Act. That recommendation is to be found in paragraph 53 of that report. In paragraph 54 of the report of the Trade Marks Enquiry Committee, 1954 a suggestion was made by means of citation of an example in these terms:

"Section 36 contains no provision similar to that embodied in paragraph (b) of Section 29 (1) of the United Kingdom Act. We can think of no good reason for this omission, but on the contrary can readily visualise the considerable hardship it has caused and if unrepaired could continue to cause, to commercial interests in India. For instance, financing corporations and other bodies holding a controlling interest in subsidiary companies e.g., J. K. Industries, have not been able validly to register marks in their own name as the law stands. A further example would be a case in which a foreign concern desired to conclude arrangements with an Indian firm to manufacture certain goods in India on behalf of the foreign concern. As the Act stands, the latter would be unable validly to register its trade mark in India, having no intention itself to use the mark in this country, and would probably and naturally be unwilling to allow its own valuable trade mark to be registered here in the name of a manufacturer. The difficulty which thus exists under the Act in its present form would be removed if the provisions of paragraph (b) of Section 29 (1) of the United Kingdom Act were incorporated in Section 36 of the Indian Act and we recommend that the latter section should be so amended and should otherwise be brought into light with Section 29 of the United Kingdom Act".

33. This was the origin of the Indian departure from the British Act. The proposal was made clearly to introduce provisions of Section 29 (1) (b) of the U. K. Act into India. It is equally clear that this proposal was rejected. This was followed by a report of Mr. Justice Raja Gopala Ayyangar on Trade Marks Law Revision in 1955. This Ayyangar Committee rejected the proposal of the report of the Trade Marks Enquiry Committee. In paragraph 218 this is what Mr. Justice Raja Gopala Ayyangar observed:

"I am against the proposal of the Committee. In my opinion the question is whether in the context of the conditions prevail-

ing in this country such a provision would not really lead to a trafficking in marks. The questions which arise in this regard are two. (1) Is it necessary to confer a right to register a mark on a person who does not intend to use it himself but contemplates merely permitting others to use it? (2) Whether it is in the public interest that such permission should be granted to enable a person to be registered in such circumstances? The Committee in their report have referred to the evidence tendered on behalf of Messrs. J. K. Industries in support of their recommendation. Having gone through the memorandum submitted on behalf of this group as well as oral evidence tendered on their behalf, I am unable to agree with the conclusion of the Committee. In my opinion any such provision is likely to encourage and indeed provide legislative sanction for a trafficking in marks. There is no real analogy between the case covered by the present Section 36 (1) and what is proposed by the Committee because in the former case the entire property in the mark would vest in the company on its registration and remain with them and there is no intention on the part of the registered proprietor to retain in himself any interest after the company comes into existence and obtains the assignment. In the latter case, however, the registered proprietor never intends to use it himself but merely desires to capitalize and derive profit from the reputation which he believes he has acquired in other fields than in the trade in goods in respect of which he desires the mark to be used. Notwithstanding that the law is different in the United Kingdom I do not consider that there is any justification or necessity to have a provision corresponding to Section 29 (1) (b) of the English Act in our Act".

34. It was Mr. Justice Raja Gopala Ayyangar's report which was accepted on this point. The conclusion to be derived from the history of this branch of Trade Mark Law in India is that the Indian Law is jealously guarding against trafficking in trade mark. This is a question of grave public importance in this country. India as an economic market, both present and prospective, has to be legally protected so far as trade mark is concerned. To allow trafficking in trade marks in any shape or form or under any cover would be disastrous for Indian economy. That is the reason as I read it why the Indian Act of 1958 did not introduce this specific provision of Sec. 29 (1) (b) of the U. K. Act but made a departure from it.

35. Apart from these two cases of agencies or quasi-agency, namely, (a) a company to be formed, and (b) in the case of registered user, the Indian Trade Marks Act also provides for assignment of a trade mark. Section 2 (1) (a) of the Indian Act defines assignment as an assignment in writing by act of the parties concerned.

Chapter 5 containing Sections 38 to 44 of the Indian Act sets out the provisions for assignment and transmission of trade mark. Section 38 gives the power to the registered proprietor to assign the trade mark and to give receipt for any consideration for such assignment. Section 37, *inter alia*, provides that the registered trade mark shall be assignable and transmissible whether with or without the good-will of the business concerned. Sections 39 and 40 deal with restrictions on assignment and deal, *inter alia*, with such questions of resemblance, deception and confusion. Section 41 *inter alia* deals with the conditions of assignment otherwise than in connection with the good-will of a business. Section 44 *inter alia* provides for registration of assignment. With appropriate safeguards, therefore, the Indian statute is liberal enough to provide for assignment of trade marks.

38. It is therefore contended on behalf of the Appellant that the Indian Trade Mark law recognises only three well-known methods of use of the trade mark by persons other than the proprietor in the case of (1) a company to be formed, (2) a registered user and (3) an assignment. There are no other methods of agency recognised by the Trade Mark Law in India by which other persons could be appointed as an agent to use the trade mark of the proprietor. This argument raises a very important principle. The preamble of the Trade and Merchandise Marks Act 1858 emphasises that it is "An Act to provide for the registration and better protection of trade marks and for the prevention of the use of fraudulent marks on merchandise".

37. In the light of these observations it will be necessary now to examine some of the decisions and authorities on the point. In discussing such authorities it will be proper to bear in mind that the law requires certain conditions to be fulfilled before registration of a trade mark. Secondly, the law also requires certain conditions to be fulfilled after registration, the non-observance of which might lead to the removal of the trade mark from the Register.

38. Now, taking the law before registration is made it is clear from Sec. 18 (1) of the statute that he must satisfy the condition that the proprietor of a trade mark *inter alia* must use or propose to use the mark himself by reason of the expression "by him" appearing in that section. Does the expression "by him" include somebody else "other than he" who is neither a company nor a registered user nor an assignee? The older English cases are relevant on the point before the new U. K. Trade Marks Act came into operation.

39. The leading case on that branch is *In re Batt (John) and Co's Registered Trade Marks* and *In re Carter's Application for a Trade Mark*, 1898-2 Ch 432. It lays down the principle that "a trader cannot properly

register a trade mark for goods in which he does not deal or in which he has not, at the time of registration, some definite and present intention to deal". The Court of Appeal in affirming the decision of Romer J. in that case observed as follows:

"Where there had been no real user of a trade mark before or since its registration, and it had been registered in a particular class, without any bona fide intention to use it in that class, the Court, on an application made under Section 90 of the Act of 1883 by another trader to register a nearly identical mark in respect of that particular class, rectified the Register by expunging the existing mark as an entry made without sufficient cause; and directed the Comptroller to proceed with the registration of the applicant's mark".

40. Romer J. at p. 438 in the above decision lays down the principle: "I take it to be clear that if persons register new trade marks, which they say they intend to use, they must, at the date of registration, have a bona fide intention of using those trade marks in respect of the goods for which they register them". The learned Judge, therefore, clearly lays down that this bona fide intention to use the trade mark must be existing at the date of the registration of the trade mark and not subsequently.

41. In discussing the principle behind this law, the learned Judge at the same page 438 points out as follows:

"One cannot help seeing the evils that may result from allowing trade marks to be registered broadcast, if I may use the expression, there being no real intention of using them, or only an intention possible of using them in respect of a few articles. The inconvenience it occasions, the cost it occasions, is very large and beyond that I cannot help seeing that it would lead in some cases to absolute oppression and to persons using the position they have obtained as registered owners of trade marks (which are not really bona fide trade marks) for the purpose of trafficking in them and using them as a weapon to obtain money from subsequent persons who may want to use bona fide trade marks in respect of some classes in respect of which they find those bogus trade marks registered. Indeed, it appears from the evidence of several experts that a system of trafficking in trade marks appears to be carried on at the present day".

42. The above case went up before the English Court of Appeal on the Bench of Lindley M. R., Chitty and Collins L. JJ. Lindley M. R. at pp. 439-40 poses the question and gives the answer in this way: "A question of law then arises which may be stated shortly as follows: Can a man properly register a trade mark for goods in which he does not deal or intend to deal meaning by 'intending to deal' having at the time of registration some definite and present intention to deal in certain goods or

descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he may think desirable. This question we answer in the negative".

43. The next case is of *In re, Neuchatel Asphalte Co.'s Trade Mark*, as reported in 1913-2 Ch 291. This case is important because it emphasizes Lindley M. R.'s observation in *Batt's case* about the "present intention at the time of registration". Sargant J. at p. 302 of the Report in 1913-2 Ch. D. 291, observed as follows:

"Applying this test I am constrained to say that there is not a present intention to deal, though I think there is a desire to deal, if and so far as the Val de Travers Company do not prevent it, with the goods under this Trade Mark. I think it may well be that in the year 1926 steps will be taken by the Neuchatel Company to deal with the goods in that way, but that seems to me to be too far off and too remote".

44. The learned Judge in *Neuchatel Company's case* quotes Lord Halsbury's interlocutory observation in *Batt's case* which is not to be found in the Report of 1898 but in (1899) 16 RPC 411, where at p. 413 Lord Halsbury observed: "The Trade Marks Acts are not for copy right in marks, they are to protect trade marks. If you have no case you are claiming only copy right, you are not claiming for the purpose of protecting your trade". Sargant J. observed at pp. 302-3 in 1913-2 Ch 291, observed as below:

"Here, although the goods of the applicants have in fact been sold in this country, they do not seem to me to have been sold in any way in connection with any trade or business as belonging to the applicants, or in such a way as to create a trade or business on their behalf, or a good deal in any trade or business which is protected under the Trade Marks Act".

45. The last of this series of cases relevant on this point is *In re, Ducker's Trade Mark*, (1928) 1 Ch 405. It is a direct authority on the proposition that the bona fide intention to use a trade mark in connection with the goods for which it is registered, as required by Section 37 of English Trade Marks Act of 1905, means a definite and present intention on the part of the proprietor so to use it and the section is not satisfied by a precautionary registration with a contingent intention of using the mark if occasion required. Nor is that section satisfied by an intention to assign the mark to a limited company for the purpose of such user. This is a case which supports the appellant's submission on the point. Tomlin J., delivered the judgment in this case. At page 409 the learned Judge observed:

"I am quite satisfied that at the time of registration Mrs. Ducker had no intention of using the mark herself and that neither she nor her husband Noel would ever have

dreamed of going into business for the purpose of marketing hair-dyes in their own names or otherwise than through the hand of a limited company".

This the learned Judge held was not enough. The learned Judge also observed at the same page:

"Although no doubt there was an intention of some sort of use the mark; that is to say, that the mark was thought to be something which some day might be useful I do not think that there was at the time of the registration any definite and present intention to use it within *In re, Batt's Trade Marks*, (1898) 2 Ch 432, the language of which is as appropriate today as when that case was decided".

46. Tomlin J., also at pages 409-10 indicated what the position was before the statutory amendment came in the United Kingdom by making the following observations:

"Moreover on the construction of Sec. 37 (Trade Marks Act, 1905) the intention to use means an intention to use by the person who registers. It is not open to a man to register a mark and say: I do not intend to use this mark myself, but I intend at some later stage or shortly to form a company, and transfer the mark to them with a view to their using it. That is not the bona fide intention to use or user by the applicant for registration which Section 37 requires".

47. Now that is a very pertinent observation of Tomlin J. Tomlin J. was construing S. 37 of the 1905 Trade Marks Act in U. K. when that exception in favour of the company to be formed had not been introduced and he came to the conclusion that the intention to use must be by the person who registers. Now that the statutory amendment in 1938 in the U. K. Act has permitted an exception to be made, *inter alia*, in favour of a company to be formed, such exception can only be limited to what is created by the statute and no more.

48. In that view the submission of the appellant before me in this appeal should be accepted on the ground that except to the extent and manner permitted by the Trade and Merchandise Marks Act, 1958 in India, the bona fide intention to use the mark must be of the person registering and not of somebody else other than those for whom the statute has made express exceptions. It is a personal right, requiring a personal intention present at the time of registration of the trade mark. It gives many legal facilities. It cannot be the intention of the Law of Trade Marks that that bona fide intention to use instead of being in the person registering could be expressed by a proxy which is not a statutory proxy recognised by the statute. That is exactly what opens the doors of trafficking in trade mark, which the trade mark law intends to prevent. It also creates the difficult situation that such agents are not within the control of the Registrar or any other public control. Un-

authorised agents in trade mark would be beyond such public control and will be only controlled by such private arrangements that they may have with the registered proprietor. That is precisely what I think was intended to be avoided and to permit such a course would be to encourage trafficking in trade marks, the very mischief the law wanted to remedy. For such an agent, who is not recognised by the statute the Trade Marks Act will not apply at all, there will be no protection of the public in that event, and there will be no puny of the trade mark register in public interest in that case. It will be left purely to the chances of a private agreement or terms between the proprietor of a trade mark and his agents, secret between themselves and undisclosed to the public register. I do not think that such a consequence was contemplated by the Trade and Merchandise Marks Act in India. Registration of trade mark is a creature of statute. It is a special statutory right which must be confined within the four corners of the statute itself which creates and cannot be allowed to travel beyond. The common law of trade mark never provided for registration of trade mark and is based on the common law right to use one's name and the reputation that a trade name or mark has built up by user and is covered by the ordinary common law action for passing off whose essence is deception or confusion. It cannot be allowed to have the best of both the worlds of common law of contracts and agency and private arrangement on the one hand and also on the other hand the benefit of the statutory law under the Trade Marks Act, regarding registration of trade marks. If anyone could appoint an agent outside the Act to substitute for the registered proprietor of the trade mark, then there would be no need for making any provisions such as Section 18, Section 45, Section 48 and Section 44. Registration under these sections in that case would not disclose the correct state of the use of trade mark in the country at all because unregistered agents will be operating in the entire field of trade using the trade mark and whose position will not be reflected in the Trade Mark Register under the Act.

49. Ducker's case, 1928-1 Ch 405 at any rate makes three propositions plain, (1) there must be definite and present intention of the person registering the trade mark, (2) that no precautionary registration is enough for this purpose, and (3) that assigning the mark to a limited company is also not enough. Ducker's case, 1928-1 Ch 405 was affirmed on appeal reported in (1929) 1 Ch 118. Lord Hanworth at page 121 of that report expressed the view, "I think that the words 'proposed to be used' mean a real intention to use, not a mere problematic intention, not an uncertain or indeterminate possibility but a resolved or settled purpose which has been reached at the time when the mark is to be registered". The observations of

Tomlin J., and of the Court of Appeal in Ducker's case are against the rather loose expression used in the decision of the Registrar of Trade Marks in the matter of an application by John Taylor Peddie reported in (1944) 61 RPC 31 at page 38 where the Registrar said:

"I think that in determining whether an applicant for the registration of a trade mark intends to use the mark in relation to the relevant goods in such a way as to justify registration, regard must be had to the difficulties and uncertainties of the present time, and that a bona fide intention on the part of the applicant for registration to use as soon as conditions allow may under present conditions well be sufficient to support the application".

The time considered in that case was the year 1943, when the last World War was on. But in any event there the fact, that sufficient intention on the part of Peddie to use the mark was established and who had in fact purchased the good-will of the business also.

50. The learned Editor of the 8th Edition of Kerly on Trade Marks at page 50 notices the fact that foreign companies often desire that an extension of their business to other countries should be effected by a subsidiary company or some other party with whom they are contractually associated, but do not wish to run any risk of the right to the trade mark being vested in other hands and that this was exactly the reason why in the English Act Section 29 (1) (b) was introduced in the Trade Marks Act of 1938. In fact, this was what the respondent American Company in this case wanted to do and have done. It has signed an agreement for registered user and it is pending registration.

51. Having discussed the authorities on the bona fide intention to use the trade mark on the part of the owner of the trade mark at the time of registration, I shall now discuss the two main authorities on post-registration cases. Before I do so, it will be necessary to refer broadly to the relevant sections of the Trade and Merchandise Marks Act, 1958 on the point. Rectification and correction of the register are provided by Chapter VII of the Indian Act and covered by Sections 56 to 59 of the statute. Section 56 of the Act provides, inter alia, that on application made in the prescribed manner to a High Court or to the Registrar by any person aggrieved, the tribunal may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of any contravention, or failure to observe a condition entered on the register in relation thereto. The grounds there are contravention or failure to observe a condition entered on the register. This is sub-section (1) of Section 56 of the Act. But sub-section (2) of Section 56 provides that any person aggrieved by the absence

or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, may apply in the prescribed manner to a High Court or to the Registrar, and the Tribunal may make such order for making, expunging or varying the entry as it may think fit. Obviously, this sub-section (2) of Section 56 of the Act is much wider. Any person aggrieved can complain against any entry in the register either on the ground (i) that it is there without sufficient cause, (ii) that it is wrongly remaining on the register, (iii) any error and (iv) any defect.

52. Now, apart from rectification and correction under Chapter VII of the statute which I have just mentioned, there is another relevant provision for the purposes of this appeal and that provision is contained in Section 46 of the Act. Section 46 of the Act appears in Chapter VI of the statute dealing with "Use of Trade Marks and Registered Users". Section 46 of the Act deals particularly with the removal from register and imposition of limitations on ground of non-use. Section 46 provides, *inter alia*, as follows:—

"(1) Subject to the provisions of S. 47, a registered trade mark may be taken off the register in respect of any of the goods in respect of which it is registered on application made in the prescribed manner to a High Court or to the Registrar by any person aggrieved on the ground either—

(a) that the trade mark was registered without any bona fide intention on the part of the applicant for registration that it should be used in relation to those goods by him or in a case to which the provisions of Section 45 apply, by the company concerned, and that there has, in fact, been no bona fide use of the trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application."

53. This Section 46 permits a registered trade mark to be taken off the register, upon an application being made. The grounds on which the trade mark can be taken off the register are: (a) that it was registered without any bona fide intention on the part of the applicant for registration, and (b) that there has, in fact, been no bona fide use of the trade mark in relation to these goods by any proprietor thereof for the time being up to a date one month before the date of the application. A glance at this Section 46 (1) (a) will at once show that it speaks of the bona fide intention on the part of the applicant for registration and that it speaks of the bona fide use of the trade mark in relation to those goods by the proprietor thereof. The emphasis on the words "applicant for registration" and "pro-

prietor thereof" appears to indicate the intention that it is the proprietor or the applicant himself and no one else. This Section 46 (1) (a) has really two limbs joined together by the word 'and'. In other words, there must be, in the first place, a 'bona fide intention on the part of the applicant for registration that it should be used in relation to those goods by him' and, secondly, that such "bona fide use of the trade mark in relation to these goods by any proprietor thereof for the time being up to a date one month before the date of the application". The question here arises also whether the use by the subsidiary company Geoffrey Manners and Co. Ltd., in whom, it is said, that the respondent American Company has forty per cent share capital and who is a separate legal entity altogether, could be said to be a use by the proprietor thereof. Use by such a company who is neither an assignee nor a registered user cannot in my judgment come within the use by the proprietor of the mark within the meaning of Section 46 (1) (a) of the Trade and Merchandise Marks Act, 1958.

54. Having cleared the grounds about the statutory position in India on this point, I shall now refer to the two cases, the Bostitch's case and Bowden's case, reported respectively in 1963 RPC 183 and (1913) 30 RPC 580.

55. In Bostitch Trade Mark case, reported in 1963 RPC 183, a foreign owner of a trade mark sold his goods in U.K. through a distributor. When war-time conditions made import impractical, the trade mark proprietor assisted the distributor to manufacture some of the goods locally, and in advertising the goods, and the distributor indicated that they were part of the trade mark owner's range. In course of time, the distributor produced other goods which he sold under that trade mark. When a disagreement arose between the parties, the trade mark owner withdrew his consent to the distributor making any further use of the trade mark. The distributor contended that as there had been no registered user agreement, and as the mark had come to signify to the public goods of the distributor's manufacture, the mark was now distinctive of the distributor, he moved to have the existing registration expunged.

56. Lloyd-Jacob J. who decided the case came to the following conclusion, namely, (1) that the failure to enter into a registered user agreement was immaterial because such agreement would not provide a protective cover for a use of the trade mark which would otherwise be deceptive, or confusing; (2) that by advertising themselves as being distributors of the trade mark owner's goods, the distributors maintained a connection in the course of trade between the goods and the trade mark owner; (3) that the mark had not been used in a deceptive

or confusive manner and, therefore, should not be expunged. The learned Judge observed that nothing under Section 28 of the U. K. Trade Marks Act, 1938, justified the view that an arrangement between the trade marks user and its owner needed to be registered, still less that failure to register had any effect on the validity of the mark. The view was expressed by the learned Judge that a trade mark owner could modify the way his goods reached the market such as by changing the locality of manufacture or employing the sub-contractor to produce the goods and his mark only became vulnerable if he permitted its use in a manner which was calculated to deceive or cause confusion. A particular observation of Lloyd Jacob J. on which the Registrar of Trade Marks relied before me appears at p. 197 of the Report and is in these terms:

"There is nothing in the Trade Marks Act or in the principles of Trade Mark law which have been developed thereunder which requires a proprietor of a registered trade mark to refrain from introducing modifications or variations in the goods to which he applies his mark or in the manner in which they reach the market. If he should find it convenient to transfer manufacture from one locality to another, or procure his supplies from sub-contractors, or arrange for assembly of completed articles by someone of his choice in lieu of doing it himself, these and a vast number of other possible changes in procedure are his sole concern. His mark only becomes vulnerable in this connection if he permits its use in the manner which is calculated to deceive or cause confusion."

57. This observation really has been the sheet-anchor for the respondent American Company in this appeal. The facts of Bostitch's case, 1963 RPC 183, therefore require careful examination, for, without such scrutiny of the facts in that case, it will not be possible to appreciate the observation quoted above. In Bostitch's case, 1963 RPC 183, the interest of McGarry and Cole Ltd., the English Company was expressed in advertisements to be as distributors in the U.K. of Bostitch, the world's largest range of staplers and stapling machines. All such machines bore a representation of the trade mark and an indication of the American origin. Samples of the machines and all the containers in which they were distributed as well as of publicity materials made available in the U.K. were exhibited. In certain instances, stapling machines so procured from America were resold not precisely in the condition in which they were received but they were associated with the frame or set-up by which their stapling efficacy was made available for use in a particular manner. It is also on record in that case that the American Company supplied detailed operating instructions, blueprints of machine set-up and full particulars of staple shapes and dimensions and

that McGarry and Cole were not able to put the machines into effective production until after one of the mechanics of the American Company had journeyed from America to England.

58. The outstanding fact remains in Bostitch's case, 1963 RPC 183, that the British concern was a distributing agent for the American concern. The second outstanding fact is that the case dealt only with Section 28 of the British Trade Marks Act relating to registered users. The third distinguishing feature of Bostitch's case, 1963 RPC 183, is that there was no actual registered user agreement as there is in the present case before me. The most distinguishing feature is that Bostitch's case does not at all deal with other sections in the U.K. Act which are comparable to Sec. 18, Sec. 45 and Sec. 48 of the Indian Act subject no doubt to its special variations and departures.

59. It has been contended on behalf of the respondent American Company that here also the respondent American Company has permitted the use by Geoffrey Manners and Co. Ltd. of its trade mark on the goods to be manufactured by Geoffrey Manners and Co. Ltd. and the trade mark and the sale of the goods should clearly show that they are using the trade mark of the American Company. That fact is supposed to give similarity between Bostitch's case and the present appeal. But the similarity ends there. The similarity also is deceptive because the nature of arrangement between the American Company and the British Company in Bostitch's case was very different from the arrangements here between the respondent American Company and Geoffrey Manners and Co. Ltd.

60. But the greater difficulty is created by the more recent decision of Pussly Galore Trade Mark case, reported in 1967 RPC 265. This is a case which dealt directly with the question before me in the present appeal relating to the meaning and interpretation of the expression "by him" used in Section 17 (1) of the U.K. Trade Marks Act, 1938, and also used in Section 18 of the Trade and Merchandise Marks Act, 1958, in India, a point which distinguishes Bostitch's case. It was decided in Pussly Galore's case that there the Registrar's decision where he said at p. 266: "In my view the words proposed to be used 'by him' in Section 17 (1) would ordinarily be taken to mean proposed to be used by the proprietor himself or by his servant or agent whose actions would in law be regarded as his own, and not proposed to be used by someone else merely under the control of the proprietor", was upheld by the Judge, Mr. Tooke, Q.C., at p. 269 of that report in these terms—

"Having carefully considered the relevant sections of the Act, I conclude that the Registrar's decision is right. In my view, Section 17 has the limited meaning attri-

buted to it by the Registrar. There is no difficulty about the case of servants and agents, because although various executive acts may be performed by them on behalf of their principal who is the applicant for the mark, the use of the mark vis-a-vis the public is by the applicant and no one else."

61. The learned Judge Mr. Tookey, Q.C., in Pussy Galore's case, 1967 RPC 265, further observes on the point of construction at p. 269 of the report as follows:—

"Whatever alternative course might have been open to the Legislature to cover such a situation, it is plain in my view that the course actually taken in the Act is to deal with intended use by a body corporate about to be constituted or by a registered user as particular cases which are made the subject of special dispensation from the effect of Section 17. This dispensation which is provided by Section 29 (1) is based on the assumption that, but for its provisions, there would be an objection to an application on the ground of lack of intention to use the mark on the part of the circumstances with which the section deals. Section 29 (2) contains a complimentary provision to protect the proprietor of a mark from a similar objection in rectification proceedings under Section 26 after registration has been effected.

The foregoing interpretation of the Act appears to me to be in conformity with the general tenor of the Act which does not anywhere contemplate legitimate use of a registered trade mark otherwise than by the registered proprietor or by a registered user. I leave aside, of course, possible cases of concurrent user and the like. Therefore, I can see no ground for giving Section 17 the broad meaning for which the applicants have contended."

62. These observations are directly contrary to the observations of Lloyds-Jacob, J., in Bostitch's case. No doubt Pussy Galore's case does not exclude the case of 'servant or agent', but then the Pussy Galore's case makes it clear that such servant or agent must be a person whose actions in law will be regarded as those of the proprietor himself "and not proposed to be used by some one else merely under the control of the proprietor". The question directly arises then, is Geoffrey Manners and Co., Ltd., a servant or an agent within the meaning of the decision of Pussy Galore's case? The answer can only be in the negative. Geoffrey Manners and Co. Ltd. is a company incorporated in India under the Indian Companies Act. It is a legal entity, independent and self-sufficient. It will not be possible to pierce the veil of this independent legal entity and enter the speculation about the fact that forty per cent of the share capital of Geoffrey Manners and Co. Ltd., is controlled by the respondent American Company. See *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar*, re-

ported in AIR 1965 SC 40 at pp. 46-47. Even if that fact is taken into consideration, that does not improve matters for the respondent American Company, for, in that case, Geoffrey Manners and Co. Ltd. is only a person who is under the 40 per cent control of the proprietor at best, which is not sufficient according to Pussy Galore's decision to make Geoffrey Manners and Co. Ltd. a servant or an agent. Besides, if Geoffrey Manners and Co. Ltd. is really a kind of an alter ego or substantial ego of the respondent American company, then in that case Geoffrey Manners and Co. Ltd. cannot be a servant or an agent but the principal or master himself in another garb. The fact remains that it is not pleaded expressly anywhere even by the respondent American Company that Geoffrey Manners and Co. Ltd. is its agent.

63. On reading the Trade and Merchandise Marks Act, 1958, of India as a whole and particularly the sections, I have discussed above, I respectfully agree with the learned Judge Mr. Tookey, Q.C., in Pussy Galore's case when he said in 1967 RPC 265 at p. 269 that "the foregoing interpretation of the Act appears to me to be in conformity with the general tenor of the Act which does not anywhere contemplate legitimate use of a registered trade mark otherwise than by the registered proprietor or by a registered user". I come to the same conclusion on a reading of the Indian Act. To permit other kinds of agencies apart from the agencies of a registered user or assignment of the trade mark to a company to be formed or in cases of permissible assignments under the statute, the Indian trade mark law does not recognise any other common law of agency, for, to do so would be to permit traffic in trade mark and to introduce person who will be beyond the control of the trade mark authorities in India. The words 'agent or servant' in Pussy Galore's case obviously mean one who is truly in fact and in law an agent or a servant. A principal or a master certainly need not do everything by his own hands but may employ a servant or an agent to do the work for him, and in case of a company or corporation who is the principal or master, it must necessarily act through a servant or agent. But neither in fact nor in law Geoffrey Manners and Co. Ltd. is a servant nor an agent of the respondent American Company.

64. It is necessary to point out here that Bostitch's case, 1963 RPC 183, was also distinguished in Pussey Galore's case, 1967 RPC 265, where at p. 267 the Registrar to Trade Marks there observed:

"Mr. Began referred me to the judgment in Bostitch Trade Mark, 1963 RPC 183. But this case, the facts of which are very special, seems to me to show no more than that in certain circumstances use by a licensee of a registered trade mark under proper control by the registered proprietor

will not destroy the distinctiveness of the mark in relation to that proprietor. It does not in my view have any bearing on the construction of Section 17 (1) relating as it does to an application to register a mark." This observation marks the crucial distinction in this case Bostitch's case had turned on the question ultimately of deception and confusion and it was held that there was no deception or confusion, because the goods were expressly notified to be of the origin belonging to the registered proprietor. That was the real ratio of that decision. Bostitch's case, 1963 RPC 183, was not a decision at all on the expression 'by him' used in Section 17 of the U.K. Trade Marks Act of 1938 and comparable to S 18 of the Indian Trade and Merchandise Marks Act of 1958. In fact, Pussy Galore's case followed the settled authorities in *Re John Batt and Co.*, (1899) 16 RPC 411 and *Re Ducker's Trade Mark*, (1928) 45 RPC 397, on this point. I see no reason to depart from that view in the present appeal before me.

65. In *Bowden's Trade Mark* case, reported in (1913) 30 RPC 580, the Court decided that both the trade marks should be removed from the register as not being distinctive and as being calculated to deceive is not a case which is directly relevant to the point in issue in this appeal before me. This was a decision on the old U.K. Trade Marks Act of 1905 and was not concerned with the question of bona fide intention of the proprietor himself to use the trade mark.

66. Mr. Das on behalf of the respondent American company drew my attention to the decision of the House of Lords in *Aristoc Ltd. v. Rysta Ltd.*, 1945 AC 68. The point of decision of that case was that a mark used on or in relation to goods to indicate the fact that they had been "repaired" by a particular person is not a trade mark within the definition of Section 68 (1) of the U.K. Trade Marks Act of 1938 and was accordingly not registrable under the provisions of that Act. I fail to see how *Aristoc's* case has any application to the facts of the present case. *Aristoc's* case no doubt has discussion about "course of trade" but that is not the point raised on the interpretation of Sections 18, 45 or 49 of the Indian statute. On the other hand, there, as Viscount Maugham indicates at p 87 of the report, the word 'Rysta' nearly resembles the sound 'Aristoc' and that if it is admitted in the register and used in respect of stockings, it was likely to deceive or cause confusion.

67. Mr. Ginnwalla, learned junior following Mr. Das, made an attempt to distinguish *Pussy Galore's* case, 1967 RPC 265. His two submissions are first that Sec. 29 (1) of the U.K. Trade Marks Act of 1938 was not a "dispensation" of Section 17 as observed by the learned Judge Mr Tookey,

Q.C., whose observations I have already quoted above and his second submission is that Section 28 of the U.K. Act was not prospective but retrospective. Valiant as these efforts of Mr. Ginnwalla are, I do not think they make any difference on the decision of this appeal or on the correctness of the decision in *Pussy Galore's* case. I have already indicated the difference between the English law and the Indian law on the basis of Section 29 (1) (b) of the U.K. Trade Marks Act, 1938, and the Indian law on the subject. The fact that Section 28 (2) of the U.K. Trade Marks Act, 1938, is retrospective and not prospective does not also help Mr. Ginnwalla. All that it says is that the permitted use of a trade mark shall be deemed to be use by the proprietor thereof. The sections of an Act have to be read as a whole and not piecemeal stage by stage.

68. For the reasons stated above and on the authorities discussed, I am of the opinion that the respondent American Company at the time of registration in 1951 of its trade mark 'Dristan' had no bona fide intention of using the trade mark by itself within the meaning of Section 18 (1) of the Trade and Merchandise Marks Act, 1958, read with Section 46 (1) (a) thereof and I hold accordingly. It necessarily follows that under Section 46 (1) the trade mark 'Dristan' should be taken off the register on the grounds stated in sub-clause (a) of Section 46 (1) of the Act.

69. The second part of Section 46 (1) (a) of the Trade Marks Act raises the further question whether there has been bona fide use of the trade mark in relation to those goods by the proprietor of the mark 'Dristan' "for the time being up to a date one month before the date of the application". As already indicated by me, both the tests are conjunctive. In other words, there must be both (a) a bona fide intention by the proprietor himself to use the mark and that (b) it shall be used for that particular period. I have already held that the respondent American Company has failed in the first test of the statute. That is enough for the purposes of this appeal.

70. I shall, however, deal with the other question under Section 46 (1) (a) of the Trade and Merchandise Marks Act, 1958, relating to the question whether there has been a bona fide use of the trade mark in relation to those goods by the proprietor for the time being up to a date one month before the date of the application because that was argued at length from the Bar.

71. The application for rectification by the appellant was made on or about April 13, 1961. There is to be, therefore, use for the time being "up to one month" before that date on the application within the meaning of S 46 (1) (a) of the Act. That fixes the time as March 13, 1961. What is to be found is that there has been use

of the trade mark up to a time prior to March 13, 1961. The fact is that the goods under the trade mark 'Dristan' were introduced into the market on October 22, 1961. In paragraph 6 of the affidavit of Madan Gopal Maheshwari, the Director of Geoffrey Manners and Co. Ltd., filed on 21-4-1962, it is stated that "on 22-10-1961 my company introduced into the market in India medicinal preparation under the trade mark 'Dristan'. Prima facie, therefore, this second test is also not satisfied by the respondent American Company. If the goods were not introduced into the market in India before 22-10-1961, then it cannot obviously be said that there has been "bona fide use of the trade mark in relation to those goods" within the meaning of Section 46-A of the Trade Marks Act.

72. What is being said on behalf of the respondent American Company in this regard is that there has been "use by samples". It will be necessary to examine the facts on which the respondent American Company relies to enable it, through the samples, to satisfy the test laid down in Section 46 (1) (a) of Trade and Merchandise Marks Act, 1958. I have already said that the Registrar of Trade Marks in this appeal relied on the Notes of Official Rulings reported in (1944) 61 RPC 148 and also the fact of the samples and medicines imported into India and the invoice dated 14-3-1960. But he did not express any opinion on this point having regard to his views on the other point. I think it will be necessary to express an opinion on the point because this is a matter which had been directly raised and argued in this appeal. It does also arise on the actual language and words used in the latter part of Section 46 (1) (a) of Trade and Merchandise Marks Act, 1958.

73. I shall first examine and scrutinise the facts on record appearing in correspondence. In a letter dated 22-1-1960 from Messrs. Geoffrey Manners and Co. to not the respondent American Company, but Home Products International Ltd. on the question of samples it is stated that "we should continue to receive the samples of your products so that we could study the possibilities of developing the same". This letter says: "Each unit may please be over-stamped—'samples for test purposes free of charge value for custom purposes only'. The invoice of Home Products International Ltd., dated 14-3-1960, shows Dristan tablets but sent as "samples sent free of charges for test purposes on commercial value: value for Customs only". In October 11, 1960 letter Geoffrey Manners and Co. Ltd. is repeating its request to the Home Products International Ltd. for "samples free of costs". The letter of 8-12-1960 from Geoffrey Manners and Co. Ltd. to Home Products International Ltd. speaks of "samples of Phenindamine Tartrate" together "with "a small quantity of Phenyl-ephhrine Hel" but not of Dristan itself.

74. That is all the evidence on the point of samples. It will be clear from this that except the invoice dated 14-3-1960 sending only three Dristan de-cogestant tablets and that only as samples free of charge for test purpose and with no commercial value, there has been no actual use of even these samples in normal trade. No other invoice is on record. Except this solitary invoice with quantities shown as "three only" for Dristan tablets, nothing else appears on record. It is expressly said to have been sent to enable Geoffrey Manners and Co. Ltd. to examine this for testing purposes. There is no evidence that these samples were distributed among the public or among doctors or in the medical profession for use on trial. The question of law that arises is that on these facts and in these circumstances, can such samples answer the requirements of law expressed by the words "bona fide use of trade mark in relation to those goods by any proprietor thereof for the time being up to a date of one month before the date of the application" within the meaning of Section 46 (1) (a) of the Trade and Merchandise Marks Act, 1958? According to the respondent American Company, that is enough. Reliance is placed on Notes of Official Rulings reported in (1944) 61 RPC 148. These notes are rather cryptic and what they say is that for the purpose of resisting an application under Section 26 of the U.K. Trade Marks Act, 1938, for the rectification of the register on the ground of non-use of the mark, the registered proprietors (an Australian company) tendered evidence that they had, with the object of establishing a mark for their goods in the U.K. exported thereto certain samples in relation to which the mark was used. The samples were supplied to an associated company in U.K. in accordance with the negotiations for marketing of the goods by them. That is all the facts stated there. It appears that in that case the samples were actually supplied to the associated company and for the purpose of "marketing of the goods" and not for the purpose of testing in the laboratory and finding out the possibility whether they could be manufactured. That is a very crucial question of fact on which the decision was given in that case and which I am presently going to quote. The plain issue is whether or not the use in relation to those samples was such as could be called "bona fide use of the mark in relation to the goods" as used in paragraphs A and B of S. 26 (1) of the U.K. Trade Marks Act of 1938. On that, the Registrar Sir Frank Lindley gave the following ruling:—

"Further, use in relation to these samples was, I think, use in the course of trade within the meaning of Section 4 and Section 68 (1) and (2) of the Act. It is not, in my view, necessary for this purpose that the goods on or in relation to which the mark is used shall be goods that are them-

selves being at the time directly offered for sale in this country. It is enough, it seems to me, if the mark is used upon, or in physical or other relation to, samples which are supplied by the proprietors of the trade mark to another firm with a view to obtaining some channel, such as an agency or wholesale purchase, for the supply of goods to this market."

75. Now, this ruling is a very limited ruling with many qualifications. No doubt it says that the samples need not be directly offered for sale, that is the point on which the respondent American company relies. But the fact remains that there are other qualifications of this ruling. The dominant qualification that this ruling indicates is that it must be a sample which is supplied by the proprietor of a trade mark to another with a view to obtaining some channel. That channel is illustrated to be an agency or wholesale purchaser for the supply of goods to the market. Here there is no agency. Here Geoffrey Manners and Co. Ltd. is neither an agent nor a wholesale purchaser within the meaning of that ruling. Secondly, this ruling is based on the specific Ss 4 and 68 (1) and (2) of the U.K. Trade Marks Act of 1938. The expression there was 'in the course of trade'. The actual language used in Section 68 (2) of the U.K. Trade Marks Act, 1938, speaking of use of a mark, expressly refers to the use "in relation to goods shall be construed as references to the use thereof upon, or in physical or other relation to goods". The same appears in Section 2 (2) (a) and (b) of the Indian Trade and Merchandise Marks Act, 1958. It is necessary to remember that Section 46 (1) (a) of the Indian Trade and Merchandise Marks Act, 1958, refers to use of trade marks after registration and not before. It is dealing with the question of striking off a trade mark which is already on the register. A trade mark which is already on the register, therefore, has to be understood in that light when construing the words "bona fide use of the trade mark in relation to the goods by any proprietor thereof for the time being up to a date one month before the date of the application". The words "bona fide use" mean that the use must be bona fide in relation to these goods and it must be a trading use and not a mere experimental use for experimental purposes which may or may not lead to a trading channel. The more crucial fact is that only three samples or a few samples sent to Geoffrey Manners and Co. Ltd. only once do not in my view satisfy the legal requirement of "bona fide use" in relation to the goods within the meaning of that expression in Section 46 (1) (a) of the Indian Act. Indeed, in my view it is no 'use' at all within the meaning of that section when post-registration use is under challenge to strike off the mark from the register. The reason is that for testing purpose these samples need not have used

any trade mark at all. Testing these tablets to explore the possibilities of their manufacture in India need not have carried any trade mark at all. I am, therefore, satisfied that the present facts in the appeal before me do not come either within the facts or the principles of the Notes of Official Rulings, 1944 (A), reported in (1944) 61 RPC 148, or within the meaning of "use" in Section 46 (1) (a) of the Indian Trade and Merchandise Marks Act, 1958.

76. I am not to be understood as saying that samples under no circumstances can be bona fide use of the trade mark in relation to the goods within the meaning of Section 46 (1) (a) of the Indian Trade and Merchandise Marks Act, 1958. They certainly can be in an appropriate case on appropriate facts which establish the bona fide use. Here on the facts, in my judgment, the samples do not amount to "use". I, therefore, hold that the respondent American Company does not satisfy the second test also under Section 46 (1) (a) of the Indian Trade and Merchandise Marks Act, 1958. My interpretation is based on the fact that this is not a pre-registration situation but a post-registration user. It must always be borne in mind that bona fide use of trade mark in relation to the goods when attempted to be proved by use of straysamples has some inherent difficulties. Bona fide use of the trade mark in relation to the goods means the normal bona fide use. Sample must, therefore, establish that it was a sample used in relation to the goods and that bona fide but when samples are used for testing for manufacturing, then the fact that such testing samples when sent bore the trade mark on the samples, seems to me to be entirely irrelevant and does not amount to a bona fide use of the trade mark. If, on the other hand, the samples are introduced and used for distribution either by the agent or by the prospective producer to establish a trade channel, to indicate that the use of the trade mark was necessary to establish the origin of the goods and making it known as to whom the goods belonged, then it is and can be bona fide use. Samples can be used in diverse ways. The nature, quality and purpose of samples are, therefore, major determining factors in holding whether in a particular case the sample can be taken to be "bona fide use of the trade mark in relation to the goods," within the meaning of Section 46 (1) (a) of the Statute in India.

77. Some arguments were advanced on behalf of the appellant about some of the words like Dristan, Bistan and also Tristone and the likely deception or confusion in the markets. It is not necessary to discuss the question in the view that I have already taken. In support of this branch of the argument it has been submitted that Dristan is in tablets while others are in capsules or ampoules.

78. Reference is made to the decision of the Pianotist Co. Ltd., reported in (1906) 23 RPC 774 dealing with the confusion between "Neola" and "Pianola" where Parker J. at p. 777 observed: "That limitation is, reading it shortly and generally, that he is not allowed to register any goods having such resemblance to a trade mark already on the register as to be calculated to deceive". It was held there by Parker J. at p. 778 that "having regard to the nature of the customer, the article in question and the price at which it is likely to be sold, and all the surrounding circumstances, no man of ordinary intelligence is likely to be deceived". On the other hand, reference for the appellant was made to the Supreme Court decision in Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories, AIR 1965 SC 980 and the observations of Iyengar J. at p. 990 to the following effect:—

"Expressed in another way, if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get-up, packing and other writings or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial; whereas in the case of passing off, the defendant may escape liability if he could show that the added matter is sufficient to distinguish goods from those of the plaintiff."

79. In the view that I am taking, it is not necessary to discuss or decide the question of alleged confusion between (1) Dristan, (2) the prior registered mark Bistan and (3) the subsequent mark Tristine, now Tristina as the proposed mark for registration of the appellant. It may be recorded here that Bistan, although has used an affidavit supporting the appellant, never took any steps either at the time of registration of Dristan or even thereafter for alleged confusion or deception.

80. What remains now to examine is the effect of the agreement between the respondent American Company, American Home Product Corporation and Geoffrey Manners and Co. Ltd. dated 18-10-1961. This is the agreement by which Geoffrey Manners and Co. Ltd. has agreed to become the registered user of the trade mark Dristan. The very first clause of this agreement says that "subject to the conditions and restrictions contained in the agreement, the American Company grants to the Indian Company non-exclusive right to use the trade mark". The second clause declares that Geoffrey Manners and Co., the Indian Company, agrees to become the registered user of that mark. There is no royalty or other remuneration payable by the Indian company to the American company by this agreement. The Indian company shall not have the right to acquire the title of the

trade mark on payment to the American company. The agreement is determinable on giving three months' notice. By this agreement made on 18-10-1961, the American company agreed to appoint the Indian company as the "registered user". That being so, it has elected upon the course. In fact, even before the Indian company was registered as an would-be "registered user", attempt was made to describe Geoffrey Manners and Co. Ltd., as the "registered user". It is on record here in this appeal that an advertisement issued in the Times of India dated 25-10-1961 stating that Geoffrey Manners and Co. Ltd. was the registered user immediately after this agreement of 18-10-1961 was signed. It is significant to note that this agreement of 18-10-1961 does not state or declare that the present arrangement of using Geoffrey Manners and Co. Ltd. will continue after the signing of the agreement. There is no reservation of that right. If the application as registered user were to succeed, then that would have retrospective effect and the agreement would have operated from 18-10-1961 and that would have created a situation from 18-10-1961 until the date of registration of Geoffrey Manners and Co. Ltd. as a registered user. The Indian company then would have been working the trade mark Dristan both in its capacity as an unauthorised agent not recognised by the Indian Trade and Merchandise Marks Act as well as an authorised registered user under the Indian Trade and Merchandise Marks Act. I do not think that the respondent American company can ride both the horses at the same time and it has to choose which course to follow. It has chosen the course that it will have the Indian company as the "registered user". It cannot then in the same breath say that the Indian company could also be a user otherwise. It is significant to note here in this connection that the Government permission or licence by which Geoffrey Manners and Co. Ltd. is now said to be manufacturing Dristan in India was given under Industries Development and Regulation Act, 1951, under which Geoffrey Manners and Co. Ltd. sought the Government's permission. The permission of the Government of India to manufacture Dristan tablets was given on certain conditions among which one was that the product would be marketed with the trade mark already in use or even without any trade mark. The scope for trafficking in trade marks is, therefore, clear even under that condition for the tablets could be manufactured without the trade mark of the proprietor and that by some kind of private arrangement between the American company and the Indian company without the control of the Indian authorities under the Indian Statute.

81. I, therefore, hold that the appellants have succeeded in establishing their case under Section 46 (1) (a) of the Trade and

Merchandise Marks Act, for the removal of the trade mark Dristan from the Indian Register That registration, in my view, should not have been made originally on the ground because there was no bona fide intention by the proprietor to use the mark himself within the meaning of Section 18 of the Trade and Merchandise Marks Act, 1958, and comes within Section 46 (1) of the Act. I, therefore, hold that that registration was contrary to law under Section 11 (b) of the Trade and Merchandise Marks Act, 1958.

82. Accordingly, I allow the appeal and set aside the order of the Registrar of Trade Marks dated the 7th December, 1964 and allow the application of the appellant for rectification of the register

83 The appeal is allowed with costs. Certified for two counsel.
CGM/DVC

Appeal allowed.

AIR 1969 CALCUTTA 360 (V 56 C 60)

BIJAYESH MUKHERJI, J

Basanta Pandey and another, Petitioners v. Sudhir Lall Seal and others, Opposite Party

Civil Revn. C No. 3820 of 1964, D/- 9-8-1968

Civil P. C. (1908), O. 1, R. 13 and O. 8, R. 2 — Plea of non-joinder of necessary parties — Plea taken vaguely at earlier stage — Plea allowed to be raised in Art. 227 proceeding — Plea, however, failed on merits — (Constitution of India, Art. 227 — Court not an appellate Court — No interference called for) — (Hindu Law — Thika tenancy held by late karta in absolute severalty — Tenancy devolves by succession and not by survivorship) — (Houses and Rents — Calcutta Thika Tenancy Act (2 of 1949), S. 3 — Thika tenancy held by late Karta of joint family in absolute severalty — Tenancy devolves by succession — Only heirs to be impleaded).

Two thika tenants Basant Pandey and Kanai Pandey, sons of late Ishwar Pandey, sought to set aside an order of ejectment directed under S 3 Cls (iv) and (v) of the Calcutta Thika Tenancy Act, invoking the court's jurisdiction under Art. 227 of the Constitution. They contended that one Biswanath, son of Basant Pandey had not been impleaded and this defect was fatal to the proceedings in that he was one of the members of the family representing the estate of the late Thika Tenant. The plea of non-joinder had been pleaded, though vaguely, in the earlier stages of the proceedings. The evidence on record showed that Basant Pandey had been the Karta of the family and that he and his brother Kanai Pandey wrote to the landlords asking that they were the heirs and that the receipts might be issued in their joint names. The landlords acted accordingly

Held, (1) that the plea of non-joinder of necessary parties could be raised at the appellate stage or in proceedings under Article 227 of the Constitution, since defect arising as a result of the non-joinder was an incurable one and especially that, in the instant case, the plea had been taken at the earliest stage of the proceedings. (1843) 8 Moo Ind App 229 (PC) and AIR 1953 Assam 193 (FB), Ref (Paras 5 and 6)

(2) that, however on the facts of the case, Biswanath was not a necessary party to the eviction proceedings. Upon their own asking his father and uncle had been treated as Thika tenants. (Paras 8 and 10)

(3) that the rule of survivorship applies to joint family property and the thika tenancy which was held by the late tenant in absolute severalty the rule of succession would apply to it and the only heirs in this regard were Basant and Kanai Biswanath whose father was alive was not an heir. (Para 9)

and (4) that Art. 227 of the Constitution did not convert the High Court into a Court of appeal, permitting substitution of its own judgment, on fact or law, for that of the subordinate tribunals. There was nothing in the case which warranted interference under Art. 227 of the Constitution with the decision of the Court below.

Cases Referred: Chronological (Para 8)
(1953) AIR 1953 Assam 193 (V 40) =
ILR (1953) 5 Assam 326 (FB),
Chandra Mohan Saha v. Union of India

(1843) 8 Moo Ind App 229 = 8 Suth-
WR 43 (PC), Dhurm Das Pandey
v Mt. Shama Soondari Dibiya
Ranjit Kumar Banerjee, for Petitioners,
Tarakanath, for Opposite Parties

ORDER. The two thika tenants, Basant Pandey and Kanai Pandey, sons of late Ishwar Pandey, have obtained this rule under Article 227 of the Constitution for setting aside an appellate order of affirmation, by which their eviction has been directed under Section 3, Clauses (iv) and (v), of the Calcutta Thika Tenancy Act, 2 of 1949. Clause (iv) makes a thika tenant liable to ejectment from his holding, inter alia, on the ground that the land is required by the landlord for the purpose of building. Likewise, Clause (v) makes a thika tenant liable to ejectment on the ground, amongst other things, that he has failed himself to occupy a major part of the holding for more than six consecutive months

2. Mr. Ranjit Banerjee, appearing in support of the rule, does not press the point grounded on Clause (v). He does not, not because it lacks substance, as he says, but because it will be futile, in view of the findings of fact that all the essential ingredients to bring the case under Clause (v) are there: (i) means of the landlords, (ii) a plan of the building to be, and (iii) need of the landlords for building. — findings, he con-

cedes with his usual fairness, he cannot assail in an application under Art. 227 of the Constitution. But, he concludes, even such findings cannot take the landlords opposite party far, as the lis is bound to fail for an inherent and incurable defect: non-joinder of a necessary party, namely, Biswanath, son of Basanta Pandey, one of the two petitioners before me, as also non-issue of ejectment notice upon him, they all father, son, uncle Kanai and others—constituting a family governed by the Mitakshara law. Such then is the only point: defect of parties: I have been called upon to decide.

3. The learned appellate tribunal is presented with this point too. But he dismisses it on the ground that nowhere in the written objection the two thika tenants, now the petitioners before me, qua opposite party in the trial forum, specify the name of Biswanath as a necessary party, denying thereby an opportunity to the landlords, the petitioners there and the opposite party here, to meet such case at the trial. All they do is to indulge in "liquid" averments that the lis is bad for non-joinder of necessary parties, or that the notice of ejectment is bad at law, served as it has not been to all representing the estate of the original thika tenant, late Iswar Pandey. The learned tribunal of appeal, therefore, concludes that a vague pleading as this is no pleading, and beneath its notice too.

4. The learned appellate tribunal has presumably at the back of its mind the principle of Order 8, Rule 2, of the Procedure Code (5 of 1908), which prescribes inter alia that the defendant must raise by his pleading all matters which show the suit not to be maintainable, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise; no less the principle of Order 1, Rule 13, which enjoins an objection as to non-joinder of parties to be taken at the earliest possible opportunity, failing which such objection shall be deemed to have been waived. Mr. Ranjit Banerjee contends that an approach, as the one the appellate tribunal makes, can hardly be availing in an action in ejectment or, say, in a suit for partition. And he cites two authorities, one of which is an ancient decision of the Judicial Committee of the Privy Council: *Dhurm Das Pandey v. Mt. Shama Soondari Dibiya*, (1843) 3 Moo Ind App 229 (PC). That was a case "of a very intricate and perplexing nature," making it "utterly impossible to explain all the facts that appear in evidence". And what happened, amongst other things, was "that, pending the suit, an act of adoption was executed by the Respondent (the plaintiff mother), whereby the whole property was divested from the mother and vested in her adopted son". An objection on that score was taken for the first time before the Board. It was said that the decree put the respondent in possession, in her own right, of that which was

divested from her by the act of adoption. Lord Campbell, delivering the advice of the Board, met this objection in two ways. First:

"No objection was made in either of those Courts (the Zillah Court and the Sudder Dewanny Court) that proper parties were not before the Court. If such an objection had been made, it might have been removed, and I think it is a safe maxim for a Court of Appeal to be governed by — that an objection, which, if taken, might have been cured, and which has not been taken in the Court below, shall not be taken in the Court of Appeal."

Second: the decree, "not very skilfully framed", be considered as a decree putting the respondent in possession as the adopted son's guardian and trustee.

5. What concerns the lis on hand is the first answer given by their Lordships: Do not allow to be taken in the Court of appeal (and necessarily still in a court exercising only its power of superintendence as I am doing, falling far, far short of an appeal) an objection, which, if taken in the primary court, might have been cured. Naturally Mr. Ranjit Banerjee relies on it and submits that the objection he has taken was incapable of being cured. The hands of the clock would not have gone back, and non-service of a notice of ejectment upon Biswanath, prior to the lis in ejectment, is beyond repair or cure. I am clear in my mind that this contention is sound and should receive effect. But whether or no it will give the petitioning thika tenants what they want is another matter. (More of which hereafter in paragraph 7 et seq. infra.)

6. The other authority is a Full Bench decision of the Assam High Court: *Chandra Mohan Saha v. Union of India*, AIR 1953 Assam 193 (FB), where the law laid down is: "Rule 13 (of Order 1) *** has no application to a case where a necessary party to the suit is not before the court and no effective decree can be made in absence of such a party. The suit in such cases is inherently defective and the point can be taken at any stage provided no new facts have to be alleged or proved."

No new facts have to be proved here. That Biswanath is a son of Basanta, members all of a family governed by the Mitakshara family, has been proved. So, Mr. Ranjit Banerjee is entitled to raise the point of non-joinder of Biswanath and non-service of the notice of ejectment upon him. And then, a point as this was in fact raised before both the tribunals below. Hence, Mr. Banerjee is entitled to raise it all the more. Thus, in view of all that goes before, the stance the appellate tribunal takes — a stance Mr. Banerjee makes a grievance of, and legitimately too — cannot be supported betraying as it does an error apparent on the face of the record, provided, of

course, Biswanath can be regarded as a thika tenant and little more going unrepresented in the lis on hand.

7. But can he be so regarded: can it be said that such a one, Biswanath, goes unrepresented in the lis right from the primary forum to this Court, and even earlier, in the matter of service of ejectment notice? These are the two questions which Mr. Tarakanath Roy, appearing for the opposite party landlords, raises and invites me to

answer in the negative, on the basis of material of undoubted authenticity on record. One class of such material consists of 99 rent-receipts, exhibits A — A (98), from September 26, 1942 (exhibit A) to December 1, 1959 (exhibit A/33), arranged in chronological order, on the whole, with a little break here and there. Of so many, only six are in the names of Basanta and Kanai, the two petitioners before me. They are —

| Sl. No. (1) | Date of receipt. (2) | Month for which rent paid. (3) | Exhibit number. (4) |
|----------------|-------------------------|-----------------------------------|------------------------|
| 1 | 2-4-1959 | February 1957 | A (94) |
| 2 | 2-4-1959 | March 1957 | A (95) |
| 3 | 1-6-1959 | May 1957 | A (96) |
| 4 | 1-8-1959 | June 1957 | A (97) |
| 5 | 1-11-1959 | August 1957 | A (98) |
| 6 | 1-12-1959 | September 1957 | A (99) |

The rest of the rent receipts right from September 26, 1942, (evinced payment of rent for July and August 1942) up to April 2, 1958, (evinced payment of rent for November 1956) are all in the name of Ishwar Pandey, admittedly the original thika tenant, and the sole tenant too.

8. Mr. Roy wants me to consider these rent-receipts, and very rightly too, with the letter dated February 6, 1959, exhibit 8, over the signatures of the two petitioners before me, to the address of the landlords opposite party. By this letter they tell the landlords that their father, Ishwar Pandey, "died a few years ago leaving us (Basanta and Kanai) as his heirs". So, mutation of their two names in the sherasta of the landlords is prayed for; is prayed for too the issue of dakhilas (rent-receipts) in their joint names. That is why the dakhilas did issue so from April 2, 1959, some ten years after their father's death, as they say. Ergo, without more, the conclusion appears to be ineluctable that the two petitioners before me are the only two recorded tenants in the books of the landlords, and on their own prayer too. Who else will the landlords, therefore, sue except these two recorded tenants? Who else will they serve their notice of ejectment upon except upon just these two tenants? So, it very much looks that the two petitioners have thrown a garrotter round their necks by having written the letter they did on February 6, 1959, the more so, because of the following admitted facts.

One, Kanai, the 3rd witness for the opposite party before the Thika Controller, himself an opposite party and now one of the

two petitioners before me, admits to have signed that letter, exhibit 8.

Two, he admits too having waited on the landlords presumably along with his brother Basanta, the other petitioner before me.

Three, such evidence in chief apart,—he admits on cross-examination:—

"Myself and my brother (Basanta) are tenants in respect of the suit property"—demonstrating, so to say, that truth has inadvertently come out from his mouth. Such illuminating evidence defies the explanation sought to be put upon it, that it does not negate Biswanath having been a tenant too. Why not say so then, on such a vital matter raised by you, and why say that you two are the two tenants?

Four, Biswanath's year of birth is put forward as 1944 by Biswanath himself, the 4th witness of the thika tenants, whereas the year of death of Ishwar Pandey is said to be 1949—vide the cross-examination of Basanta, the second witness for the thika tenants, and himself a thika tenant. Thus, Biswanath was born some five years ahead of Ishwar's death. Still on February 6, 1959, ten years after Ishwar's death and some fifteen years after Biswanath's birth, his father and uncle, Basanta and Kanai, respectively, wrote to the landlords that they were the only heirs of Ishwar and that their names might be mutated. I, therefore, said, at the risk of repetition, without more, there is no escape from the conclusion that the two petitioners before me are the two thika tenants. Biswanath is not one such. At all events, there is, in the conclusion come to by the Appellate Tribunal on the

foot of material he had had put before him, no error apparent on the face of the record, or the like, which alone can give me jurisdiction to interfere with the order complained of, let alone the question whether or not I should act at all in the exercise of my jurisdiction, even if there is such an error. Sure enough, Article 227 does not convert this Court into a Court of appeal, permitting substitution of its own judgment, on fact or law, for that of the subordinate tribunals. I see no grave dereliction of duty nor any flagrant abuse of the fundamental principles of law, resulting in the miscarriage of justice. Where then is my power to interfere?

9. But, Mr. Ranjit Banerjee contends, there is a little more which tilts the conclusion in favour of the petitioning thika tenants. Does not a thika tenant include, by the very definition in Sec. 2, Clause 5, of the Calcutta Thika Tenancy Act, 1949, asks Mr. Banerjee, his successors-in-interest? It does. So what? The mode of devolution of this property, under the Mitakshara Law, applicable here, is, therefore, by survivorship, concludes Mr. Banerjee, with Biswanath (the grandson) as an heir of Ishwar upon his death in 1949. To that the answer is: the rule of survivorship applies to joint family property, which the thika tenancy here is not. It was the separate property held in absolute severalty by the last owner, namely, Ishwar. Therefore, the rule of succession, not the rule of survivorship, governs the devolution of such property. Hence, Basanta and Kanai are the only two heirs of Ishwar, as they stated truly enough in their letter of February 6, 1959: Exhibit 8. Biswanath, whose father is alive, is not one. See Article 24, p. 83, Mulla's Hindu Law, 13th Edn. So I hold, rejecting Mr. Banerjee's contention.

10. Now remains the question of Biswanath (assuming him to be an heir) going unrepresented in the list, or to go a little more, not having been served with the notice of ejectment. That Basanta is the karta of the family in his own admission, on cross-examination. True it is that the landlords' petition before the Thika Controller does not state in express terms that he is being proceeded against as karta. What though that is so? The fact remains that he is the karta. On March 19, 1962, when the lis was instituted, Biswanath was either a minor or had just ceased to be of nonage. If a minor, who would act more in his interest in the lis than his father Basanta? If just a major, his consent is plain to be seen. He does not say in his evidence that his father's interest is inimical to his. He says instead:

"I live with my father. My father is the karta of the family. I have same interest with my father in the suit property." On such consideration too, non-joinder of Biswanath in the notice of ejectment and in the lis also cannot stand between the landlord's opposite party and suc-

cess they have earned so far. To sue the karta, in the circumstances, is to sue all members of the family. First and last, this is a singularly unfit matter for interference under Article 227 of the Constitution.

11. In the result, the rule fails and do stand discharged.
No costs.

TVN/D.V.C.

Petition dismissed.

AIR 1969 CALCUTTA 363 (V 56 C 61)

A. N. RAY AND S. K. MUKHERJEA, JJ.

Jagannath Gupta and Co. Private Ltd., Appellant v. Mulchand Gupta, Respondent.

A.F.O.O. No. 96 of 1968, D/-26-7-1968, from judgment and order of Datta, J. D/-23-4-1968.

(A) Companies Act (1956), S. 483 — Order made in matter of winding up in order to be appealable under Sec. 483 does not have to satisfy test of judgment within meaning of CL 15 of Letters Patent — Any order made in winding up is appealable under S. 483 unless it is merely procedural order not affecting rights of parties — Held, order refusing stay of winding up is order in matter of winding up and is appealable: (1966) 70 Cal WN 516, held, not good law in view of AIR 1965 SC 507; Case-law Ref. — (Letters Patent (Cal.), CL 15).

(Paras 19, 40, 41)

(B) Companies Act (1956), S. 433 — Winding up on just and equitable grounds — Held, on facts, that respondent's application for winding up was not motivated by desire to do justice to company or to see that justice was done to shareholders but for private reasons, that is, to injure directors for acts of omission and commission in which respondent himself participated or acquiesced — That, in the circumstances respondent should not be permitted to proceed with the hearing of the application and stay of winding up must be granted: Order of Datta, J., D/-23-4-1968 (Cal.), Reversed.

(Paras. 24, 26, 34, 43)

(C) Companies Act (1956), S. 433 — Order for winding up must be confined to grounds set out in petition — Allegations and circumstances on date of petition should alone be looked into — On summons taken out by company for stay of winding up proceedings commenced at instance of respondent, the Judge being satisfied that petition was not made bona fide, was inclined to grant stay but ultimately refused stay on ground that company had suppressed fact of sale of certain property after winding up petition was presented — Held, stay should have been granted — Fact of suppression of alleged sale should not have weighed with the Judge, because it was beyond scope of petition and sale was a disputed transaction (Per Ray, J.).

(Paras 28, 33)

(D) Companies Act (1956), Ss. 235, 433 — Where remedy of investigation has been chosen, winding up should not be allowed to be pursued. (Para 33)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 772 (V 55) = 1968-1 Com LJ 275, Seth Mohan Lal v. Gram Chamber Ltd., Muzaf-farnagar 33
- (1968) 1968-1 Com LJ 301 = 72 Cal WN 117, Mica Export Promo-tion Council v. G. C. L. Joneja and Sons 29
- (1963) AIR 1968 Mad 1 (V 55) = ILR (1967) 3 Mad 227 (FB), Palaniappa Chettiar v. Krishna-murthy 17
- (1968) AIR 1968 Mad 374 (V 55) = 38 Com Cas 337, Nadar Press Ltd. v. N. P. S. N. Ramiah Nadar 83
- (1968) AIR 1968 Pat 280 (V 45) = ILR 46 Pat 1292, D. C. Mehta v. Lakshmpat Singhania 87
- (1967) AIR 1967 Cal 159 (V 54) = 70 Cal WN 472, Ashoka Market-ing Ltd. v. Union of India 81
- (1966) AIR 1966 SC 1707 (V 53) = (1966) 2 SCJ 128, Hannagar Sugar Mills Co. Ltd., Bombay v. M. W. Pradhan 67
- (1966) AIR 1966 Cal 151 (V 53) = 70 Cal WN 280, New Central Jute Mills Co. Ltd. v. Deputy Secre-tary, Ministry of Finance 81
- (1966) AIR 1966 Cal 319 (V 53) = 69 Cal WN 767, Royal Nepal Air-lines Corporation v. Manorama Mehar Singh 17
- (1966) 70 Cal WN 518 = (1966) 36 Com Cas 485, John Herbert & Co Pvt. Ltd. v. Pranay Kumar Dutta 15, 17, 31, 40
- (1965) AIR 1965 SC 507 (V 52) = 1964-1 SCR 717, Shankarlal Agar-wala v. Shankar Lal Poddar 16, 17, 18, 19, 36, 37, 39, 40
- (1960) AIR 1960 Cal 582 (V 47) = 64 Cal WN 861, Mohammed Felu-meah v. S. Mondal 17
- (1959) AIR 1959 Bom 386 (V 46) = ILR (1959) Bom 295, Western India Theatres Ltd. v. Ishwar-bhai Somabhai 87
- (1957) AIR 1957 Cal 727 (V 44) = 61 Cal WN 559, Shorab Mer-wanji Modi v. Mansata Film Distri-butors 17
- (1956) AIR 1956 SC 213 (V 43) = 1955-2 SCR 1066, Rajahmundry Electric Supply Corporation Ltd. v. Nageshwara Rao 80
- (1956) AIR 1956 Cal 630 (V 43) = 60 Cal WN 840, M. B. Sirkar and Sons v. Powell and Co. 17
- (1955) AIR 1955 Bom 355 (V 52) = ILR (1955) Bom 550, Bachhara Factory Ltd. v. Hurjee Mills Ltd. 82

- (1953) AIR 1953 SC 198 (V 40) = 1953 SCR 1159, Ram Ashrumati Debi v. Rupendra Deb 17
- (1952) 56 Cal WN 29, In re, Bharat Vegetable Products Ltd. 32
- (1928) AIR 1928 Cal 295 (V 15) = ILR 55 Cal 262, Madan Gopal Daga v. Sachindra Nath Sen 40
- (1917) 1917-2 Ch 71 = 86 LJCh 424, Moody v. Cox and Hatt 27
- (1917) 1917-1 KB 486 = 86 LJBK 257, R. v. Kensington Income-tax Commrs; Ex parte Princes Edmund de Potignac 22
- (1878) 5 Ind App 116 = ILR 3 Cal 806 (PC), Dorab Ally Khan v. Abdool Azeez 29
- (1883) 24 Ch D 259 = 52 LJ Ch 934, In re, Chapel House Colliery Co. 33
- (1872) 8 Beng LR 433 = 17 Suth WR 364, Justices of the Peace for Calcutta v. Oriental Gas Co. 40
- (1850) 42 ER 89 = 2 Mac & C 231, Dalglish v. Jarvie 21
- A. C. Mitra, S. C. Sen and R. C. Nag, for Appellant; B. Das, S. B. Mukherji and N. K. Das, for Respondent.
- RAY J: This appeal is from the judgment and order of Datta, J., dated 23rd April 1968.
2. The order was made on the sum-mons dated 4th September 1967 taken out by Jagannath Gupta and Co. Private Ltd. inter alia for the orders first, that the respon-dent Mulchand Gupta the petitioner in Com-pany Petition No. 158 be restrained from taking by himself his servant and agents or otherwise any further proceeding upon the said petition whether by advertising the same or otherwise, secondly, that the said petition be removed from the file of the proceedings and thirdly, for payment of costs.
3. In support of the summons there is an affidavit of Bidya Bhusan Gupta affirma-ed on 4th September 1967.
4. Mulchand Gupta who preferred the Company Petition No. 158 of 1967 filed an affidavit in opposition affirmed on 13th Nov-ember 1967. Bidya Bhusan Gupta filed an affidavit in reply affirmed on 20th Nov-ember 1967. There are further affidavits of Mulchand Gupta affirmed on 27th March 1968 and of Bidya Bhusan Gupta affirmed on 20th April 1968.
5. Bidya Bhusan Gupta stated in his affi-davit in support of the summons that the company from its inception carried on busi-ness in manganese and iron ore and broker-age in jute, gunny and hessian and that the company still continues to carry on the busi-ness. The further allegations in the said affidavit are that the total bank balance to the credit of the company's account as on 16th August 1967 is about Rs. 1,30,000. The company has been suffering some loss in the business of manganese ore on ac-count of restriction by the Government on the export of ore and general trade depres-

sion. The capital of the company has not been exhausted. The assets of the company and the investments are worth Rupees 8,76,432 and are shown separately in Annexure C to the said affidavit.

6. In the said affidavit the other allegations made by Bidya Bhusan Gupta are that the respondent Mulchand Gupta until 30th April 1966 had been in the employment of the company as an officer at a salary of Rs. 700 per month when he voluntarily left and yet between the months of July 1966 and March 1967 he made claims against the company for his salary for the months of May to August 1966. It is also alleged in the said affidavit that Mulchand Gupta by a letter dated 8th October 1966 claimed partition inter alia of the properties at Ranchi Garden House, Bhaironpur Agricultural land properties and Guuraoro ancestral house and land belonging to the estate of the deceased Jagannath Gupta.

7. It is also alleged in the said affidavit that the company had been holding its annual general meeting and laying its duly audited accounts before the meeting and notices were served on all the members. The respondent, it is alleged, all throughout had notice of the affairs of the company and never raised any objection.

8. It is further alleged in the said affidavit that on or about 9th August 1966 the respondent Mulchand Gupta commenced a proceeding before the Regional Director, Company Affairs, Calcutta, against the company and its directors alleging that the company did not hold meetings and that no notice of general meeting had been received and that the company did not pay dividends and that the company had been continuously losing and dissipating the shareholders' assets and that there was no register of shares and shares were transferred without transfer deed, that address of shareholders and directors was not entered, that the directors did not send profit and loss account and balance sheets, that the directors did not give any information about the activity of the company and that all the properties of the company had been sold at a considerable loss and Vijoy Kumar Saraf alias Gupta, aged 16 years, was admitted as a director on 4th September 1962, that he was not qualified to hold any shares of the company, and finally that the director submitted a fabricated report of the company's stock to the Bank of India and the policy of the directors was going against the shareholders.

9. On 21-7-1967 Mulchand Gupta filed the Company Petition No. 158 and it was admitted on 1st August 1967. It is alleged that the petition for winding up is not presented bona fide but is intended to bring pressure on the company and is an abuse of process of Court. It is also alleged that except the respondent's group (Mulchand Gupta) all other shareholders are satisfied that the winding up of the company will

be injurious to the interest of the company. It is also alleged that the winding up of the company will gravely embarrass the directors in resisting proceedings before the Company Law Board and that charges before the Board are identical.

10. Mulchand Gupta in his affidavit in opposition alleged that the company's immovable properties except premises No. 8, Murlidhar Sen Lane, Calcutta-7, had been sold and/or transferred. One of the major disputes centres on the allegation in the affidavit of Bidya Bhusan Gupta that Jagannath Gupta who held 495 shares bequeathed 125 shares to Padam Chand Gupta, 250 shares to Bidya Bhusan Gupta, 65 shares to Gopal Krishna Gupta and 55 shares to Debi Prosad Gupta. Mulchand Gupta in his affidavit alleged that though the shares were alleged to have been transferred by Jagannath Gupta in 1949, the same was not recorded till 1952. Mulchand Gupta alleged that the proceedings were false and colourable transactions and intended to deprive Mulchand Gupta of his right, title and interest in the said shares. Mulchand Gupta in his affidavit alleged that the brokerage business was speculative and that the company was practically defunct and the company was in a moribund condition. Mulchand Gupta further denied that the assets were worth Rs. 8,76,432 as alleged. With regard to the properties, Mulchand Gupta alleged that Bhaironpur Agricultural land belonging to the company was transferred to Mulchand Gupta's son Gopal Krishna although no such transfer in fact took place and thereafter the property was acquired by the State of Punjab and the compensation moneys had not been credited in the books of the company. With regard to the Guuraoro ancestral house, Mulchand Gupta alleged that the same was shown to have been transferred to his son on or about 24th March 1958, but, in fact, no such transfer took place and the property still remains registered in the name of his son Gopal Krishna Gupta and that the benefit of the property was not enjoyed by the company but by Bidya Bhusan Gupta and members of his family.

11. The learned Judge was pleased to hold that on the facts and circumstances of this case the winding up application should be stayed but was eventually pleased not to stay the winding up application because a certain event was brought to the notice of the learned Judge while the judgment was under consideration. The fact which weighed with the learned Judge in refusing the stay was that one of the properties of the company, namely, the Guuraoro building and land which is No. 18 in the schedule of properties to the memorandum and articles of association was sold by the company and the fact of such sale was suppressed by Bidya Bhusan Gupta while the application for stay was heard. The application for stay was filed in the month of September

ber 1967 and the application was heard by the learned Judge on 30th January, 31st January and 1st February 1968 and the judgment was reserved. Mulchand Gupta affirmed an affidavit on 27th March 1968 and in that affidavit alleged that in the petition for winding up it was alleged that all properties except item No. 15 described as 8, Murlidhar Sane Lane, Calcutta, had been sold or transferred. Mulchand Gupta alleged that in the application for injunction made by Bidya Bhusan Gupta, the latter stated that items 1 to 14 in the Schedule A to the memorandum and articles of association had been sold and item No. 17 had been acquired by the Government of Punjab and that the company was still the owner of the other properties. Mulchand Gupta in the said affidavit affirmed on 27th March 1968 alleged that item No. 16 in Schedule A namely, the Ranchu property, was conveyed in the name of the wife of Bidya Bhusan Gupta and that item No. 17 in the said Schedule A being the Bhaironpur property, had been appropriated to have been transferred to Mulchand Gupta's son Gopal Krishna Gupta although no such transfer had taken place and item No. 18, namely, Guaraoro property had also been shown to have been transferred to Mulchand Gupta's son Gopal Krishna Gupta although no such transfer had taken place. In the affidavit in reply affirmed by Bidya Bhusan Gupta affirmed on 25th November 1967, on the Judge's summons dated 4th September 1967 Bidya Bhusan Gupta alleged that Bhaironpur and Guaraoro properties could not be delivered to the purchasers and the conveyances in respect thereof were treated as cancelled and further that Bhaironpur property was eventually acquired by the Government of Punjab. Mulchand Gupta in paragraph 7 of his affidavit affirmed on 27th March 1968 said that he made enquiries during the pendency of the winding up petition and before the application for injunction was made and came to know that Bidya Bhusan Gupta acting on behalf of the company had transferred the said property to Vijay Kumar Gupta alleged to be the adopted son of late Madhav Prasad Gupta and the natural son of Bidya Bhusan Gupta. In paragraph 8 of the said affidavit affirmed on 27th March 1968, Mulchand Gupta alleged that he came to know of the transfer of Guaraoro property on 1st March 1968 and obtained a certified copy of the conveyance on 12th August 1967 and further alleged that the transfer was a false and colourable transaction.

12. Bidya Bhusan Gupta affirmed an affidavit on 20th April 1968 in answer to Mulchand Gupta's affidavit. In paragraph 6 of the said affidavit, he alleged that the appropriate deed of conveyance dated 12th August 1967 had been retained by the company and was never acted upon and the property was still dealt with by the company and the company is in possession and enjoyment thereof.

13. On these affidavits, the learned Judge was pleased to hold that if it had been brought out in the first instance, it might have materially affected the position in the matter of granting stay. The main consideration of the learned Judge was that most of the properties were sold between the years 1949 and 1960 and prima facie this might not have been the subject-matter of winding up but the transfer which was effected after the presentation of the winding up weighed with the learned Judge and, therefore, the learned Judge felt disinclined to grant a discretionary order of stay of winding up.

14. There are two questions which call for determination. First, whether an appeal lies. Secondly, whether there should be a stay of the winding up petition.

15. Counsel on behalf of the respondent contended that an appeal was incompetent for three reasons: First, that the order is made in the exercise of inherent power of the Court and, therefore, it is not appealable. Secondly, that the order is not a judgment within the meaning of the word in Clause 15 of the Letters Patent. Thirdly, Section 483 of the Companies Act cannot be invoked in the present case because there is yet no winding up. Section 483 was construed by counsel for the respondent to be attracted only where a winding up order had been made. Counsel for the respondent relied on the Bench decision in John Herbert and Co. Private Ltd. v. Pranay Kumar Dutta, reported in (1966) 70 Cal WN 516. That was a decision on an appeal from an order refusing to stay proceedings on a Company Petition No. 22 of 1965. It was held that in rejecting such an application, the Court merely decided that there was a prima facie case for enquiry and it could not then and did not in fact adjudicate upon the rights of the parties and therefore it was not a judgment under Clause 15 of the Letters Patent.

16. Counsel for the appellant, on the other hand, contended first that the order was not in exercise of inherent power but that the order was made in the matter of winding up. Secondly, it was said that the order was a judgment within the meaning of the word in Clause 15 of the Letters Patent. Thirdly, it was said that it was an order in the matter of winding up under Section 483 of the Companies Act and, therefore, an appeal was competent. Counsel for the appellant relied on the decision of the Supreme Court in Shankarlal Agarwala v. Shankarlal Poddar, reported in AIR 1965 SC 507.

17. It must be stated at the outset that in the Bench decision in John Herbert Company's case, (1966) 70 Cal WN 516, there is no reference to the decision of the Supreme Court in AIR 1965 SC 507. The Bench decision proceeded on a consideration of the question as to whether an order refusing stay is a judgment within the meaning of the word under Clause 15 of

the Letters Patent. Counsel for the appellant relied on the decision of the Supreme Court in Rani Ashrumati's case, reported in AIR 1953 SC 198 and Bench decisions of this Court in Shorab Merwanji Modi v. Mansata Film Distributors, reported in AIR 1957 Cal 727, Royal Nepal Airline case, reported in AIR 1966 Cal 319, in the case of M. B. Sirkar and Sons v. Powell and Co., reported in AIR 1956 Cal 630, another Bench decision in the case of Mohammed Felumeah v. S. Mondal, reported in AIR 1960 Cal 582 and a Bench decision of the Madras High Court reported in AIR 1968 Mad 1 (FB) in support of the proposition that a decision refusing stay would be a judgment.

18. It is necessary to keep in the forefront Section 483 of the Companies Act which enacts that appeals from any order made or decision given in the matter of the winding up of a company by the Court shall lie to the same Court to which and the same manner in which and subject to the same condition under which appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction. In Shankarlal Aggarwala's case, AIR 1965 SC 507, the question for consideration was the correctness and legality of an order of a Bench decision of this Court refusing to confirm a sale by the liquidators of the assets of a company which was being wound up. Counsel for the respondent laid emphasis on the feature that the decision of the Supreme Court was confined to a case of a company which had been wound up. I am unable to accept that feature as either the ratio of the decision or as having any logic or principle in controlling the meaning of Section 483 of the Companies Act. The reasons are twofold: First, the section itself refers to any order made or decision given. Secondly, orders made or decisions given are to be in the matter of the winding up of a company. To accede to the contention of the counsel for the respondent that only after winding up is made, an order made or a decision given in winding up will be appealable is to restrict the language of the section.

19. The Supreme Court in Shankarlal Aggarwala's case, AIR 1965 SC 507, referred to the views of this Court as also the views of the Bombay High Court on orders or decisions under Section 202 of the 1913 Companies Act. Section 202 was in the same language as Section 483 of the Companies Act, 1956. With regard to the meaning of the expression, order or decision used in Section 202 of the 1913 Companies Act, the Supreme Court accepted the Bombay view to be correct, namely, that an order or decision in the matter of winding up would not be merely procedural in character but that it would be an order or decision to affect the rights and liabilities of the parties. The Supreme Court fur-

ther observed that the right of appeal was conferred by the first limb of Section 202. The first limb of Section 483 of the 1956 Companies Act is the same as the first limb of Section 202 of 1913 Companies Act. The first limb of the section states that appeals from order made or decision given in the matter of the winding up of a company by the Court shall lie to the same Court. Therefore, the Supreme Court decision is an authority for the proposition that any order made or decision given in the matter of winding up of a company is appealable. After the decision of the Supreme Court which is the law of the land the Bench decision of this Court will not be of any avail to the respondent to contend that appeal from an order of stay of the matter of winding up does not lie. The Supreme Court decision further held that the second limb of Section 202 of the 1913 Act which was the same as the second limb of Section 483 of the 1956 Companies Act refers to the manner and the conditions subject to which the appeals may be had and the second limb must be construed as merely regulating the procedure to be followed in the presentation of the appeal and of hearing them, the period of limitation within which the appeal is to be presented and the forum to which appeal would lie, and not as restricting or impairing the substantive right of appeal. Therefore, the Supreme Court concluded that on the construction of Section 202 of the Companies Act occasion did not arise to examine the meaning of the expression judgment in the Letters Patent. In the present case the order refusing stay of winding up of a company is an order made or decision given in the matter of winding up of a company. I am, therefore, of opinion that the appeal in the present case is competent and the decision of the Supreme Court settles that question.

20. In order to appreciate the controversies as to whether there should be a stay or not it is necessary to refer to three broad features in the present case. First, that the company is really a family concern which was started by Jagannath Gupta. Jagannath Gupta had four sons: Bidya Bhusan, Padam Chand, Mulchand and Bim Sen. Bidya Bhusan had a son Madhav Prasad who died in 1945 and a daughter Bimala who was married to Uma Shankar Sharaf. There was a son by that marriage and the name of the son was Vijay Kumar Sharaf. Vijay Kumar Sharaf was adopted in the month of May 1967 by the widow of Madhav Prasad Gupta. Mulchand Gupta has two sons: Gopal Krishna and Indrajit. Bhim Sengupta had two sons: Debi Prasad and S. Shukla. The second feature is about the distribution of shares in this company. The capital of the company is Rs. 25,00,000 divided into 1000 ordinary shares of Rupees 2,500. The paid up capital is Rs. 25 lakhs. The said 1000 ordinary shares were initially held as follows:

| | |
|-------------------------|------------|
| (a) Jagannath Gupta | 495 Shares |
| (b) Srinath Bhuran Devi | 5 shares |
| (c) Bidya Bhusan Gupta | 125 shares |
| (d) Padam Chand Gupta | 125 shares |
| (e) Mool Chand Gupta | 125 shares |
| (f) Bhim Sen Gupta | 120 shares |
| (g) Krishna Devi | 5 shares |

The first directors of the company were Jagannath Gupta, Padam Chand Gupta, Bidya Bhusan Gupta. Jagannath Gupta while alive at a meeting of the Board of Directors held on 6 September 1949 passed a resolution whereby he nominated his successors to his 495 shares or bequeathed or transferred his 495 shares in the event of his death and 125 shares were given to Padam Chand Gupta, 250 shares to Bidya Bhusan Gupta, 65 to Gopal Krishna Gupta son of Mulchand and 55 shares to Debi Prosad Gupta son of Bhim Sen Gupta. The third distinctive feature in the present case is that the company was formed with 19 properties specified in Schedule A to the Memorandum and Articles of Association.

21. The learned Judge referred to the three features in the present case and as to whether the company being a family concern the principle of dissolution of partnership should apply. Secondly, whether the allegations of sale of properties and allegations as to distribution of shares should find place in winding up. The learned Judge was also pleased to observe that in view of the fact that most of the properties had been sold between the years 1949 and 1960 the petition for winding up suffered from the vice of delay. The learned Judge was pleased to hold that if the shareholders had any grievance with regard to loss of properties there was nothing to prevent the shareholders from recovering the properties alleged to have been lost. The learned Judge was also pleased to hold that the reference to the Regional Director Company Affairs about the affairs of the company was also to be taken into consideration.

22. Counsel for the respondent laid emphasis on the suppression of fact by Bidya Bhusan Gupta as to sale of Guuraoro properties. It was stated that the appellant invoked the remedy of injunction which was an equitable relief and the utmost candour was expected in the present case. Reliance was placed in support of that proposition on *Kerr on Injunction*, 6th Edition, page 323 and the decisions in *Dalghish v Jarvie*, reported in (1850) 42 ER 89 and the case of *Princess Edmond de Polignac* reported in 1917-1 KB 466 and it was contended that if there was possibility of influencing the decision by suppression of fact the exercise of discretion by the trial Court should not be disturbed.

23. Counsel for the appellant on the other hand contended that the petitioner in the winding up petition was guilty of suppression of facts which were grave in nature. First, that Mulchand Gupta was in service of the company and Mulchand Gupta him-

self gave an indemnity to sell one of the properties in the year 1960. Secondly, that Mulchand Gupta suppressed from the Court the fact that there was investigation called for by Mulchand Gupta by referring the matter to the Company Law Board. Thirdly it was said that the application for stay was of a defensive nature and the application for winding up was on the offensive and therefore the principle of suppression would apply with greater rigour in the case of winding up petition than in the case of application for stay.

24. In the exercise of jurisdiction for staying the winding up petition counsel for the respondent contended that the winding up petition was not controverted by affidavits and therefore the allegations had not been gone into and therefore the court should not stay if the facts reveal the necessity of enquiry. Broadly stated, the proposition would be correct that the court would not stay the winding up if the facts disclosed grounds for winding up. In the present case, one of the most important elements is that Mulchand Gupta was in the employment of the company upto the year 1966 and he did not take any step to object about these affairs as long as he was in employment. In the second place, the allegations are that most of the properties were sold between the years 1940 and 1960. When a petitioner waits for seven years to come to a court of law on a charge of winding up the court will decide as to whether the petition is presented for legitimate grievances or is presented in aid of collateral reasons. In the present case, the facts leave no doubt whatsoever that the sale of properties for over two decades ended in the year 1960. When Mulchand Gupta was in the active knowledge of all affairs of the company and was himself a party to indemnify the company in respect of sale of Chittaranjan Avenue property at Calcutta it cannot be denied that the allegations for winding up the company on the ground of sale of properties is not the real and legitimate ground for winding up. Winding up is a remedy which will be open to shareholders or other persons who find that the affairs of the company are being conducted in such a manner that there is either no business done according to the objects or that business is done by persons who are not elected in a specified way or that business is not done in accordance with the principles of commercial administration or commercial probity and efficiency. In the present case Mulchand Gupta was a party to the business and administration of the company for a long time and he participated in the sale of property which sale is now impeached and he gave guarantee to indemnify the company in respect of claims and demands made by Mulchand Gupta himself or by any of the members of his family against the property and the self-same person challenges the transactions as constituting a ground for winding up.

"Marhum ka Bima Tha. Malum Nahin Hai Kitne Rupaya Ka Tha. 30/40 Hazar Rupaya Ka Ho Ga, Thik Yad Nahin Hai" (The deceased was insured. I do not know for how many rupees it was. It might be for Rs. 30/40 thousand; I do not remember exactly). The said statement is very vague. It is not known whether it was life insurance simpliciter or whether he was insured for accidents also whether the insured nominated any particular individual, and whether the amount was duly claimed and collected by any or all of the appellants (applicants). In the absence of any evidence that the 5 applicants other than the wife got advantage of the said insurance amount, we consider that the said amount should not be taken into consideration as against the 5 applicants other than the wife.

46. The deceased was aged about 40 years at the time of his death and was stated to be in good health. It can, therefore, be reasonably assumed that but for the accident he would have lived up to the age of 60 years i.e. for a further period of 20 years. Capitalising the sum of Rs. 125/- per month for 20 years, the pecuniary loss of each of the appellants would be Rs. 30,000/-. The wife Ishwari Devi, got the husband's share in the firm, the capital value of which, according to A. W. 7, was Rs. 73,874/25 np. The advantage thus got by her was much more than the pecuniary loss suffered by her. We, therefore, consider that no further amount of compensation need be paid to the wife, Ishwari Devi. As regards the children left by Sham Lal, the eldest son Jagjit Kumar was aged about 19 years and was studying in Karori Mal College, Delhi, in B.Sc. (Final), the second son, Naresh Kumar, was aged about 18 years and was studying in Shri Ram College of Commerce in 2nd year, the daughter, Asha, was aged about 14 years, and was studying in the Nav Bharat Higher Secondary School. Each of them, as stated above, had suffered a pecuniary loss of Rs. 30,000/- and they have not been shown to have received any pecuniary advantage by reason of the death of their father.

47. Sham Lal also left behind him his father, Mela Ram Malik, who was aged about 67 years, and his mother, Lakshmi Devi, who was aged about 65 years, on the date of the application. In view of their ages, we consider that in computing the pecuniary loss suffered by them, it would meet the ends of justice if the calculation is made for 5 years and not for 20 years in their cases. So calculated, the pecuniary loss suffered by each of them would be Rs. 7500/-.

48. In the case of the daughter, Asha, had the father not died in the accident, he would have got her married in

another 5 or 10 years and she would not have remained unmarried till the father attained the age of 60 years. Since we have taken the entire period of 20 years in computing the pecuniary loss in her case also, we consider that the expenses for her marriage, which the father might have incurred, need not be taken into account, in computing the compensation payable to her.

49. No other head of claim was canvassed before us.

50. However, since the claimants get a lump-sum, and also because of the uncertainties of life, such as the deceased or the claimants might die before the expiry of the normal span of life, a deduction of 10 to 20 per cent from out of the amount of pecuniary loss has usually been made in decisions dealing with cases under the Fatal Accidents Act, vide Krishnamma v. Alice Veigos, 1966 A.C.J. 366 (Mys). In our opinion, the reasons for the said deduction are based on justice and fairplay between the parties, and, therefore, a deduction on that account may be made even in claims made under the Motor Vehicles Act. In the present case, we think that a deduction of 15 % on the ground of lump-sum payment would be fair and just. Making the said deduction of 15% from the sum of Rs. 30,000/- in the case of each of the 3 children of Sham Lal, the amount of compensation payable to each of them would come to Rupees 30,000/- minus Rupees 4,500/- = Rupees 25,500/-. Similarly, making the said deduction of 15% from the sum of Rs. 7,500/- in the case of each of the parents of Sham Lal, the amount of compensation payable to each of them would come to Rs. 7,500/- minus Rupees 1,125/- = Rs. 6,375/-.

51. In this appeal, the eldest son, Jagjit Kumar, who was one of the claimants before the Tribunal, was added as respondent 6 in the appeal. However, as the cause of action for all the claimants was the same, and we are going to make an order which ought to have been made by the Claims Tribunal we are of the opinion that in exercise of our power under Order 41, Rule 33 read with section 151, Code of Civil Procedure, we should make an order for compensation in favour of Jagjit Kumar also in order to do complete justice between the parties.

52. In view of our finding that the accident took place on account of the rashness and negligence on the part of the Driver and the Conductor of the offending bus, they (respondents 4 and 5) as well as the Municipal Corporation of Delhi and the Delhi Transport Undertaking (respondents 2 and 3) are liable for the payment of the compensation to the claimants.

53. Accordingly, we allow the appeal, set aside the judgment and order of the Claims Tribunal, dated 17-3-1966, and order that Jagjit Kumar Malik, Naresh Kumar Malik, Asha Malik be paid Rs. 25 500/- each, and Mela Ram Malik and Smt. Lakshmi Devi, parents of Sham Lal, be paid Rs. 6,375/- each, by respondents 2 to 5. The appellants (applicants) are also entitled to their costs throughout payable by respondents 2 to 5.

KSB Appeal allowed.

AIR 1969 DELHI 194 (V 56 C 32)

(HIMACHAL BENCH, SIMLA)

I D. DUA, C. J.

AND T. V. R. TATACHARI, J.

Raja Sahib of Nalagarh, Petitioner v. The Punjab State and others, Respondents.

Civil Writ Petn. No. 32 of 1967, D/- 18-6-1968

Houses and Rents — Punjab Public Premises and Land (Eviction and Rent Recovery) Act (3 of 1959), Ss. 7 (2) and 5 — Constitution of India, Art. 14 — S. 7 (2) is violative of Art. 14 on the basis of reasoning adopted by AIR 1967 SC 1581 in striking down S. 5 as violative of Art. 14 — Even otherwise, in absence of S. 5, S. 7 (2) cannot operate.

Reasoning given by AIR 1967 SC 1581 in striking down section 5 of the Act as violative of Art. 14 of the Constitution clearly covers S. 7 (2) of the Act also. Rule 7 of Punjab Public Premises and Land (Eviction and Rent Recovery) Rules (1959) does not constitute a sufficiently cogent defence to the challenge based on reasoning of the Supreme Court: C. Ref. No. 1 of 1968 D/- 29-5-1968 (Delhi), Rel. on. (Paras 7 and 10)

Even otherwise, S. 5 and S. 7 (2) seem to be so inextricably inter-connected that once section 5 is removed from the body of the Act, S. 7 (2) would seem to be difficult to operate. S. 7 (2) is dependent on section 5, under which the Collector has to be satisfied that the public premises are in unauthorised occupation of some one. (Para 8)

Assuming, however, that section 7 (2) is not dependent upon section 5, the assessment of damages by Collector under section 7 (2) cannot be upheld as valid. The principles of assessment of damages mentioned in this sub-section are apparently those which are contained in Rule 7. But unfortunately, no procedure has been prescribed for the determination of what is essentially a lis requiring judicial determination. The matters which the Collector is enjoined to take into consideration are undoubtedly broadly

specified, leaving it open to the officer to take into consideration other relevant matters for the purpose of assessing the damages. The conferment of power on an executive officer to determine what is essentially a lis or a civil dispute requiring adjudication in the ordinary Republican Courts seems to be somewhat difficult to uphold. There is no procedure prescribed for the trial of such an important issue nor any cogent ground justifying such a discriminatory provision in the case of those who may be in unauthorised occupation of public premises. (Obiter) (Para 8)

Cases Referred: Chronological Paras (1968) C. Ref. No. 1 of 1968, D/- 29-5-1968 (Delhi) 10

(1967) AIR 1967 SC 1581 (V 54) = (1967) 3 SCR 399, Northern India Caterers Pvt. Ltd. v. State of Punjab 3, 5, 6

(1963) AIR 1963 Punj 290 (V 50) = ILR (1963) 1 Punj 761, Northern India Caterers Pvt. Ltd. v. State of Punjab 3

A. C. Mehta, for Petitioner; S. Malhotra for R. N. Malhotra, for Respondent.

I. D. DUA, C. J.: This petition under Articles 226 and 227 of the Constitution of India praying for quashing the order of Shri B. S. Grewal, Financial Commissioner, Punjab, dated 17-10-1964 has been referred to a larger Bench by my learned brother Tatachari, J. by his order dated 15-11-1967 because it raises the question of the vires of section 7 of the Punjab Public Premises and Land (Eviction & Rent Recovery) Act, 1959 (Act XXXI of 1959) (hereafter called the Act). This section has been challenged on the ground that it is discriminatory and violative of Article 14 of the Constitution.

2. Stating briefly the facts giving rise to this challenge the petitioner Raja Sahib of Nalagarh claims to have been a proprietor of the land in dispute situated in villages Seri and Ghansot, Tehsil Nalagarh, District Ambala, before the formation of the Patiala and East Punjab States Union, when the State of Nalagarh merged into the said Union. Later the Pepsu Government, by means of a notification dated 16-7-1955 relinquished the said land in favour of the villagers. As a result of this relinquishment, the land vested in the Panchayats of the villages concerned. On 14-6-1958, one Smt. Ram Payari complained to the Tehsildar that the land was still retained in possession by the petitioner and that his cattle were grazing in the lands. After certain reports by the various Tehsildars, the Commissioner made an order for the recovery of Rs. 2,517.50 Paise as lease money from the petitioner. It is averred in the writ petition that the order was made by the Commissioner on

12-10-1961 and a review against the same was dismissed on 5-6-1963. The matter was taken by the petitioner on revision to the Financial Commissioner and the Financial Commissioner reduced the demand to Rs. 2,000/- because he felt that a part of the land at least had been utilised by the villagers for grazing their cattle.

3. It is in these circumstances that the present writ petition was presented in this Court. It is unnecessary to go minutely into the contents of the writ petition because in 1965, when it was presented to the Punjab High Court, the view which prevailed in that Court was that the Act was constitutional and not violative of either Article 14 or Article 19 (1) (f) of the Constitution or of the principles of natural justice. This view was taken by a Full Bench of the Punjab High Court in *The Northern India Caterers Private Ltd. v. State of Punjab*, AIR 1963 Punj 290, which decision was reversed on appeal by the Supreme Court in *Northern India Caterers Private Ltd. v. State of Punjab*, AIR 1967 SC 1581. The majority view of the Supreme Court held section 5 of the Act to be discriminatory and violative of Article 14. Because of the reversal of the decision of the Full Bench of the Punjab High Court, in the present writ petition, an application was made for permission to raise the question of the validity of section 7 of the Act and the permission having been granted, the case has been referred to a larger Bench as stated above.

4. It is not contested that the only provision under which the Commissioner could have made this demand is S. 7 of the Act, though we must point out that the order of the Commissioner has not been attached with the writ petition and we have not had the benefit of looking at that order. The learned counsel appearing at the bar have also not attempted to make any point on the ground of absence of that order before us.

5. The learned counsel for the petitioner has principally if not exclusively, relied on the majority view of the Supreme Court in the case of *Northern India Caterers Pvt. Ltd.* AIR 1967 SC 1581 and according to him, the grounds which have invalidated section 5, apply with equal force to S. 7, whereas the learned counsel for the respondent has made a feeble attempt to distinguish section 7 from section 5 by making a reference to Rule 7 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Rules, 1959 which reads as under:

7. Assessment of damages — In assessing damages for unauthorised use and occupation of any public premises, the

Collector shall take into consideration the following matters, namely—

(a) the purpose and the period for which the public premises were in unauthorised occupation;

(b) the nature, size and standard of the accommodation available in such premises;

(c) the rent that would have been realised if the premises had been let on rent for the period of unauthorised occupation to a private person;

(d) any damage done to the premises during the period of unauthorised occupation;

(e) any other matter relevant for the purpose of assessing the damages."

According to him, this rule provides sufficient guidance to the Collector in assessing damages for unauthorised use and occupation of public premises. He has also contended that section 9 of the Act provides for an appeal to the Commissioner from an order made by the Collector under section 7 and these provisions negate any challenge to the assessment of damages under section 7 on the ground of arbitrariness.

6. We may now turn to the majority view of the Supreme Court decision in the case of *Northern India Caterers Pvt. Ltd.*, AIR 1967 SC 1581. Section 5 of the Act, which directly arose for construction, was struck down as violative of Article 14 of the Constitution. It will be helpful at this stage to read section 5:

"5. Eviction of unauthorised persons—

(1) If, after considering the cause if any, shown by any person in pursuance of a notice under section 4 and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the Collector is satisfied that the public premises are in unauthorised occupation, the Collector may, on a date to be fixed for the purpose, make an order of eviction, for reasons to be recorded therein directing that the public premises shall be vacated by all persons who may be in unauthorised occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the public premises or of the estate in which the public premises are situate.

(2) If any person refuses or fails to comply with the order of eviction within thirty days of the date of its publication under sub-section (1), the Collector or any other officer duly authorised by him in this behalf may evict that person from, and take possession of, the public premises and may, for that purpose, use such force as may be necessary.

Provided that in the case of any such person who is not a Government employee and who has been in continuous

occupation of the public premises for a period exceeding three years immediately preceding the date of the publication of the order of eviction the Collector shall not, if an application is made to him in this behalf, evict such person from the public premises within sixty days, of such publication."

Shelat, J who prepared the majority judgment, expressed their view thus

"On these considerations, it may be contended that segregation of tenants of public properties and premises from the tenants of private property is based on justifiable reason and that such segregation has a rational nexus with the object and policy of the Act.

Assuming that such classification is valid, the complaint of the appellants is that section 5 of the Act makes discrimination amongst those in occupation of public properties and premises inter se and that such discrimination has no valid basis nor any reasonable nexus with the object of the Act. Under section 4, if the Collector is of opinion that any person is in unauthorised occupation of any public premises and that he should be evicted, he has to issue a notice calling upon such person to show cause why an order of eviction should not be made. Under section 5, if the Collector is satisfied that the public premises are in unauthorised occupation he has the power to make an order of eviction giving reasons therefor. The contention is that the Government thus has two remedies open to it, one under the ordinary law and the other a drastic and more prejudicial remedy under the present Act. The words 'the Collector may make an order of eviction' in section 5 show that the section confers discretion to adopt the procedure under sections 4 and 5 or not. Section 5 has left it to the discretion of the Collector to make such an order in the case of some of the tenants and not to make such an order against others. Section 5 thus enables the Collector to discriminate against some by exercising his power under S 5 and take proceeding by way of a suit against others, both the remedies being simultaneously available to the Government. There can be no doubt that if the Collector were to proceed under Sections 4 and 5 the remedy is drastic for a mere opinion by him that a person is in unauthorised occupation authorises him to issue a show cause notice and his satisfaction under section 5 is sufficient for him to pass an order of eviction and then to recover under section 7 rent in arrears and damages which he may assess in respect of such premises as arrears of land revenue. Section 5 does not lay down any guiding principle or policy under which the Collector has to decide in which cases he should follow one or the other procedure and, therefore, the choice

is entirely left to his arbitrary will. Consequently, Section 5 by conferring such unguided and absolute discretion manifestly violates the right of equality guaranteed by Art 14

It is well settled that if a law were to provide for differential treatment for amongst persons similarly situated it violates the equality clause of Art 14." The learned Judge, after referring to some of the earlier decisions of the Supreme Court continued.—

"Assuming that persons in occupation of Government properties and premises form a class by themselves as against tenants and occupiers of private owned properties and that such classification is justified on the ground that they require a differential treatment in public interest, those who fall under that classification are entitled to equal treatment among themselves. If the ordinary law of the land and the special law provide two different and alternative procedures, one more prejudicial than the other discrimination must result if it is left to the will of the authority to exercise the more prejudicial against some and not against the rest. A person who is proceeded against under the more drastic procedure is bound to complain as to why the drastic procedure is exercised against him and not against the others, even though those others are similarly circumstanced. The procedure under section 5 is obviously more drastic and prejudicial than the one under the Civil Procedure Code where the litigant can get the benefit of a trial by an ordinary Court dealing with the ordinary law of the land with the right of appeal, revision etc., as against the person who is proceeded against under section 5 of the Act as his case would be disposed of by an executive officer of the Government, whose decision rests on his mere satisfaction, subject no doubt to an appeal but before another executive officer, viz., the Commissioner. There can be no doubt that section 5 confers an additional remedy over and above the remedy by way of suit and that by providing two alternative remedies to the Government and in leaving it to the unguided discretion of the Collector to resort to one or the other and to pick and choose some of those in occupation of public properties and premises for the application of the more drastic procedure under section 5, that section has lent itself open to the charge of discrimination and as being violative of Art. 14. In this view, section 5 must be declared to be void."

7. This reasoning quite clearly covers section 7 (2) as well which reads as under—

" (7) " " "

(2) "Where any person is, or has at any time been, in unauthorised occupa-

tion of any public premises, the Collector may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of the use and occupation of such premises and may, by order, require that person to pay the damages within such time as may be specified in the order:

Provided that no such order shall be made until after the issue of a notice in writing to the person calling upon him to show cause within such time as may be specified in the notice why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same have been considered by the Collector."

Rule 7, to which our attention has been drawn, does not seem to us to constitute a sufficiently cogent defence to the challenge based on the reasoning of the majority view of the Supreme Court. It may be pointed out that it is section 7 (2) of the Act which concerns us in the present case because it is under this sub-section that the Collector is empowered to assess damages on account of use and occupation of public premises by its unauthorised occupants.

8. Even otherwise section 5 and section 7 (2) seem to us to be so inextricably inter-connected that once section 5 is removed from the body of the Act, section 7 (2) would seem to us to be difficult to operate. Indeed it is dependent on section 5, under which the Collector has to be satisfied that the public premises are in unauthorised occupation of someone. Assuming, however, that section 7 (2) is not dependent on section 5 and that the finding on the point of unauthorised occupation of public premises arrived at by a competent Court may constitute the basis for the Collector to proceed to assess the damages on account of the use and occupation of such premises the question still remains whether the assessment by the Collector under this section can be upheld as valid. The principles of assessment of damages mentioned in this sub-section are apparently those which are contained in Rule 7 reproduced earlier. But unfortunately, no procedure has been prescribed for the determination of what is essentially a lis requiring judicial determination. The matters which the Collector is enjoined to take into consideration are undoubtedly broadly specified, leaving it open to the officer to take into consideration other relevant matters for the purpose of assessing the damages. The conferment of power on an executive officer to determine what is essentially a lis or a civil dispute requiring adjudication in the ordinary Republican Courts also seems to be somewhat difficult to uphold. There is no procedure prescribed for the trial of such an important issue and no

cogent ground has been brought to our notice justifying such discriminatory provision in the case of those who may be in unauthorised occupation of public premises.

9. Though on this ground also, the impugned order seems to be vulnerable, we would, however, like to confine our conclusions on the ground that in the absence of Section 5, Section 7 (2) cannot operate, because on the second point, we have not had the privilege of hearing full-fledged arguments.

10. Incidentally, it may be pointed out that a Bench decision of this Court has in C. Ref. 1 of 1968 (Hukam Chand v. S. D. etc.) decided on 29-5-1968 (Delhi) struck down Section 7 (2) of Public Premises (Eviction of Unauthorised Occupants) Act 32 of 1968 as invalid and the reasoning adopted in that case appears to apply to the present case as well. Section 7 (2) of the Act is accordingly struck down as invalid.

11. For the foregoing reasons, we allow this writ petition quash the impugned order, but without any order as to costs.

AKJ/D.V.C.

Petition allowed.

AIR 1969 DELHI 197 (V 56 C 33)

(HIMACHAL BENCH AT SIMLA)

I. D. DUA, C. J.

Har Bhaj and another, Appellants v. Barfi and others, Respondents.

Regular Second Appeal No. 283 of 1967, D/- 10-7-1968.

Civil P. C. (1908), Ss. 96 and 100-101 and O. 20, R. 4 — First appellate court—Duty of — Judgment must clearly suggest that court has applied judicial mind to appreciation of evidence particularly when reversing conclusions of fact.

The Courts of first appeal must always bear in mind that their conclusions of fact are binding on this Court on second appeal and this Court has, in view of section 100, Civil P. C., no jurisdiction to reappraise or re-evaluate the evidence for the purposes of appreciating the correctness or otherwise of conclusions on questions of fact. It is, therefore, incumbent on the Courts of first appeal to pay proper attention to the evidence on the record and to make well-reasoned orders in regard to those conclusions, particularly when they are reversing the conclusions of fact of the first Court.

No general rule can be laid down that in all cases the Courts of first appeal must mention every piece of evidence and reproduce the testimony of every witness with elaborate comment. All that is intended is that the judgments of such

Courts must clearly suggest that they have applied their judicial mind to the appreciation of the evidence and manifestly convey the process of judicial thinking by which they differ from the conclusions of the Courts below. (Case sent back to the first appellate court for redecision in accordance with law. High Court refrained from going through evidence itself, though invited by the parties, on the ground that the lower Appellate Court must be given an opportunity to perform its duties in accordance with law.)

(Paras 2, 3, 4)

R. S. Phul, for Appellants; M. R. Gupta, for Respondents.

JUDGMENT: This Regular Second Appeal (R.S.A. 283 of 1967) was originally registered in the Punjab High Court as R. S. A. No. 656 of 1962. On its transfer to this Court, the present number has been assigned to it.

2. After reading the judgments of the two Courts below, I have no hesitation in setting aside the judgment and decree of the lower Appellate Court and sending it back to the same Court for a fresh decision in accordance with law. The trial Court had on an appraisal of the evidence on the record decided issue No 1 in favour of the plaintiffs and granted a decree in their favour. On appeal, the learned Senior Subordinate Judge with enhanced appellate powers reversed the conclusions of fact without properly discussing the evidence on the record. I may at this stage reproduce a part of the impugned judgment:

"The learned Subordinate Judge has held that the construction and working of the water flour mill was an act of appropriation and he further held that the sanctioning authority was the Raja and he by accepting the rent from the plaintiff-respondents, tacitly sanctioned their holding the land for the purposes of their running a flour mill. The perusal of evidence on the record clearly shows that conditions Nos 3 and 4 for the sanctioning of appropriation are not fulfilled. Raja Sahib, therefore, could not, according to Rule 27, of Forest Rules of Kangra Division, grant the sanction." This is a highly unsatisfactory way of reversing the conclusion of fact on evidence arrived at by the Court of first instance. The Courts of first appeal must always bear in mind that their conclusions of fact are binding on this Court on second appeal and this Court has, in view of section 100 Civil P. C., no jurisdiction to reappraise or re-evaluate the evidence for the purposes of appreciating the correctness or otherwise of conclusions on questions of fact. It is, therefore, incumbent on the Courts of first appeal to pay proper attention to the

evidence on the record and to make well-reasoned orders in regard to those conclusions, particularly when they are reversing the conclusions of fact of the first Court.

3. As a matter of fact, in regard to the first point dealt with by the lower Appellate Court as well, the judgment cannot be described to be entirely satisfactory, though to an extent perhaps, it is slightly more detailed. Even there, I do feel that the learned Senior Subordinate Judge could have more clearly discussed the evidence, both oral and documentary, on the record with a view to pointing out as to how and where he differed from the appreciation of the evidence, both oral and documentary, as appraised by the first Court. I must not be understood to lay down as a general rule that in all cases the Courts of first appeal must mention every piece of evidence and reproduce the testimony of every witness with elaborate comment. All that I intend to lay down is that the judgments of such Courts must clearly suggest that they have applied their judicial mind to the appreciation of the evidence and manifestly convey the process of judicial thinking by which they differ from the conclusions of the Courts below.

4. Without expressing any opinion on the correctness or otherwise of the conclusions of the first Court, I would merely send the case back to the lower Appellate court for a re-decision in accordance with law and in the light of the observations made above. I was of course invited by the learned counsel at the bar to myself go through the evidence and record my independent findings on evidence, but I have refrained from doing so because the lower Appellate Court must be given an opportunity to perform its duties in accordance with law. I refuse to act as a Court of first appeal in cases where the lower Appellate Court is appropriately to perform those functions.

5. Costs in this Court would be costs in the cause. Parties are directed to appear in the lower Appellate Court on 12-8-1968 when another short date would be given for further proceedings.
VGW/D.V.C. Order accordingly.

AIR 1969 DELHI 198 (V 56 C 34)
JAGJIT SINGH, J.

Nawal Kishore Tara Chand, Petitioner v. State, Respondent.

Criminal Revn. No 178-D of 1966 D/- 12-11-1968, against order of Addl. Dist. & S J Delhi, D/- 26-2-1966.

LL/AM/G326/68

(A) Prevention of Food Adulteration Act (1954), S. 10 (7) (as it stood prior to amendment of 1964) — Taking of samples of Chillies powder, by Food Inspector — Another Food Inspector and a peon present at relevant time — Two customers who were also present refusing to become witnesses — Absence of any witnesses from public cannot be regarded as non-compliance with requirements of Section 10 (7). (Para 4)

(B) Prevention of Food Adulteration Act (1954), S. 20 (as it stood prior to amendment by Act 49 of 1964) — N, a Municipal Prosecutor authorised under S. 20 through a resolution of Municipal Corporation to institute and conduct all prosecutions under the Act — Complaint filed by him is valid — General authorisation to prosecute offences under the Act is valid — What the section means is that prosecution must be instituted either by some person duly authorised with delegated power or else by some person not so delegated but with the written consent of an authorised person—Provisions of S. 198-B Cr. P. C. are not in pari materia with those of S. 20 — AIR 1963 Ori 158, Dissented from; AIR 1963 S. C. 1198 Disting.; (1963) (1) Cr. L.J. 708 (Punjab) and (1962) 64 Punj LR 1039, Foll.—Criminal P. C. (1898), S. 198-B — Civil P. C. (1908), Preamble — Interpretation of Statutes. (Para 13)

(C) Prevention of Food Adulteration Rules (1955), Appendix B, R. A. 05.10 — Sample of Chillies powder — Report of Public Analyst — Presence of extraneous colouring matter in the form of coaltar dye — Classification of coaltar dye is not necessary — Mere presence of extraneous colouring matter is sufficient to make chillies (Capsicum) adulterated. (Para 6)

(D) Prevention of Food Adulteration Rules (1955) Rr. 7 and 18 — Specimen impression of seal used to seal the sample was affixed on Form No. VII sent along with sample of Chillies powder — Report of Public Analyst mentioning that he found "the seal" intact and unbroken — Held no objection could be taken that there was nothing in report to show that seal on bottle containing sample tallied with specimen seal impression — Report obviously meant that seal tallied with specimen signature. (Para 7)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 1198 (V 50)=
1963 (2) Cri LJ 194, Gour Chandra Rout v. Public Prosecutor Cuttack 10, 11
(1963) AIR 1963 Orissa 158 (V 50)=
1963 (2) Cri LJ 305, K. G. Anjaneyalu v. Chairman, Puri Municipality 10
(1963) 1963 (1) Cri LJ 708=ILR
(1962) 1 Punj 723, Gurnam Singh Lal Singh v. State 13

(1962) 64 Pun LR 1039 = ILR
(1963) 1 Punj 63, State v. Motiram 13
U. M. Trivedi with S. P. Pandey and D. P. Bajaj, for Petitioner; V. D. Misra, for Respondent.

ORDER: On November 1, 1961, Shri M. L. Zutshi, Food Inspector, went to the shop of Shri Naval Kishore, petitioner, and purchased a quantity of chillies powder for purpose of analysis. On one of the samples of that article of food being sent to the Public Analyst, for analysis, it was found to be adulterated with artificial coaltar dye.

2. Shri Nirmal Kumar Jain, Municipal Prosecutor, filed a complaint against the petitioner. On the petitioner being tried by Shri Jagmohan, Magistrate First Class, Delhi, he was convicted for an offence under section 7 read with section 16 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) and was fined Rs. 400/- only. The appeal filed by him against this conviction and sentence was heard by Shri R. N. Agarwal, Additional Sessions Judge, Delhi and was dismissed on February 26, 1966. Thereafter the present revision was filed in this Court.

3. The learned counsel for the petitioner assailed the judgments of the courts below by contending that no independent witnesses were called by the Food Inspector to be present when samples of chillies-powder were taken, as was required by section 10 (7) of the Act. It was also urged that the report of the Public Analyst did not show the type of coaltar dye with which the sample was found adulterated and that there was nothing to show that the seal on the bottle containing the sample tallied with the specimen seal impression. Another contention raised was that Shri Nirmal Kumar Jain, who filed the complaint, was not an authorised person.

4. On the date when the sample of chillies powder was purchased, S. 10 (7) of the Act had not been amended by the Prevention of Food Adulteration (Amendment) Act, 1964. Sub-section (7), as it then stood, required as far as possible not less than two persons to be called to be present at the time of taking samples of any article of food from any person selling such articles. Besides Shri Zutshi, there were present, Shri Sachdeva, also a Food Inspector, and Om Parkash peon. They fully supported the prosecution version. Shri Zutshi deposed that two customers were present at the shop but they did not agree to become witnesses in the case. There is nothing to show that this part of the statement of Shri Zutshi is in any way incorrect. The two customers who were present at the shop of the petitioner having refused to become witnesses the absence of any witnesses from the

public cannot be regarded as non-compliance with the requirements of S 10 (7) of the Act, as it stood on the relevant date

5. It is true that the report of the Public Analyst did not indicate the type of coal-tar dye which was present in the sample. During the trial, the Public Analyst was also examined as a court witness and stated that the coal-tar dye found in the sample was not classified though its colour was red.

6. It was hardly necessary to classify the coal-tar dye as under rule A. 0510 of the rules in Appendix 'B' to the Prevention of Food Adulteration Rules, 1955, chillies (capsicum) have to be free from extraneous colouring matter in order not to be adulterated. Due to presence of extraneous colouring matter in the form of coal-tar dye the sample was rightly considered to be adulterated.

7. On Form No VII, which was sent along with the sample of chillies-powder, was affixed a specimen impression of the seal used to seal the sample. The report of the Public Analyst mentioned that he found "the seal" intact and unbroken which obviously meant that the seal tallied with the specimen impression. On this ground, therefore, no objection can be validly taken on behalf of the petitioner. Of course it would have been more proper if in the report the fact about the seal on the container of the sample tallying with the specimen impression of the seal had been specifically mentioned.

8. Regarding the contention that the complaint was filed by an unauthorised person, it will be noticed that Shri Nirmal Kumar Jain was authorised under section 20 of the Act, through a resolution of the Municipal Corporation (No 973 dated 10-2-1961). A copy of that resolution, Exhibit PK, is on the record of the trial court. The resolution shows that the recommendations of the Medical Relief and Public Health committee for authorising Shri Nirmal Kumar Jain under section 20 of the Act, to institute and conduct all prosecutions arising under the Act, were approved.

9. According to the learned counsel for the petitioner, there could be no general authorisation by the local authority prior to the amendment of S. 20 of the Act by section 11 of the Prevention of Food Adulteration (Amendment) Act, 1964 (No 49 of 1964). Before amendment, section 20 read as under:

(1) No prosecution for an offence under this Act shall be instituted except by, or with the written consent of the State Government or local authority or a person authorised in this behalf by the State Government or local authority

Provided that a prosecution for an offence under this Act may be instituted by a purchaser referred to in S. 12, if he

produces in court a copy of the report of the public analyst along with the complaint.

(2) No court inferior to that of a Presidency magistrate or a magistrate of the first class shall try any offence under this Act.

10. In *K. G. Anjaneyalu v. Chairman, Puri Municipality*, AIR 1963 Orissa 158, by placing reliance on *Gour Chandra Rout v. Public Prosecutor, Cuttack*, AIR 1963 S.C. 1198, it was held that a general authorisation made long before the date of commission of the alleged offence would not suffice and that the authorisation must be by the authority concerned with respect to a specific complaint.

11. In the case of *Gour Chandra*, AIR 1963 SC 1198 their Lordships of the Supreme Court were considering the essential requisites for initiation of prosecution of the editor, printer and publisher of a Uria daily newspaper for printing matter known to be defamatory of the Governor of Orissa, under S. 501 of the Indian Penal Code, on a complaint filed by a Public Prosecutor on sanction being granted by the Secretary to Government of Orissa as required by section 198-B of the Code of Criminal Procedure. Their Lordships made the following observations:

"It has to be borne in mind that sub-section (3) of section 198-B speaks of a complaint under sub-section (1) and the complaint under sub-section (1) is a specific complaint in writing made by the Public Prosecutor. Therefore, reading the two sub-sections together it would be clear that the authorisation by the Governor is of the sanction with respect to a specific complaint."

12. The relevant provisions of section 198-B of the Code of Criminal Procedure run thus:

"198-B (1) Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code (other than the offence of defamation by spoken words) is alleged to have been committed against the President, or the Vice President, or the Governor or Rajpramukh of a State, or a Minister, or any other public servant employed in connection with the affairs of the Union or of a State, in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence without the accused being committed to it for trial, upon a complaint in writing made by the public prosecutor

(3) No complaint under sub-section (1) shall be made by the Public Prosecutor except with the previous sanction,

(a) in the case of the President or the Vice President or the Governor of a State

of any Secretary to the Government authorised by him in this behalf;

(b) in the case of a Minister of the Central Government or of a State Government, of the Secretary to the Council of Ministers, if any, or of any Secretary to the Government authorised in this behalf by the Government concerned;

(c) in the case of any other public servant employed in connection with the affairs of the Union or of a State of the Government concerned."

13. It seems to me that provisions of section 198-B of the Code of Criminal Procedure are not *pari materia* with those of section 20 of the Act before its amendment by Act 49 of 1964. Section 198 of the Code of Criminal Procedure prohibits a court from taking cognizance of certain offences including those under sections 500 and 501 of the Indian Penal Code except upon complaint made by a person aggrieved by such offence. The normal procedure, therefore, is that it is for the person defamed to himself make a complaint to the Court in order to enable the court to take cognizance of the offence complained of. The provisions of section 198-B, as was held by the Supreme Court, were enacted for the specific purpose of allowing the State to prosecute a person for defamation of a high dignitary of a State or a Public servant, when such defamation is directed against the conduct of such person in the discharge of his public functions. Obviously, therefore, the sanctioning authority is to apply its mind to the facts of the particular case before according sanction.

In *Gurnam Singh Lal Singh v. State*, 1963 (1) Cri LJ 708, (Punjab) the Punjab High Court did not accept the contention that a general authorisation of a Food Inspector to prosecute all offences under the Act was invalid. D. Falshaw, J. (as he then was) observed that what the section meant was that the prosecution must be instituted either by some person duly authorised with delegated power or else by some person not so delegated but with the written consent of an authorised person. The Bench decision in the *State v. Moti Ram*, 1962-64 Punj LR 1039 also proceeded on the same basis. With great respect I am in agreement with the view taken in these cases.

14. In my opinion, the conviction of the petitioner cannot be considered to be unjustified. In the matter of sentence he was leniently dealt with. The revision is accordingly dismissed.

Revision dismissed.

LGC/D.V.C.

AIR 1969 DELHI 201 (V 56 C 35)

FULL BENCH

I. D. DUA, C. J., S. K. KAPUR
AND JAGJIT SINGH, JJ.

Brig. E. T. Sen (Retd.) Petitioner v. Edatata Narayanan and others, Respondents.

Criminal Original Nos. 39 and 40 of 1968, D/- 12-12-1968.

(A) Contempt of Courts Act (1952), Ss. 3, 4 — Contempt of Court by one person — Another person taking entire responsibility for offence and expressing unqualified regrets — Is no ground for absolving former — Applicability of rule to Editor and correspondent of newspaper—(Constitution of India, Art. 215).

If contempt of Court is committed by a person then merely because someone else takes the responsibility for the contempt committed by the former it is no ground in law to absolve him or to decline to take notice of the former's guilt. Hence where the Editor of a newspaper takes the entire responsibility for what has appeared in his newspaper and also expresses unconditional regrets for the contempt of Court, it is not open to him to contend that the correspondent of the newspaper who is actually responsible should not be made a party to the proceedings for contempt. (Para 5)

(B) Constitution of India Arts. 19 (1) (a) and (2), 129, 141, 215, 366 (10), 372 and Sch. 7 List I Entry 77 and List III Entry 14—Fundamental right of freedom of speech and expression — Freedom of press — Extent of — Cannot override law of Contempt of Courts—Law of contempt of Court whether statutory or as developed by decisions of Supreme Court and High Courts is not violative of Art. 19 (1) (a) but is expressly saved by Art. 19 (2) — Expression 'contempt of Court' — Though not statutorily defined is not vague or indefinite—(Contempt of Courts Act (1952), Ss. 1 and 3).

Article 19 of the Constitution guarantees protection to all citizens against infringement of their right of freedom of speech and expression, but this protection excludes the operation of any existing law and is not intended to prevent the State from making any law imposing reasonable restrictions on the exercise of this right, *inter alia*, in relation to contempt of Court. The suggestion, therefore, that freedom of speech and expression, and particularly freedom of the press in India, is designed by the Constitution to override law of contempt of Court, is unacceptable. There is no such alleged right in the public to be apprised of all that happens in open Court or no obligation on the editors and publishers of newspaper to publish all the material which

can override the law of Contempt of Court. Article 215 of the Constitution expressly speaks of the power of High Court as a Court of record to punish for contempt of itself. Similar power is vested in the Supreme Court by virtue of Art. 129. (Para 10)

A challenge to the law of contempt of Court as developed by the decisions of Courts being violative of Article 19 (1) (a) of the Constitution cannot be sustained in face of the express language of Art. 19 (2), which preserves the law relating to contempt of Court. Legislative competence to enact law of contempt of Courts is beyond question in view of List I Entry 77 and List III Entry 14 of Sch. 7 of the Constitution and there is nothing unconstitutional in the judicial determination by the Courts as to the meaning of the expression "Contempt of Court". The argument that this expression being undefined by statute is not open to construction by the High Courts and by the Supreme Court, and that it is too vague and indefinite to be enforceable, is unacceptable. (Para 10)

Law declared by the Supreme Court is binding on all Courts within the territory of India and if the law relating to contempt of Court has been recognised by the Supreme Court, then its constitutionality must be upheld. Case law reviewed. (Para 11)

(C) Contempt of Courts Act (1952), S. 3—Contempt of Court—Interference with course of justice—Likelihood and not actual interference is essential—(Constitution of India, Art. 215).

To constitute contempt of Court it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of offending statements and it is enough if it is likely or it tends in any way to interfere with the proper administration of justice. (Para 12)

(D) Contempt of Courts Act (1952), S. 4—Justification and apology—(Constitution of India, Art. 215).

Apology has to be offered clearly at the earliest opportunity indicative of remorse and contrition which is the essence of the purging of a contempt and it should not be offered in the hope and with the object of avoiding punishment. Apology and justification ill go together. It is therefore wrong on the part of a lawyer to contend that if the Court finds his client's conduct as amounting to contempt of Court, then he is willing to tender an unconditional apology. AIR 1955 SC 19 Disting (Para 15)

(E) Contempt of Courts Act (1952), Sections 3 and 4—Benefit of doubt—Publication of letter in a pending case marked by Court only for identification—Letter neither proved, nor admitted in evidence

nor read out in Court—Held that in view of principle that action for contempt should be taken with caution and deliberation, it was proper to ignore publication of full text of letter in newspaper in peculiar facts of case and benefit of doubt given to accused—(Constitution of India, Art. 215) (Para 17)

(F) Contempt of Courts Act (1952), S. 3—Publication of Court proceedings—When amounts to contempt of Court—Duty of press-reporters and newspapers pointed out—(Constitution of India, Art. 215).

Neither the press reporter nor the publisher of a newspaper can claim an indefeasible right to put his own gloss on the statements in Court by selecting stray passages out of context which may have a tendency to convey to the reader to the prejudice of a party to the proceedings, a sense different from what would appear when the statement is read in its own context. To reproduce stray misleading passages in bold headlines in order to attract the attention of casual readers may serve as an aggravating factor. Similarly, while reproducing the Court proceedings, no words may be added, omitted or substituted if their effect is to be more prejudicial to a party litigant than the actual proceedings. Any deviation in the report from the correct proceedings actually recorded, must, if it offends the law of contempt of Court, render the alleged contemner liable to be proceeded against. (Para 23)

(G) Contempt of Courts Act (1952), Ss. 3 and 4—Complaint for defamation against printer and publisher of newspaper—Accused publishing in their newspaper Court proceedings in such manner as to hamper fair trial of complainant—Accused held were guilty of contempt of Court—Ignorance of law or inability of legal advisers to properly guide their clients though not a mitigating circumstance Court in the circumstances of case gave the contemnors a severe warning—(Constitution of India, Art. 215). (Para 24)

Cases Referred: Chronological Paras

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 (1954) AIR 1954 SC 10 (V 41) = 1953 SCR 1169, Brahma Prakash Sharma v. State of U. P.
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 (1951) 1951 AC 482 = 95 SJ 333, Arthur Reginald Perrers v. King
 (1943) AIR 1943 PC 202 (V 30)= 70 Ind App 216, Debi Prasad Sharma v. King Emperor
 (1930) 1930-2 Ch. 368 = 99 LJ Ch 560, William Thomas Shipping Co., In re
 (1900) 1900-2 QBD 36=69 LJ QB 502, R. v. Gray
 M. C. Chagla with C. L. Sareen, for Petitioner; R. K. Garg, S. C. Agarwal, A. K. Gupta and Sumitra Chakravarty, for Respondents.

INDER DEO DUA, C. J.: These two criminal original applications (Criminal Original Nos. 39 and 40 of 1968) by Brig. E. T. Sen (Retd.) under section 3 of the Contempt of Courts Act read with Article 215 of the Constitution, raising as they do common questions, are being disposed of by one order.

2. Brig. E. T. Sen is a retired Brigadier of the Indian Army, having retired in May, 1967 and is at present the Resident Manager of Messrs Ceat Tyres of India Ltd., New Delhi. He filed a criminal complaint under sections 500, 501 and 502, Indian Penal Code, against D. P. Sinha, the Printer and Publisher of "New Age", an English newspaper published

from New Delhi, for having printed and published a pamphlet "I was a CIA agent in India", alleged to have been written by one John D. Smith, an American, who is stated to have defected to Russia, on the averment that the said pamphlet contained serious libellous and defamatory statements against the complainant. That complaint is pending in the Court of Shri P. S. Bhatnagar, Sub-Divisional Magistrate, Delhi. The two applications before us arise out of what happened during the cross-examination of the complainant by the counsel for the accused, Shri E. Narayanan, respondent No. 1 in CrI O. 39 of 1968, is the Editor and Shri P. Viswanath, respondent No. 2, is the Printer and Publisher and Shri Vidya Rattan, respondent No. 3, is the Correspondent of the "Patriot", which is a local English Daily Newspaper published from New Delhi. According to the Petitioner, respondents Nos. 1 to 3 are siding with D. P. Sinha and doing their best to poison the public opinion against the petitioner. He has referred to the contents of the issues of the "Patriot" dated 13-7-1968, 14-7-1968, 19-5-1968, 8-6-1968, 2-7-1968, 1968, 4-8-1968 and 13-8-1968 in support of the submission and it is averred that from the circumstances narrated in the application, as also from the manner of reporting, it is apparent that there is a persistent one-sided press campaign by the "Patriot" against the cause of the petitioner with a view to poisoning the mind of the general public and thereby hampering the course of justice. The grounds on which this application has been moved read as under:

1. Because the respondents 'carried on a parallel enquiry in a matter which is sub judice and published the result of the said enquiry when those very facts had to be proved by the accused. By doing so, the Court and public at large were prejudiced.

2. Because of the publication of the letter alleged to have emanated from one John D. Smith without the same having been proved in the trial Court either in respect of its authorship or its contents.

3. Because the proceedings were inaccurate and misleading and there was a display of headlines of scaring and sensational character.

4. Because the publications were calculated to prejudice the public mind and interfere with the due course of justice.

5. Because misrepresentation of the proceedings of the Court scandalised it.

6. Because the respondents asserted the establishment of facts as correct when they were disputed in a pending case and had yet to be proved.

7. Because the reporting in the newspaper is one-sided, against the petitioner and in favour of the accused, and

8 Because these publications have seriously prejudiced the petitioner's cause.

3. Turning now to Cr. O. 40 of 1968 in which Shri D. P. Sinha, respondent No 1, is the Printer and Publisher of the "New Age" and Shri Bhupesh Gupta, respondent No 2, the Editor of the said newspaper, it is averred that these respondents, while reporting the Court's proceeding of the criminal complaint under sections 500, 501 and 502, Indian Penal Code, against Shri D. P. Sinha, have been carrying on a calculated and persisted press campaign through the columns of the aforesaid newspaper against the prosecution with a view to poison the mind of the general public so as to hamper a fair trial of the complaint. The composition of the headlines and the nature of display of the reports about the criminal case in question are *maliciously designed* to impress upon the mind of the public that the prosecution case was a weak one and that the prosecution was not likely to succeed in proving the guilt of the accused. The respondents have published material which is not legal evidence in the case and have given such scaring, mischievous and suggestive headlines in block letters that the same are bound to poison the mind of the public, the witnesses for the prosecution and thus to hamper the conduct of a fair and impartial trial. The respondents it is pleaded have gone a step further by publishing the result of an alleged parallel enquiry conducted by the English local daily the "Patriot". The tendency of the reporting has been described:

(a) To prejudice the mind of the general public against the petitioner by giving an impression that he is not likely to succeed in his case.

(b) To deter the witnesses of the petitioner from coming forward to give evidence in his favour.

(c) To scandalise the Court by depriving it of the power of doing that which is the end for which it exists — namely, to administer justice duly and impartially and with reference solely to the facts judicially brought before it, and

(d) To prejudice the public opinion by misstatement of facts and by suppressing the material facts and by emphasising one-sided version against the petitioner's cause and in favour of the accused. The issue of the "New Age" dated 21-7-1968 has been relied upon in support of the allegations of contempt of Court. It has also been alleged that while reporting the Court's proceedings of 12-7-1968, in the issue of the "New Age", full text of the letter marked 'A' was published before this document was proved and before it could be established whether it had actually been written by John D. Smith. According to the petitioner's

avertment, it is not even known as to who Mr. Garg is and the genuineness of the letter has still to be established. Publication of a photostat of a part of this letter and an envelope, according to the petitioner, is designed by the respondents to suggest that the letter was written from Russia by John D. Smith and the envelope was addressed to one P. P. Garg. This publication is by itself pleaded to constitute a gross contempt of Court because a reading thereof is bound to prejudice the mankind at large and hamper the fair trial of the case. Some of the other material contained in the same issue of the "New Age" has also been relied upon in support of the petition. The following headline in the same issue of the "New Age" has been relied upon in support of the charge of contempt of Court:

"Cia Man Smith Paid For Brig Sen's Drinks."

The above headline, according to the petitioner, is an attempt to convey that Mr. Smith to whom the complainant referred, was a "CIA MAN", though there is no evidence on the record that Smith was a Cia Man or that the petitioner had knowledge of his being one. The headline is said to have been designedly given a shape so as to prejudice the mind of the public and the witnesses and thus thwart the course of fair trial. It is added that the following headline displayed in block letters:

"COMPLAINT MADE IN 1961 TO VIJAYALAKSHMI PANDIT".

does not form part of the Court proceedings and is based on an alleged parallel enquiry made by the "Patriot" and published in its issue dated 14-7-1968. This headline is stated to be highly misleading and has a tendency to poison the mind of the general public and the petitioner's witnesses and also to otherwise prejudice the course of fair and impartial trial. Connected with this headline is the following material published in the same issue of the "New Age" on which the petitioner places reliance for his charge:

"A report in the New Delhi Daily PATRIOT on July 14 says:

"Mr. Smith's letter mentioned that he had presented a letter about the illegal activities of the American Intelligence service in India to Mrs Vijayalakshmi Pandit in January, 1961, when she was India's High Commissioner to Britain and that this complaint contained reference to Brig. (then Colonel) Sen.

'Contacted, Mrs. Vijayalakshmi Pandit confirmed the receipt of such a complaint in London in 1961."

It is on the basis of this material that it is averred that there was a parallel enquiry on the part of the "Patriot" and the publication of the result of such an

enquiry both by the "Patriot" and the "New Age" constitutes a gross contempt of Court.

4. Referring to the issue of the "New Age" dated 7-7-1968, in which the Court's proceedings of 1-7-1968 were reported, it is averred that the respondents again displayed scaring headlines and mis-statement and suppression of material facts with a view to prejudice the public opinion and poison the same against the petitioner including publication of scandalous and irrelevant questions asked and disallowed by the Court. This grievance includes the headline in block letters:

"E. T. SEN: JOINED ARMY TO 'EARN MORE MONEY'."

This headline is stated to be entirely out of context and to have been displayed to prejudice and poison the public mind against the petitioner. The grievance extends to the publication of the text of cross-examination, including questions disallowed by the trial Court and this publication is stated to have been inspired by a desire to prejudice the petitioner in the conduct of the prosecution. The relevant portion of the statement of the complainant is reproduced in the application for contempt in the following words:

"I left this job because I felt that Army would suit me best. I also thought that in the Army I will become an officer and earn more money."
The following two questions:

"1. Are you aware that in 1940 the British Army was being used to suppress the Indian National movement? Were you aware that Indians hired by the British rulers in the Indian Army as also the British officers of the Indian Army were used to suppress the national movement of the country?"

2. Did you or did you not have any qualm of conscience that you were likely to be used against the national movement while in the Indian Army?"
stated to have been overruled by the Court were published in the "New Age" dated 7-7-1968 and, according to the petitioner's case, reading of these questions by the general public is bound to leave an impression which is liable to do incalculable harm in poisoning their mind against the petitioner-complainant. The petitioner has attached with his application a copy of his statement in examination-in-chief and cross-examination recorded in the presence of the accused till the date of his filing the present applications in this Court, to support his charge. The publications in the issues of the "New Age" dated 21-7-1968 and 7-7-1968, it is averred, amount generally to one-sided special pleading on the part of the respondents in favour of respondent No. 1 and against the interests of the

petitioner-complainant. The manner of the reporting is also stated to be calculated to poison the mind of the general public and thereby to harm the course of justice.

5. The defence of the respondents may now be seen. In Crl. O. 39 of 1968, respondent No. 1, Shri Edatata Narayanan, Editor of the "Patriot", has in his affidavit dated 21-9-1968 expressed unqualified regrets for any contempt of Court in respect of his acts as Editor of the "Patriot" brought to the notice of this Court. While owning this responsibility he has also taken, without reservations, full responsibility for whatever has appeared in the "Patriot" and has added that consistent with the established traditions in the field of journalism, Editors do not shift responsibility on the correspondents for the material published in their papers and it is suggested that it would have been more appropriate if the correspondent of the "Patriot" had not been impleaded in these proceedings. This suggestion is clearly misconceived and I must point out that if contempt of Court is committed by a person, then merely because someone else takes the responsibility for the contempt committed by the former, it is no ground in law to absolve him or to decline to take notice of the former's guilt. The suggestion made in this affidavit is, in my view, based on a complete misunderstanding and misconception of the law of contempt of Court. This respondent has, in the last paragraph, adopted the averments in the affidavit of Shri Vidya Rattan, respondent No. 3, the correspondent for whose action he has taken the responsibility on himself.

6. Respondent No. 3 has of course begun with the following words in paragraph 3 of his affidavit:

"That I have every respect for Courts of justice and I express unqualified regrets for any contempt of Court in my acts brought before this Court."
But paragraph 4 and the succeeding paragraphs squeeze out the lifeblood of this seeming unqualified apology. Paragraph 4 deserves to be reproduced in order to understand whether the unqualified apology is the outpouring of a penitent heart moved by a genuine feeling of remorse or it is meant to serve as a plea to escape punishment after contesting on the merits the charge of the commission of contempt of Court and failing in the attempt:

"4. That I also say that I had no intention to commit contempt of the Court of Shri P. S. Bhatnagar, S. D. M., Paharganj, Delhi, in publishing the reports referred to in the petition. I bona fide reported the proceedings of the Court and there was nothing to suggest to me that any part of my report would con-

stitute contempt of Court. I submit with respect that no part of my report amounts to contempt of court. I leave it to the Hon'ble Court to decide whether I have acted within the exercise of my rights to report proceedings of Court held in public available to me and in the discharge of my duty to the readers."

Then follow about 10 pages dealing with each allegation in the application for contempt of Court, and indeed it is also pleaded that the petition for contempt of Court has been filed with the object of putting pressure upon the respondents to refrain from giving due publicity to the trial of the petitioner's complaint against Shri D. P. Sinha. It is added that the reports of the Court proceedings (sic) in other newspapers including "Current" and "National Herald".

7. Respondent No 2 Shri P. Vlswnath, Printer and Publisher of the "Patriot", has in his affidavit adopted the averments in the counter-affidavit of Shri Vidya Rattan and has said nothing else on his own behalf separately. It is unnecessary to refer in detail to the rejoinder by Brig E. T. Sen dated 28-9-1968. He has of course laid emphasis on the submission that unqualified regrets are not genuine as the plea in defence amounts to a "rolled-up plea of justification and unqualified regrets" which is not recognised as effective apology in the eye of law.

8. In CrI. O 40 of 1968, the affidavit, without date but attested on 2-9-1968, filed on behalf of Shri Bhupesh Gupta, Editor of the "New Age", respondent No 2, merely purports to adopt the averments made in the counter-affidavit of Shri D. P. Sinha, respondent No 1, the Printer and Publisher of the "New Age". The affidavit of Shri D. P. Sinha, which is also undated, but is sworn on 2-9-1968, begins with paragraphs 3 and 4 which are on lines similar to paragraphs 3 and 4 of the affidavit of Shri Vidya Rattan, respondent No 3 in CrI. O 39 of 1968. Paragraph 22 of this counter-affidavit is also similar to paragraph 20 of Shri Vidya Rattan's affidavit in the connected case. In this counter-affidavit, also an attempt has been made to fully justify the publication of the impugned material.

9. At the bar, on behalf of the respondents, a very serious attempt has been made by reference to some provisions of the Constitution to make out a case of freedom of press which would override the law of contempt which has been described to be indefinite and unprecise. I must confess that it was not possible to find any clear cut argument which was sought to be developed, and indeed, at one stage, Shri R. K. Garg went to the length of submitting that the public

had a right to know as to what was happening in all the proceedings in Courts of law and justice in this realm, and a newspaper which performs its duty of making available to the public verbatim proceedings of the Court, cannot be held guilty of contempt of Court irrespective of the tendency as alleged by the petitioner. The constitutional challenge as developed by Shri R. K. Garg was not easy to appreciate, though considerable time was taken by the learned counsel on this aspect.

10. Article 19 of the Constitution, on which initially an attempt was made to found the defence by the respondents, guarantees protection to all citizens against infringement of their right of freedom of speech and expression, but this protection excludes the operation of any existing law and is not intended to prevent the State from making any law imposing reasonable restrictions on the exercise of this right, inter alia, in relation to contempt of Court. The suggestion, therefore, contained in the lengthy and elaborate arguments addressed at the bar that freedom of speech and expression, and particularly freedom of the press in India, is designed by the Constitution to override law of contempt of Court, is unacceptable. Article 215 of the Constitution expressly speaks of the power of High Court as a Court of record to punish for contempt of itself. Similar power is vested in the Supreme Court by virtue of Article 129. I have considered it appropriate to refer to Article 129 because arguments against the power of the High Courts to punish for their contempt would, on the arguments addressed on this aspect, be equally applicable to the Supreme Court's power to punish for its contempt. Entry No 77 in List I (Union List) of Schedule VII of the Constitution, includes the power of the Parliament to make laws on the subject, inter alia, of contempt of the Supreme Court and Entry No 14 in List III (Concurrent List) of this Schedule empowers both the Parliament and the State Legislature to make laws on contempt of Court excluding contempt of the Supreme Court. Faint attempt was made on behalf of the respondents to address arguments on the basis of Articles 13, 368 (10) and 372 of the Constitution for the purpose of founding a challenge to the law of contempt of Court as developed by the decisions of Courts being violative of Article 19 (1) (a) of the Constitution, but it is unnecessary to deal with this argument in face of the express language of Article 19 (2), which preserves the law relating to contempt of Court. Legislative competence to enact law of contempt of Court is beyond question and there is nothing unconstitutional in the judicial determination by the Courts as

to the meaning of the expression "Contempt of Court". The argument that this expression being undefined by statute is not open to construction by the High Courts and by the Supreme Court, and that it is too vague and indefinite to be enforceable, though ingenious, is unacceptable.

11. Law declared by the Supreme Court is binding on all Courts within the territory of India and if the law relating to contempt of Court has been recognised by the Supreme Court, then its constitutionality must be upheld. As Shri Garg has addressed lengthy arguments with great seriousness on the constitutional challenge, I consider it proper to turn to the decisions of the Supreme Court.

In *re Hira Lal Dixit*, (1955) SCR 677 : (AIR 1954 SC 743) a Bench of five Judges of the Supreme Court dealt with the case of contempt of the Supreme Court. The circumstances which led to contempt proceedings are, that on 14-9-1954, two appeals being *Saghir Ahmad v. State of U. P.* and *Mirza Hasan Agha v. State of U. P.* (AIR 1954 SC 728) appeared for hearing and final disposal on the daily board of the Supreme Court. A number of writ petitions were also fixed for hearing. The two appeals were called for hearing on that day and remained part-heard. The hearing continued on the 15th and 16th September and concluded on the 17th, when the Court took time for considering its decision. A large number of persons, presumably the petitioners in the writ petitions or otherwise interested therein, attended the Court on all those dates because the result of the decision of the appeals was also to conclude the writ petitions. On 15-9-1954, a leaflet printed in Hindi language and characters, consisting of 18 pages, intitled "Hamara Vahan Vibhag" meaning "Our Transport Department", purporting to be written by Hira Lal Dixit and containing a foreword purporting to be written by Sri Krishna Dutt Paliwala with a block photograph of Hira Lal Dixit on the front page, was distributed in the Court premises. This leaflet contained a graphic account of the harassment and indignity said to have been meted out to the writer by the State officers and the then State Minister of Transport in connection with the cancellation and eventual restoration of the licence in respect of a passenger bus. The second paragraph on page 15 of that leaflet contained a passage reproduced in the report which was the subject-matter of contempt proceedings, but it is unnecessary for our purposes to reproduce it here. After referring to *Brahma Prakash Sharma v. State of Uttar Pradesh*, 1953 SCR 1169 : (AIR 1954 SC 10) also a decision by five Judges,

which dealt with the case of scandalising the Court, it was observed as under:

"The present case does not fall within that category, for here there has been no scandalising of the Court itself. The question here is whether the offending passage is of such character and import or made in such circumstances as would tend to hinder or obstruct or interfere with the due course of administration of justice by the Court. To begin with, the leaflet was written by a person who was himself the petitioner in one of the writ petitions which were on the cause list for hearing. The actual timing of the publication of the leaflet is significant. It was circulated at a time when the appeal and the writ petitions including that of the respondent, Hira Lal Dixit, himself were posted on the cause list and the appeals, on the decision of which depended the fate of those numerous petitions, were being actually heard. The place of publication was also not without significance. It was distributed in the Court premises where a very large number of licensees had foregathered. The fact of distribution of the leaflet in the Court premises was denied in the affidavit of this respondent but when a suggestion was made that evidence be recorded on this point the learned counsel appearing for him did not press for it and accepted the position that the leaflet was in fact distributed in the Court premises. In the circumstances, the only other question that remains is as to what was the meaning and purpose of the offending passage in the leaflet."

The Court then went into the contents of the passage and repelled the argument that it was innocuous and only expressed a laudatory sentiment towards the Court and that such flattery could not have the slightest effect on the minds of the Judges of the Supreme Court. The Court negatived the contention that flattery was the sole or even the main object with which this passage was written or with which it was published at the time when the hearing of the appeal was in progress. The Court approved the decision in *Brahma Prakash Sharma's case*, 1953 SCR 1169 : (AIR 1954 SC 10) and observed that it is not necessary that there should in fact be an actual interference with the course of administration of justice and that it is enough if the offending publication is likely or if it tends in any way to interfere with the proper administration of law. According to this judgment, the summary jurisdiction exercised by superior Courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law as is administered in the Court and thereby affording protection to public interest in

the purity of the administration of justice.

In *Pratap Singh v. Gurbaksh Singh*, AIR 1962 SC 1172, the Court approvingly reproduced the following definition of "Contempt of Court" from Oswald's *Contempt of Court*, 3rd Edition, page 6:

"To speak generally, contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation." In this decision, it was again reiterated that the question in such cases is not whether the action in fact interfered but whether it had a tendency to interfere with the due course of justice.

In 1964, in re, Under Art. 143, Constitution of India, AIR 1965 SC 745, as a result of the controversy between the Uttar Pradesh Legislative Assembly and the Allahabad High Court, the President of India made a reference to the Supreme Court for its opinion on the following five questions

1 Whether, on the facts and circumstances of the case, it was competent for the Lucknow Bench of the High Court of Uttar Pradesh, consisting of the Hon'ble Mr. Justice N. U. Beg and the Hon'ble Mr. Justice G. D. Sahgal, to entertain and deal with the petition of Mr. Keshav Singh challenging the legality of the sentence of imprisonment imposed upon him by the Legislative Assembly of Uttar Pradesh for its contempt and for infringement of its privileges and to pass orders releasing Mr. Keshav Singh on bail pending the disposal of his said petition;

(2) Whether, on the facts and circumstances of the case, Mr. Keshav Singh by causing the petition to be presented on his behalf to the High Court of Uttar Pradesh as aforesaid, Mr. B. Solomon, Advocate, by presenting the said petition and the said two Hon'ble Judges by entertaining and dealing with the said petition and ordering the release of Shri Keshav Singh on bail pending disposal of the said petition committed contempt of the Legislative Assembly of Uttar Pradesh;

(3) Whether, on the facts and circumstances of the case, it was competent for the Legislative Assembly of Uttar Pradesh to direct the production of the said two Hon'ble Judges and Mr. B. Solomon, Advocate, before it in custody or to call for their explanation for its contempt;

(4) Whether, on the facts and circumstances of the case, it was competent for the Full Bench of the High Court of Uttar Pradesh to entertain and deal with the petitions of the said two Hon'ble Judges and Mr. B. Solomon, Advocate,

and to pass interim orders restraining the Speaker of the Legislative Assembly of Uttar Pradesh and other respondents to the said petitions from implementing the aforesaid direction of the said Legislative Assembly; and

(5) Whether a Judge of a High Court who entertains or deals with a petition challenging any order or decision of the Legislature imposing any penalty on the petitioner or issuing any process against the petitioner for its contempt or for "infringement of its privileges and immunities or who passes any order on such petition commits contempt of the said Legislature and whether the said Legislature is competent to take proceedings against such a Judge in the exercise and enforcement of its powers, privileges and immunities."

A Bench of seven Judges of the Supreme Court heard elaborate arguments on this reference and had the assistance of a large number of eminent lawyers drawn from almost all the States in India. The question raised related to the powers both of the Legislatures and of the High Courts to punish for their contempt. The illuminating judgment in this case exhaustively reviews the case law both English and Indian on the subject and what emerges from this judgment is that the power of the High Courts and of the Legislatures to punish for their contempt was not questioned by anyone.

12. In *Surendra Mohanty v. State of Orissa*, Criminal Appeal No. 107 of 1956 decided on 23-1-1961 (SC) on appeal by the contemner from his conviction and sentence ordered by the High Court of Orissa for contempt of Court, a Bench of five Judges allowed the appeal on the merits. It, however, observed that the Contempt of Courts Act confers on the High Courts the power to punish for the contempt of inferior Courts and this power being wide and described as arbitrary, deserves to be exercised with circumspection and restraint and only in cases where it is necessary for maintaining the course of justice pure and unaffected. In *Thakur Jugul Kishore Sinha v. The Sitamarhi Central Co-operative Bank Ltd.*, Criminal Appeal No. 18 of 1965 D/- 13-3-1967 : (AIR 1967 SC 1494), the appellant had been convicted by the Patna High Court for contempt of the Court of the Assistant Registrar, Co-operative Societies. On appeal, the main question raised centred round the argument whether the Assistant Registrar was functioning as a Court judicially subordinate to the High Court and this was decided against the appellant. The Court, however, also observed as follows:

"Generally speaking any conduct that tends to bring the authority and administration of the law into disrespect or disregard or to interfere with or preju-

dice party litigants or their witnesses during their litigation amounts to contempt of court: see Oswald on Contempt page 6. In order that courts should be able to dispense justice without fear or favour, affection or ill-will, it is essential that litigants who resort to courts should so conduct themselves as not to bring the authority and the administration of law into disrespect or disregard. Neither should they exceed the limits of fair criticism or use language casting aspersions on the probity of the courts or questioning the bona fides of their judgments. This applies equally to all Judges and all litigants irrespective of the status of the Judge i.e. whether he occupies one of the highest judicial offices in the land or is the presiding officer of a court of very limited jurisdiction. It is in the interests of justice and administration of law that litigants should show the same respect to a court, no matter whether it is highest in the land or whether it is one of inferior jurisdiction only. The Contempt of Courts Act, 1952 does not define 'contempt' or 'courts' and in the interest of justice any conduct of the kind mentioned above towards any person who can be called a 'court' should be amenable to the jurisdiction under the Contempt of Courts Act, 1952."

In *Tukaram G. Gaokar v. R. N. Shukla*, AIR 1968 SC 1050, again power to punish for contempt is recognised. Since the conclusion of the arguments in the case in the hand, a Bench of three Judges of the Supreme Court has on 8-11-1968 given a judgment in *Re. P. C. Sen*, Criminal Appeal No. 119 of 1966 (SC) in which Shah, J. speaking for the Court, has dealt with the matter very exhaustively. Thus observed the learned Judge:

"The law relating to contempt of Court is well settled. Any act done or writing published which is calculated to bring a Court or a Judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the Court, is a contempt of Court: *R. v. Gray*, (1900) 2 Q. B. D. 36 at p. 40. Contempt by speech or writing may be by scandalising the Court itself, or by abusing parties to actions, or by prejudicing mankind in favour or against a party before the cause is heard. It is incumbent upon Courts of Justice to preserve their proceedings from being misrepresented, for prejudicing the minds of the public against persons concerned as parties in causes before the cause is finally heard, has pernicious consequences. Speeches or writings misrepresenting the proceedings of the Court or prejudicing the public for or against a party or involving reflection on parties to a proceeding amount to contempt. To make a speech tending to influence the result of a pending trial, whether civil or cri-

iminal, is a grave contempt. Comments on pending proceedings, if emanating from the parties or their lawyers, are generally a more serious contempt than those coming from independent sources. The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere with the due course of justice. The question is not so much of the intention of the contemner as whether it is calculated to interfere with the administration of justice."

The Court then reproduced the following passage from *Debi Prasad Sharma v. King-Emperor*, 70 Ind App 216 at p. 224:

"... the test applied by the . . . board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law."

The submission that intention of the contemner is the decisive test was negated and reliance in support of the argument of intention on *Saibal Kumar Gupta v. B. K. Sen*, (1961) 3 S. C. R. 460: AIR 1961 SC 633 was held to be unhelpful. The observations of Imam, J. in that judgment were explained and it was held that those observations do not imply that in the absence of intention to interfere with the course of justice, the conduct which tends to or is calculated to interfere with the administration of justice cannot be punished as contempt. The decision in *Arthur Reginald Perrers v. King*, (1951) A. C. 482, was also held not to support this submission. It may be pointed out that in the case of *In re: P. C. Sen*, Cri. App. No. 119 of 1966 D/- 8-11-1968 (SC) the Chief Minister of Bengal had broadcast a speech which touched the merits of a cause pending in and awaiting adjudication by the Calcutta High Court. In the course of the judgment, the position in regard to the legal proceedings without the aid of a jury was clarified in these words:

"It is difficult to accept the contention that comments which are likely to interfere with the due administration of justice by holding up a party to a proceeding to ridicule or to create an atmosphere against him in the public mind against his cause when the trial is held without the aid of a jury do not amount to contempt. If a party to the proceeding is likely to be deterred from prosecuting his proceeding or people who have similar cause are likely to be dissuaded from initiating proceedings, contempt of Court would be committed. It matters little whether the trial is with the aid of the jury or without the aid of jury."

While commenting on some English decisions reported as *The William Thomas*

Shipping Co., In re, H. W. Dhillon and Sons Ltd. v. The Company, In re, Sir Robert Thomas, (1930) 2 Ch. 368 and Regina v. Duffey, Ex Parte Nash, (1960) 2 Q. B. D. 183, Shah, J. proceeded to state:

"But our Courts are Courts, which administer both law and equity. Assuming that a Judge holding a trial is not likely to be influenced by comment in newspapers or by other media of mass communication may be ruled out—though it would be difficult to be dogmatic on that matter also—the Court is entitled and is indeed bound to consider, especially in our country where personal conduct is largely influenced by opinion of the members of the caste, community, occupation or profession to which he belongs, whether comments holding up a party to public ridicule, or which prejudices society against him may not dissuade him from prosecuting his proceeding or compel him to compromise it on terms unfavourable to himself. That is a real danger which must be guarded against: the Court is not in initiating proceedings for contempt for abusing a party to a litigation, merely concerned with the impression on the Judge's mind or even on the minds of witnesses for a litigant. It is also concerned with the probable effect on the conduct of the litigant and persons having similar claims."

After suggesting that a Judge while hearing an appeal may be influenced unconsciously by what he reads in newspapers, the learned Judge added:

"No distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may amount to contempt when the case is triable with the aid of a jury, and not when it is triable by a Judge or Judges."

The Court also repeated what is now almost axiomatic that ordinarily a Court would not initiate proceedings for commitment for contempt where there is a mere technical contempt. The same Bench of the Supreme Court has still more recently in *Perspective Publications (P) Ltd. v. State of Maharashtra*, Criminal Appeal No. 159 of 1966 (SC), affirmed the order of the Bombay High Court convicting the appellants there of contempt of Mr. Justice Tarkunde of that High Court in his judicial capacity and of the Court. The charge of contempt was based on the publication on 24-4-1965 of an article under the caption "STORY OF A LOAN and Blitz Thackersey Libel Case" in the weekly periodical called "Mainstream". That article was stated to have been contributed by a person under the name of "Scribbler". The Court again reviewed the case-law.

The American and Australian decisions were held to be hardly of much assistance in India because the decisions of the various High Courts and of the Supreme Court have crystallized the principles applicable here by mostly adopting the principles followed by English Courts. In this decision, it is again pointed out, by making a reference to *Brahma Prakash's case* 1953 SCR 1169 : (AIR 1954 SC 10) (supra), which may by now be considered to be incontrovertible, that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of offending statements and it is enough if it is likely or it tends in any way to interfere with the proper administration of justice.

13. This Court has also, in several Full Bench decisions, laid down the law in regard to contempt of Court with sufficient clarity. In *Surat Singh v. Des Raj Chowdhry*, 1968 Delhi LT 1 (FB), the power of this Court to punish for contempt has been stated to be inherent in its character as a Court of Record and the recognition of this power under Article 215 of the Constitution has been noticed. After referring to Article 19 (1) (a) and Article 19 (2) of the Constitution, it has been pointed out that neither the Constitution nor any other law contemplates any exemption or a saving provision in favour of the press or the profession of journalism as such, with the result that the freedom of speech and expression as guaranteed by Article 19 (1) (a) has been held to be available to all citizens in an equal degree without conferring any greater privilege on the press or the journalists. This, however, does not by any means affect the high esteem in which free civilized democratic society like ours holds independent and public-spirited journalists to express their views fearlessly but rationally in sober and restrained language. It has further been pointed out in this decision that though contempt of Court has not been defined either in the Constitution or in any other statute, its concept is now very well settled. "Contempt by speech or writing", it has been pointed out: "may be by scandalising the Court by itself or by abusing parties to actions, or by prejudicing mankind in favour of or against a party before the cause is heard because in the last-mentioned instance, injurious misrepresentation concerning litigating parties may induce them to discontinue the action or to compromise or may deter other persons, with good causes or actions, from approaching the Court. And then, it may also tend to influence in a subtle or subconscious manner the judicial thinking on the part of the Court."

In Re: Court of Its Own Motion v. K. S. Sethi, Cr. O. 49 of 1967, decided on 23-11-1967 : (AIR 1968 Delhi 248), a Full Bench of this Court observed that Article 215 of the Constitution gives every High Court the right and power to punish a contempt of itself. Contempt, according to this decision, may consist of conduct which prejudices the parties or the witnesses during litigation or it may consist of conduct which brings the authority and administration of law in disrespect or disregard or it may tend to impede, embarrass or obstruct the Court in discharge of its duties. This decision was unsuccessfully assailed in the Supreme Court. As recently as November, 1968, a Full Bench of this Court convicted Shri R. K. Dalmia for contempt of Court (Cr. O. 55 of 1968), though that was undoubtedly a clear-cut case and the counsel did not raise any objection similar to those raised before us. I need not refer to the innumerable decisions of other High Courts except to a recent full Bench decision of the Punjab and Haryana High Court in S. Sher Singh v. Raghu Pati Kapur, 69 Pun LR 673: (AIR 1968 Punj 217) in which all conceivable grounds were urged by the alleged contemner in his challenge to the law providing for punishing for the offence of contempt of Court. It has been observed in this decision that in so far as the offence of contempt of Court is concerned, the essence of the matter is the tendency to interfere with the due course of justice. It is unnecessary to refer in detail to the exhaustive judgment prepared by Mehar Singh, C. J.

14. The submission that the public has a right to be apprised of all that happens in the open Court and that the respondents having merely answered to the rightful demand of the public by publishing the material in question, contempt of Court cannot, as a matter of law, be held to be committed, has merely to be stated to be rejected. No such alleged right of the public and no such alleged obligation on the part of the respondents can override the law of contempt of Court, without which effective and pure administration of justice seems to us to be inconceivable in a set-up like ours.

15. Before turning to the objectionable publications, I may appropriately advert to the argument on which Shri R. K. Garg addressed this Court in defence for more days than one. According to him, the law of contempt of Court is unprecise and undefined and not only is his client unaware, even his lawyers feel handicapped and they were unable to advise and guide him as to how far he could go in publishing the impugned material in question. On this very ground is founded the argument that his client

cannot offer an unqualified apology and that all that he can say is that if the Court finds that his client's conduct amounts to contempt of Court, then he is willing to tender an unqualified apology. I am wholly unable to sustain this submission. The law of contempt of Court is as precise as it can be in view of its very nature. It depends on the facts and circumstances of each case and the law reports abound with decisions which are legion, conveying a fairly clear idea to anyone, who chooses to read them with requisite care and attention, as to what is the precise scope and effect of the law of contempt of Court and, broadly speaking, it is reasonably settled as to when a publisher must pause and ponder whether or not to transgress the bounds discernible from those decisions. In regard to the apology also, it is settled by a host of decisions by the various High Courts and quite a few by the Supreme Court that an apology and a justification ill go together. We are not unaware of some observations in the Supreme Court decision in M. Y. Shareff v. The Hon'ble Judges of the High Court of Nagpur, (1955) 1 S. C. R. 757 : (AIR 1955 SC 19), but they must be confined to the peculiar facts and circumstances of that case, and on the authority of that decision, it is not possible to hold that in a case like the present, an apology, operative after a finding by the Court that the impugned publication amounts to contempt of Court, deserves to be accepted. Apology, it is settled beyond dispute, has to be offered clearly at the earliest opportunity indicative of remorse and contrition which is the essence of the purging of a contempt and it should not be offered in the hope and with the object of avoiding punishment.

16. Coming now to the merits of Cr. O. 39 of 1968, the effect of the headline in bold type "CIA AGENT'S LETTER ADMITTED IN COURT" and the second headline in much bolder type "SEN SAYS SMITH OFTEN PAID FOR HIS DRINKS" published on the front page of the issue of the "Patriot" dated 13-7-1968, seems to me to tend to prejudice the public mind against the petitioner. It is not a fair and faithful report of the proceedings of the Court and the selection of the bolder type for the specially chosen subject-matter in question seems to betray an oblique purpose or motive. In the reply, no serious attempt has been made to show that this report is an accurate reproduction of the statement made in Court and during the arguments, it has been sought to be explained by suggesting that the trend of the Court statement justifies the impression formed by the respondents-journalists and this impression is fairly reported in the impugned news item. Similar is the

explanation for using the bold headlines I am far from satisfied with this explanation. Holding this not to be a fair and faithful report of the Court proceedings and also that it tends to convey to the reader an impression prejudicial to the complainant, this publication clearly tends to prejudice mankind against the complainant and it thus falls within the mischief of contempt of Court.

17. In regard to the publication of the letter alleged to have been written by one John Smith and addressed to one P. G. Garg, we feel, after going through the record, that the reporter and the publisher might well have thought that this letter had been duly admitted in evidence though in fact it seems to me to have been only marked for identification and not admitted in evidence or proved. In this respect, I am inclined to give to the respondents benefit of doubt. Publication of the full text of the letter would also seem to me on the facts of this case, to be indiscreet, but here again, I am inclined to give to the respondents benefit of doubt. It would certainly have been more fair and proper on the part of the respondents not to have published it in extenso when it was not actually read out in Court. Being conscious of the principle that action for contempt of Court should not be taken too lightly, but with caution and deliberation, I consider it proper to ignore the publication of the full text of the letter on the peculiar facts and circumstances of this case.

18. In regard to the publication on the front page of the issue of the "Patriot" dated 14-7-1968, according to which Mr. Smith's letter mentioned that he had presented a letter about the legal activities of the American Intelligence service in India to Mrs. Vijaylakshmi Pandit in January, 1961, when she was Indian High Commissioner to Britain and that this complaint contained references to Brig. (then Colonel) Sen and the report by the Staff Reporter of the newspaper suggesting that he had contacted Mrs. Vijaylakshmi Pandit who confirmed the receipt of such a complaint in London in 1961, we feel that this publication has also a tendency to prejudice mankind against the complainant by reference to something which the Staff Reporter did in connection with a matter which was sub judice in Court in the proceedings initiated by the complainant-petitioner. The subject-matter of this publication read as a whole cannot but tend to create an impression prejudicial to the complainant.

19. I am disinclined to hold that the other publications referred to in CrI. O 39 of 1968 by themselves amount to contempt of Court, and indeed they were not seriously pressed by Shri Chagla in

his argument. He only referred to them in passing to contrast the sketchy nature of the report in the other issues of the "Patriot". It was, however, suggested by the learned counsel that the general manner and method of publishing the Court proceedings was far from fair, faithful and accurate.

20. This takes us to CrI. O. 40 of 1968. The petitioner's learned counsel has at the outset drawn our attention to the defect in the affidavit in reply at p 52 of the record filed by Shri Bhupesh Gupta, respondent No 2, that in the verification clause, he has not stated that paragraphs 1 to 3 of the affidavit are true to his personal knowledge and belief. The word "personal", says the counsel, is missing in the affidavit filed in Court. This, according to the respondents' learned counsel, seems to be a typing mistake. In my view, this is a lapse both on the part of the Oath Commissioner who attested this affidavit and on the part of the deponent who swore this affidavit and filed it in Court without checking up that there was no such typing mistake. It does give us an impression that the affidavit was not read either by the Oath Commissioner or by the deponent with the care it deserved. I need, however, say nothing more in this connection on the present occasion.

21. At page 7 of the "New Age" dated 21-7-1968, is published the full text of the letter alleged to have been written by John Smith to one Mr. P. B. Garg. The offending publication with the headline "COMPLAINT MADE IN 1961 TO VIJAYALAKSHMI PANDIT" in very bold type begins as under:

"Following is the text of the letter of John Smith introduced in evidence by the defence counsel P. B. Garg." Then the whole letter is reproduced which purports to be addressed to one Mr. P. B. Garg. I have given the benefit of doubt to the respondents in CrI. O 39 of 1968 for forming an impression that this letter was admitted into evidence, though from the record, it may be inferred that after the Court had corrected the proceedings of 12-7-1968 and clarified that the letter in question was only placed on the record, those who wanted to publish the Court proceedings on 21-7-1968 should have taken proper care to inform themselves of the correction incorporated by the Presiding Officer when signing the typed proceedings. But here again, I am inclined to give the benefit of doubt to the respondents in this case, though I cannot help observing that publication of the full text of this letter was somewhat indiscreet on their part. The bold type about "COMPLAINT MADE IN 1961 TO VIJAYALAKSHMI PANDIT" and a reproduction of the report from the 'Daily Patriot' of 14-7-1968, in my opinion does

constitute contempt of Court inasmuch as it tends to prejudice public mind against the complainant by making a reference to some sort of investigation or enquiry which the Reporter of the "Patriot" is suggested to have carried out in connection with a matter requiring adjudication by the Court in a pending proceeding on the evidence to be recorded. The publication of the photostat of John Smith's letter to Garg and of the envelope showing address, also seems to me to be a transgression of the limits of a fair and faithful reporting of Court proceedings. The question whether the letter was actually written by John Smith to P. B. Garg and who this gentleman is was a matter which had yet to be determined by the Court on legal evidence and its publication on 21-7-1968 does not seem to me to fall within the doctrine of fair and faithful reproduction of the Court proceedings held on 12-7-1968. In the same issue of the "New Age" at page 6, the headlines in very bold type "CIA MAN SMITH PAID FOR BRIG. SEN'S DRINKS" seems to me to be an unfaithful and unfair reproduction of the Court proceedings. This conveys an impression of interpreting the statement and not of faithfully and accurately reproducing it. I have accordingly little hesitation in holding this publication to amount to contempt of Court.

22. In the issue of the "New Age", dated 7-7-1968, at page 12, occur the following headlines in very bold type:

"E. T. Sen; Joined Army to earn more money."

23. This also seems to me to tend to convey a somewhat erroneous impression about Sen's statement in Court, read as a whole, and is accordingly not a fair and faithful reproduction of the Court proceedings. This publication thus also seems to me to fall within the mischief of contempt of Court as discussed above. Neither the press reporter nor the publisher of a newspaper can, in my view, claim an indefeasible right to put his own gloss on the statements in Court by selecting stray passages out of context which may have a tendency to convey to the reader to the prejudice of a party to the proceedings, a sense different from what would appear when the statement is read in its own context. To reproduce stray misleading passages in bold headlines in order to attract the attention of casual readers may serve as an aggravating factor. Similarly, while reproducing the Court proceedings, no words may be added, omitted or substituted if their effect is to be more prejudicial to a party litigant than the actual proceedings. Any deviation in the report from the correct proceedings actually recorded, must, if it offends the law of contempt of Court,

render the alleged contemner liable to be proceeded against.

24. On a consideration of all the facts and circumstances of the case and as a result of the foregoing discussion, I am constrained to hold the respondents in both the cases to be guilty of contempt of Court, but as their plea is that they were ignorant of the precise implication of law of contempt and their legal advisers were also unable to guide them properly, I feel that a severe warning would on this occasion serve the ends of justice. In taking this lenient view in this case, the stress laid on Shri Garg's argument that the alleged contemnners' legal advisers were unable to understand the correct legal position and were thus unable to give proper advice, has, to some extent, weighed with this Court. It must, however, be made clear that in future, this Court would take a more serious view of such publications and the ignorance of the law or inability of the legal advisers to properly advise their clients, would not be considered a mitigating circumstance. It may be pointed out that on behalf of the petitioner, it was argued that the "New Age" is the official paper of the Communist Party and the "Patriot" is otherwise a Communist paper. The impugned publications were accordingly designed by the respondents in both the cases to hamper the fair trial of the case by poisoning the public mind against the plaintiff. It is not disputed by the respondent that the "New Age" is the Communist Party's official organ, but the "Patriot" is stated to be an independent paper with its own views and policy. I have not taken into account the allegation the "Patriot" being a Communist paper because this Court, while considering the question of contempt of Court, is wholly unconcerned with the political views of alleged contemnners. The charge of contempt of Court in this case is to be considered on the merits unmindful of the alleged contemnners' political views. I have, however, taken notice of the fact that the printer and publisher of the "New Age" is a party to the proceedings in a criminal Court in regard to which the contempt of Court is alleged. This seems to me to be a factor of considerable relevance.

25. Shri Chagla had, in the course of his arguments, referred us to the issue of the "New Age" dated 28-7-1968, where at Page 6, a photograph of Shri R. K. Garg, the defence counsel in the case, was published along with the proceedings of the case and it was suggested that it was not a fair and impartial report of the proceedings but was meant to give publicity to the counsel. In my opinion, this cannot be contempt of Court and that is the

only question with which I am concerned in these proceedings.

26. The petitioner is entitled to his costs which I fix at Rs 250/- in each case

27. S. K. KAPUR J.: I entirely agree

28. JAGJIT SINGH, J.: I entirely agree.
KSB Contemner warned.

AIR 1969 DELHI 214 (V 56 C 36)

SPECIAL BENCH

S. K. KAPUR, HARDAYAL HARDY
AND JAGJIT SINGH, JJ

Omesh Saigal and another, Petitioners
v. R. K. Dalmia, Respondent.

Criminal Original No. 55 of 1968, D/-
14-11-1968.

(A) Contempt of Courts Act (1952),
Ss. 1, 4 — Person not directly interested
in case approaching Magistrate in his
chambers after Court hours and asking
him to accept bail on behalf of accused
— On Magistrate's refusal, person threaten-
ing Magistrate by show of his wealth,
to teach him a lesson — It is interference
with administration of justice and amounts
to contempt of Court — Contemner, con-
sidering his age was administered warn-
ing and was ordered to pay costs.

The purpose of the contempt jurisdic-
tion is to uphold the majesty and dignity
of the law Courts and the image of such
majesty in the minds of the public can-
not be allowed to be distorted. Action for
contempt is not for the purpose of plac-
ing Judges in a position of immunity
from criticism but is aimed at protection
of the freedom of individuals and the
orderly and equal administration of laws.
(Para 8)

Where a person who was not directly
concerned with the litigation and did not
in the legal sense represent the accused,
walked into the Chamber of the Magis-
trate after Court hours, to persuade him
to accept bail on behalf of the accused
and upon refusal of the Magistrate to do
it after Court hours, the person told the
Magistrate that he had got some secret
inquiry initiated against him and that he
should withdraw the orders otherwise he
would teach him a lesson and made a
show of his wealth and threatened that
the Magistrate had challenged a formid-
able foe.

Held that this conduct clearly amount-
ed to an act tending to impede, embar-
rass or obstruct the Court in the dis-
charge of its duties. It was nothing short
of an effort to interfere with the order-
ly administration of justice. Administra-
tion of justice could not be effective un-
less respect for it was fostered and main-
tained. Such interference shook the very
pillars of the administration of justice
and the confidence of the people in the

Courts which was of prime importance
to the litigants in their struggle for the
protection of their rights and liberties.
The person was guilty of contempt of
court. (Para 8)

Held further considering the fact that
the Contemner was an old man of about
75 years with ill health and must have
been carrying a feeling of frustration on
one of his workmen being sent to jail
when an order for bail had already been
passed, the interest of justice would be
served by administering a warning to
him. This lesser punishment was being
awarded having regard to the circum-
stances of this case. The contemner was
also ordered to pay Rs 200/- as costs. The
Court, however, sounded a note of warn-
ing that any act impairing the majesty
of the Courts will be dealt with strongly
for no person has a choice of taking law
into his own hands and interfering with the
impartial administration of justice. If
any person has any grievance against
judicial orders made by Courts there are
ample remedies for rectification of the
errors, but the flow of administration of
justice must be kept unimpeded and its
channels clear. (Para 10)

(B) Criminal P. C. (1898), S. 499 —
Consideration of bail bond after Court
hours — Duty of Magistrate.

Held that the Magistrate should not
have refused to consider the surety bond
of the accused person on the ground that
he had risen for the day from the Court.
Whereas it should be appreciated that he
worked upto 5.15 p.m. in scrutinising the
bail-bonds of 12 accused persons, it is to
be expected that un-influenced by the
none too proper conduct of persons
interested in the accused he should have
devoted a few more minutes and consider-
ed the bail-bond of the accused particu-
larly when the following day happened
to be a Sunday. Liberty of the subjects
must be given a top priority in a spirit
of dedicated devotion. One must always
remember that the rights of the subjects
flow not from the mercy of the Courts
but from the guarantees of our system of
laws, namely, no person should be
deprived of his liberty even for a moment
except in strict conformity with law.
Courts exist to administer law as well as
justice in conformity with law and spend-
ing a few more minutes even after 5.15
P. M. would have exhibited a better
desire for fostering the administration of
justice. (Para 9)

(C) Contempt of Courts Act (1952),
S. 4 — Apology — The alleged apology
held to be no apology.

The written apology tendered by the
contemner towards the end of the argu-
ments was: "I had no intention to com-
mit any contempt of Court and as advis-
ed by my counsel, I committed no such
contempt. Still if the Hon'ble Court con-

sider that what I uttered constitutes contempt of Court, I tender my unqualified apology".

Held that this was no apology in the eye of law. (Para 12)

(D) Contempt of Courts Act (1952), S. 3 (2) — Held on facts that the section was no bar to jurisdiction of High Court to punish contempt of subordinate Court — Penal Code (1860) S. 228.

Per Hardayal Hardy, J.: The essential ingredients of offence under S. 228, Penal Code are firstly, intention, secondly, insult or interruption to a public servant and thirdly, the public servant concerned should be sitting in any stage of judicial proceeding. (Para 14)

Where in approaching the magistrate after he had retired to his chambers after court hours, the respondent's intention was not merely to threaten the Magistrate and cast un-merited aspersions on him in respect of certain action which he had taken in the discharge of his judicial functions, but also to administer a warning to his colleague another Magistrate, who had seisin of the case at that time, and his further intention was to give as much publicity to what he had done, the object clearly was to scandalize the Magistrates and thus to deflect them from a strict and non-hesitant performance of their duties. In such a case section 3 (2) of the Act cannot stand in the way of the High Court's jurisdiction in taking action for contempt against the respondent. (1900) 2 QB 36, Ref. (Paras 17, 18)

Cases Referred: Chronological Paras
(1900) 1900-2 QB 36 = 69 LJ QB 16
502, Queen v. Gray

V. D. Misra, Addl. Standing Counsel, for State and I. M. Lal, for Omesh Saigal, for Petitioners; R. V. S. Mani with P. N. Chadha, for Respondent.

S. K. KAPUR, J.: Upon a report received from the Additional District Magistrate that Shri R. K. Dalmia has committed contempt of Court, a notice was issued to him on 15th October, 1968. The circumstances that led to the report may now be set out.

2. Shri Omesh Saigal, Sub Divisional Magistrate, New Delhi, made a report on 27th July, 1968, to the Deputy Commissioner that he had a case (State v. Kewalramani and twelve others) fixed in his Court for 27th July, 1968; that the case was taken up immediately after lunch when the accused were ordered to be released on bail; that according to the Sessions Court the file was sent to Shri N. C. Jain, Sub Divisional Magistrate, New Delhi, for consideration of the surety bonds for release of the accused persons; that by about 5.20 P. M. the surety bonds of 12 accused persons had been accepted but no surety was pre-

sent for the 13th accused; that at about 5.35 P. M. when "Mr. Badri Nath, Mr. Ramesh Chander, Magistrate 1st Class and myself were sitting in the retiring room having a cup of tea, Mr. N. C. Jain came from his Court and lighted a cigarette. Shortly after he was followed by twenty/thirty people who pressed him for the acceptance of the bail-bond of one of the accused in the afore-mentioned case. Mr. Jain told them that he had already accepted the bail-bonds of twelve accused and as no surety was present at the time when he was holding the Court, now he will not accept the surety in the retiring room after Court hours.

Shortly afterwards at about 5.45 P.M. a thin gentleman who introduced himself as R. K. Dalmia entered the room. At this all the other persons who were pressing Mr. Jain for the acceptance of the bail, left. He was politely given a seat. He enquired from us about our identities at which we introduced ourselves. Mr. Dalmia then requested Mr. Jain to accept the surety but Mr. Jain reiterated his position that the Court had already risen for the day. Mr. Dalmia said that many Magistrates considered and accepted the sureties at their residences but Mr. Jain informed him that he was not going to do it after he had risen for the day"; that thereafter Shri Dalmia addressed Shri Jain in Hindi, which, as translated, reads — "Dalmia talks only once. Ram Krishan Dalmia has come. Even Pandit J. used to do the work asked by me. In case I ask Indira or Chavan, they also cannot turn down my request"; that thereafter he suddenly turned towards Shri Omesh Saigal and told him that in the case he had summoned his men as accused and said the following in Hindi, which, as translated, reads — "I shall teach you a lesson for your childishness. Omesh Saigal, you have taken wrong proceedings against our men by acting in childish-manner. I have got initiated a secret inquiry against you. You will come to know after a few days. Withdraw your orders, otherwise I shall see you and teach you a lesson. I can be your well-wisher if you act as asked by us. You are not understanding us. You have not understood me. I have crores of rupees. By summoning my men, you have challenged a formidable foe. I shall see you"; and that by the afore-mentioned utterances Shri Dalmia had intimidated and insulted Shri Omesh Saigal for the acts done by the latter in the discharge of his judicial duties, had committed contempt of his Court and had also impliedly threatened Mr. Jain that it will be in Mr. Jain's interest to accept the surety.

3. Shri R. K. Dalmia in his reply affidavit had admitted having entered the room where the said three learned Magistrates were sitting though, accord-

ing to him, the said Magistrates were sitting in the common room and not in the retiring room of Shri Omesh Saigal. He has, however, denied having used the words attributed to him by Shri Omesh Saigal. His version of the happening on the 27th July 1968, may be set out in his own words—

"At about 5.35 P. M. Shri Kewalramani telephoned and narrated to me as to how he and other employees of the Management were put to unnecessary and avoidable harassment and were sent to police lock-up etc. He also informed me that the bail-bond of one of the 13 employees had not been accepted. He requested me to go to the Court and make a request for the bail of the remaining one person to Shri N. C. Jain. I in sympathy with them went to the Court though owing to my bad health I have not been going out anywhere and I did not even go to the Keventer's Factory during the long strike which entailed a heavy loss. When I reached the Court I learnt that Shri N. C. Jain was sitting in the retiring room and his staff was also sitting in the Court. I along with Shri Kewalramani, the Adviser, and Shri N. N. Kaul, the Commercial Manager of Edward Keventer (S) Pvt. Ltd. went to see Mr. Jain. I entered the retiring room and the said two gentlemen stayed within hearing distance at the door. Mr. Jain was pointed out to me by Mr. Kewalramani. I first introduced myself to Mr. Jain who offered me a seat. At that time two or three persons including one lady were also sitting there. I did not know any of them. I first wanted to know the good names of the persons present there. One gentleman sitting next to Mr. Jain who was dressed with half sleeved and unbuttoned shirt replied that he was Mr. Omesh Saigal. Others did not reply. I thanked Mr. Jain for having accepted bail-bonds of 12 persons and requested him that the next day being Sunday, if he accepted also the bail of the remaining one person who was a very poor employee, he would be saved from imprisonment for 2 days. While making this request I also said that the Magistrates had been granting bails in their chambers and retiring rooms and even at their residences during holidays. Even on a previous occasion, on 20-5-68, bails of seven persons in the case under sections 107/150 Cr. P. C. had been accepted by Shri Kapoor, Magistrate 1st Class, in this very retiring room. I further added that even Shrimati Indira Gandhi and Shri Chavan sometimes accept applications and grant requests at their residences in the interest of justice, and that he (Mr. Jain) had full discretion to accept the bail-bonds anywhere he liked. I also submitted to him that if he had any doubt regarding the soundness of the surety brought

before him for the remaining person, the employer Company, i.e. Edward Keventer (S) Pvt. Ltd., which had assets worth crores of rupees, could stand surety. The learned Magistrate, however, did not accept my request." Shri Dalmia also denied having addressed Shri Saigal in the language attributed to him. He, in his counter-affidavit, says—

"Mr. Saigal, while I was making an appeal to Mr. Jain only to accept bail of the remaining one accused also, intervened and in an angry mood said, 'why are you harassing us after Court's hours'. I told him that I was only making a request to Mr. Jain in the interest of justice and there was no occasion for him to intervene and stand in the way. I further told Mr. Saigal that all this trouble would not have arisen if he had acceded to the repeated requests of the counsel to pass orders for bail early and not as late as after 3.45 p.m. As already explained the entire matter rested with Shri N. C. Jain and Shri Saigal was not in the picture. There was no occasion for me to ask Mr. Saigal to withdraw any order already passed as there was no order to be withdrawn by him. There was also no occasion at all for me to give him any threats as has been mentioned by him nor I had done so."

4. Mr. Mani, the learned counsel for the alleged contemner, does not dispute that in case it is held that Shri Dalmia used the words attributed to him he would be guilty of contempt of Court. Mr. Mani's effort, however, all along was to show that he had not used the said words and the version given by Shri Dalmia in his affidavit was the correct one. Mr. Mani suggested that there was gross exaggeration on the part of Shri Omesh Saigal due to the fact that the latter bore a grievance against Shri Dalmia because of transfer petitions filed by accused persons, who are employees of Edward Keventer (S) Pvt. Ltd. in which company Shri Dalmia holds considerable interest, in two criminal cases from the Court of Shri Saigal. Mr. Mani underlined the allegations of personal bias made in the transfer petitions against Shri Omesh Saigal by the accused persons. He, however, did not dispute that the case was transferred, without pronouncing upon the said allegations, on the ground that Shri Omesh Saigal having visited the spot, the quarrel at which place led to the prosecution, in his executive capacity, should not try the case.

Mr. Mani also emphasised the following assertions in the counter-affidavit filed by Shri Dalmia as indicative of a grudge borne by Shri Omesh Saigal.

(1) The allegations made in paragraph 15 to the effect that Shri Omesh Saigal tried to put pressure on the representa-

tives of the Management of Edward Keventer (S) Pvt. Ltd. to increase the remuneration of the Company's workmen. In the said paragraph it is stated—

"After the close of the meeting in the presence of the parties, Shri Saigal began to dictate the minutes of the meeting. He put certain words as having been agreed to by the Management's representatives which was not a fact. Shri Kewalramani protested but Shri Saigal ignoring his protest, dictated his minutes and asked the Management's representatives to sign the same. Shri Kewalramani, however, at the time of signing these minutes added a note that they had not expressed any opinion."

(2) The allegations made in paragraph 16 that—

"it was rumoured that the police on the basis of various reports made by the Management moved for action against some strikers, but Shri Saigal insisted that some officer of the Management should also be impleaded. It was at this that, on 18-5-68, summons were issued to the above said 6 officers and 4 employees of the Management under sections 107/150, Criminal Procedure Code, requiring their appearance in the Court of Shri Saigal, on 20-5-1968 at 10 A.M."

This allegation was made in the transfer application as well and the learned Magistrate while replying to the same in his comments said—

"The allegations in this para are stated to be founded on rumours. I do not think it calls for any comments".

Mr. Mani said that this was no denial of the allegations and, therefore, they should be taken as having been admitted by Shri Omesh Saigal.

(3) The allegations made in paragraph 17 of the affidavit that on 20th May, 1968, when surety-bonds for the accused persons had been prepared and placed before Shri Saigal the latter directed that those be produced before his link Magistrate Shri K. K. Bhasin as he had to go somewhere and adjourn the case to 23rd May, 1968. Shri Omesh Saigal thus declined to accept the bail-bonds of these accused while he accepted the bail-bonds furnished by the strikers (opposite party). Shri Bhasin Magistrate in turn handed over the bail-bonds to Shri Kapur Magistrate who accepted 7 bail-bonds but returned the remaining three on the ground that sureties were women. At this fresh surety bonds were prepared but by that time both Shri Bhasin and Shri Kapur had left the Court and the surety bonds were taken to the Additional District Magistrate, Shri R. K. Anand. Shri Saigal was also present there and the learned Additional District Magistrate asked the counsel for the accused persons to go to the Parliament

Street and Shri Saigal would return and consider the sureties. The Advocate and the sureties waited till 6.00 P. M. but Shri Saigal did not return and the three accused persons had to be sent to Tihar Jail.

5. The last of the allegations was contained in the transfer petition also with a slight difference in the version inasmuch as in the transfer petition it is stated that "the bail-bonds were taken to Shri R. K. Anand, A. D. M. He was in meeting with other Magistrates. . . ." In his comments to this allegation Shri Omesh Saigal said that he returned to the Court premises at about 6.30 P. M. but no one was present.

6. It is in these circumstances that we have been called upon to answer whether Shri Dalmia is guilty of contempt of Court?

7. The entire matter, in the circumstances, turns on the question as to whether or not Shri Dalmia used the language attributed to him and, if not, did he use any language which constitutes contempt of Court? Mr. Misra, the learned counsel for the State, and Mr. Lal, appearing for Mr. Omesh Saigal, contended that the allegations made in the transfer application as to the personal bias were baseless; that Shri Omesh Saigal had no personal bias; that as appears from the transfer application itself Shri Saigal had gone to Shri R. K. Anand to attend a meeting and he had made alternative arrangements for consideration of the surety bonds; that the allegations made in the counter-affidavit about recording of some agreement by the representatives of the Management in the minutes stood falsified by the recorded minutes wherein it is stated that "the representatives of the Management Mr. F. M. Kewalramani and Mr. Dharam Pal were also sympathetic in this regard and they stated that they can only give final assurance after consulting the Board of Directors. They promised consulting Board of Directors today"; and that in the application dated 3rd August, 1968; and that after the happening of 27th July, 1968, for urging additional grounds in support of the transfer of the case from Shri Omesh Saigal's Court, the talk between the learned Magistrates and Shri Dalmia had not been mentioned. Mr. Misra is right when he says that the minutes recorded by Shri Omesh Saigal on the 15th day of May, 1968, do not support the allegation of Shri Dalmia that Shri Saigal "put certain words as having been agreed to by the Management's representatives which was not a fact".

8. The heart of the problem, as I have said already, is whether Shri Dalmia went to the retiring room where the

learned Magistrates were sitting and used certain words which constitute contempt of Court? Shri Dalmia admits having gone into the chamber or the common room where the Magistrates were sitting. It also appears from his counter-affidavit that he bore a serious grudge against Shri Omesh Saigal. He also admits having said that even Shrimati Indira Gandhi and Shri Chavan sometimes accepted applications and granted requests at their residences and having told Shri Saigal that "all this trouble would not have arisen if he had acceded to the repeated requests of the counsel to pass orders for bail early and not as late as after 3.45 P. M."

Taking this admission by itself shows that Shri Dalmia did not talk to Shri Saigal in a respectful manner expected of a party interested in litigation. All this has to be taken in the light of the fact that Shri Dalmia himself states that on that day he went to the Court in spite of his bad health and in spite of the fact that he had not moved out of his house for some time or even during the long strike which entailed a heavy loss. Shri Dalmia was not directly concerned with the litigation and he was not in the legal sense a representative of the accused persons. He should not have walked into the chamber of the learned Magistrates and should have approached them only through the counsel. Shri Dalmia must have, therefore, been in an excited mood at that time.

Having regard to these facts, I have no doubt in my mind that even if the words attributed to Shri Dalmia may not be the exact words used by him yet substantially the version of Shri Omesh Saigal is correct. I am satisfied that he must have told him that he had got some secret inquiry initiated against him and that he should withdraw the orders otherwise he would teach Shri Saigal a lesson. He must have also spoken to Shri Jain the words attributed to him. He must have also made a show of his wealth and threatened that Shri Saigal had challenged a formidable foe. This conduct was clearly an act tending to impede, embarrass or obstruct the Court in the discharge of its duties. It was nothing short of an effort to interfere with the orderly administration of justice. Administration of justice cannot be effective unless respect for it is fostered and maintained. Such interference shakes the very pillars of the administration of justice and the confidence of the people in the Courts which is of prime importance to the litigants in their struggle for the protection of their rights and liberties. The purpose of the contempt jurisdiction is to uphold the majesty and dignity of the law Courts and the image of such majesty in the minds of the

public cannot be allowed to be distorted. Action for contempt is not for the purpose of placing Judges in a position of immunity from criticism but is aimed at protection of the freedom of individuals and the orderly and equal administration of laws. I cannot but strongly condemn any one interested in a litigation to walk into the chamber of the Judge and use threatening words or ask the Judge to withdraw an order at the threat of teaching him a lesson. It must, therefore, be held that Shri Dalmia committed contempt of Court.

9. Before parting with this case I may however, say that I have not felt very happy about Shri Jain's refusal to consider the surety bond of the accused person on the ground that he had risen for the day from the Court. Whereas I do appreciate that he worked up to 5.15 P.M. in scrutinising the bail-bonds of 12 accused persons, I should have expected, that uninfluenced by the none too proper conduct of Shri Dalmia or some others he should have devoted a few more minutes and considered the bail-bond of the accused particularly when the following day happened to be a Sunday. Liberty of the subjects must be given a top priority in a spirit of dedicated devotion. One must always remember that the rights of the subjects flow not from the mercy of the Courts but from the guarantees of our system of laws, namely, no person should be deprived of his liberty even for a moment except in strict conformity with law. Courts exist to administer law as well as justice in conformity with law and spending a few more minutes even after 5.15 P.M. would have exhibited a better desire for fostering the administration of justice.

10. That takes me to the punishment and I must confess that this has given me a few anxious moments. I, however, feel that having regard to the fact that Shri R. K. Dalmia is an old man of about 75 years with ill health and must have been carrying a feeling of frustration on one of his workmen being sent to jail when an order for bail had already been passed, I consider that the interest of justice will be served by administering a warning to Shri Dalmia. This lesser punishment is being awarded having regard to the circumstances of this case but we do want to sound a note of warning that any act impairing the majesty of the Courts will be dealt with strongly. I would like to point out that no person has a choice of taking law into his own hands and interfere with the impartial administration of justice. If any person has any grievance against judicial orders made by Courts there are ample remedies for rectification of the errors, but the flow of administration of justice must be kept unimpeded and its chan-

nals clear. The contemner will also pay Rs. 200/- as costs.

11. Shri Dalmia was not present in Court when the rule was heard on 6th November, 1968. An application was, however, filed for his exemption from personal appearance supported by a medical certificate to the effect that he was suffering from hypertension, palpitation of heart and weakness. In view of this we heard the rule in his absence. He was, however, directed to be present today.

12. Shri Dalmia also tendered a written apology towards the end of the arguments, it is stated in that application:—

"I had no intention to commit any contempt of Court and as advised by my counsel, I committed no such contempt. Still if the Hon'ble Court consider, that what I uttered constitutes contempt of Court, I tender my unqualified apology." This is no apology in the eye of law, and I would decline to accept it.

13. JAGJIT SINGH, J.: I agree.

14. HARDAYAL HARDY, J.: I have had the advantage of reading the judgment prepared by my learned brother Kapur J. and I completely agree with him that it seems hardly necessary to add anything of my own. There is however one aspect of the matter which was adverted to by the learned counsel for the respondent, although en passant, in the course of his argument to which a brief reference may be made. It was argued that the alleged action of the respondent, no matter how audacious and reprehensible, was still not punishable as contempt by this Court because S. 3 (2) of the Contempt of Courts Act 32 of 1952 excludes the jurisdiction of the High Court in cases where the acts alleged to constitute contempt of subordinate courts are punishable as contempt under specific provisions of the Indian Penal Code e.g., Sections 228, 178 and 179 etc. In the present case the action of the respondent, it was urged, was no more than offering an insult to Shri Omesh Saigal and criticising his conduct as a judicial officer by telling him that he had taken wrong proceedings against his men. The argument appears to me to be wholly mis-conceived. The essential ingredients of an offence under Section 228 I. P. C. are firstly, intention; secondly, insult or interruption to a public servant; and thirdly, the public servant concerned should be sitting in any stage of judicial proceeding.

15. At the time when the respondent visited the retiring room or common room of the magistrates, as he preferred to call it, Shri Omesh Saigal was not sitting in any stage of judicial proceeding. Under the orders passed by the Sessions Court on a transfer application

filed by the accused in whom the respondent was interested, the task of accepting bail bonds had been entrusted to another magistrate, Shri N. C. Jain. According to the respondent himself, Shri Omesh Saigal was not in the picture at all. His only sin, if sin it might be called, in the eyes of the respondent, was that in the discharge of his judicial functions, he had ordered process to issue against some officers and workmen of Edward Keventer (S) Pvt. Limited in which the respondent is stated to have substantial interest, on a complaint filed before him. Moreover, the words addressed to Shri Omesh Saigal, as already stated by my learned brother, were substantially as had been reproduced in the report made to us. These words are very much more than a mere insult to the magistrate. They scandalize his court in such a way as to create distrust in the popular mind and impair the confidence of people in courts.

16. Lord Russel of Killowen said in Queen v. Gray. (1900) 2 QB 36.

"Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority is a contempt of court. That is one class of contempt. Further any action done or writing published, calculated to obstruct or interfere with the due course of justice or the lawful process of courts is a contempt of court. The former class belongs to the category which Lord Hardwick, L. C., characterised as "Scandalising a court or a judge."

17. That the respondent's intention was not merely to threaten Shri Omesh Saigal and cast un-merited aspersions on him in respect of certain action which he had taken in the discharge of his judicial functions, but also to administer a warning to his colleague Shri N. C. Jain who had seisin of the case at that time. His further intention would also appear to be to give as much publicity to what he had done because of the admission made in his affidavit that before entering the retiring room he had asked his men to wait outside within the hearing distance. It could be a spirit of sheer bravado that had prompted this hard-boiled business-man to do so. The object clearly was to scandalize the magistrates and thus to deflect them from a strict and non-hesitant performance of their duties.

18. I have therefore no hesitation in holding that section 3 (2) of the Act cannot stand in the way of this Court's jurisdiction in taking action for contempt against the respondent for which but for his old age and failing health a sentence of imprisonment would have been more appropriate punishment.

RGD

Order accordingly,

AIR 1969 DELHI 220 (V 56 C 37)

M. M. ISMAIL, J.

Sh. Inder Sain Bakshi s/o Bakshi Anant Ram, Appellant v. Union of India, through Secy. Ministry of Defence Govt. of India; New Delhi, Respondent.

Second Appeal 53-D of 1959 D/- 29-8-1967, from decree of 1st Addl. Dist. J; Delhi, D/- 20-1-1959

(A) Constitution of India, Arts. 311, 309 and 310 — Applicability of Art. 311 — Person holding post connected with defence — Article does not apply.

Article 309 uses the general expression "public services and posts in connection with the affairs of the Union". Article 310 categorises them as defence service, civil service, all-India service, any post connected with defence or any civil post. On the other hand, Art. 311 uses the expression 'a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State'. The consequence of this is that a member of a defence service or a person who holds any post connected with defence is outside the scope of Art. 311 of the Constitution though he falls within the scope of Articles 309 and 310. 1967 Services Law Reporter 471 (SC) and AIR 1960 Madh Pra 119 and AIR 1966 Madh Pra 82 Rel. on. (Para 10)

(B) Civil P. C. (1908), S. 9 — Army Instructions of 1949, No. 212—Downgrading of Government employee — Contravention of Army Instructions — Suit by employee is maintainable.

A person who holds a post connected with defence is entitled to file a suit for a declaration that his down-grading is wrongful and is in contravention of the provisions contained in Army Instruction No. 212 of 1949 in that he was not given a reasonable opportunity to defend himself as contemplated by those Instructions. (Para 17)

It is not possible to lay down as a general principle of law that directions or instructions issued under a statute must be taken to confer rights on parties which may be enforced in a Court of law while directions and instructions issued not pursuant to any statutory power should be treated only as administrative instructions issued for the guidance of the Officers of the department, not conferring any rights on individuals. Whether particular directions or instructions confer any rights on any individual officer, which may be enforced in a Court or not, must be decided with reference to the authority by whom the said directions or instructions were issued, the contents of those directions or instructions and the context in which and

the purpose for which they were issued. Even directions issued pursuant to statutory powers can constitute merely administrative directions not conferring any rights on any individual. AIR 1959 SC 694 and AIR 1959 SC 896 Rel. on.

(Para 16)

(C) The Civilians in Defence Services (Classification, Control and Appeal) Rules (1952), R. 31—Order down-grading appellant — No appeal pending against order as contemplated by R. 31 when Rules came into force — Memorial by appellant against order in appeal however pending — Memorial held could not constitute an appeal within the meaning of R. 31 and his case could not be disposed of under the Rules. (Para 18)

(D) Constitution of India, Art. 309, Proviso — Regulations for the Medical Services of the Army in India, Paras 399, 427, 428 — Regulations are not made under Art. 309, Proviso — Termination of services of Government servant on ground of physical unfitness under Rules — Not lawful.

The services of a Government servant to whom Art. 311 is not applicable can be terminated by the President at his pleasure under Art. 310 of the Constitution. If the President himself does not exercise that pleasure, it must be exercised by some other authority specified in a statute enacted or rules made under Art. 309 of the Constitution and in accordance with the provisions contained in the said statute or the rules. If the pleasure is not so exercised, then it is no exercise of the pleasure at all. (Para 23)

The Regulations for the Medical Services of the Army in India are not made under the Proviso to Art. 309 of the Constitution or in exercise of any other statutory power. In fact, these Regulations are old ones and have been in existence long before the commencement of the Constitution. Therefore the termination of service of a Government servant on the ground of his physical unfitness certified by the Medical Board under the Regulations is not in accordance with Art. 310 read with Art. 309 and it is unlawful. Case Law Discussed. (Para 25)

Cases Referred: Chronological Paras

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| (1953) AIR 1968 Punj 312 (V 55) = | |
| ILR (1967) 1 Punj 649 (FB) Sham Lal v. Director Military Farms | 24 |
| (1967) Civil Appeal No. 1185 of 1955 D/- 6-2-1967 = 1967 Services LR 471 (SC), Jugatrai Mahim Chand Aijwani v. Union of India | 10 |
| (1966) AIR 1966 Madh Pra 82 (V 53) = 1965 MPLJ 831, Kallash-chandra Ratan Chand v. General Manager, Ordnance Factory Khamaria, Jabalpur | 10 |

- (1966) ILR (1966) 2 Punj 305 (FB),
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East Frontier Rly. 23, 24
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port Appellate Tribunal Madras 16
- (1956) AIR 1956 All 330 (V 43) =
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India 15
- (1956) AIR 1956 Punj 42 (V 43) =
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v. Union of India 16
- (1955) AIR 1955 Cal 543 (V 42) =
59 Cal WN 835, Atindra Nath
Mukherjee v. G. F. Gillot 16
- (1955) AIR 1955 Punj 166 (V 42) =
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India v. Ram Chand Beli Ram 16
- (1954) AIR 1954 Cal 399 (V 41) =
58 Cal WN 107, Union of India
v. Someshwar Banerjee 22
- (1937) AIR 1937 PC 31 (V 18) =
ILR (1937) Mad 532, Venkata Rao
v. Secy. of State 16
- Gyan Singh Vohra, for Petitioner; Pra-
kash Narain, Advocate, Central Govt.
Counsel with A. B. Saharya, for Respon-
dent.

JUDGMENT: This second appeal arises out of a suit for declaration filed by the appellant against the Union of India.

2. The appellant's case was that he was a Civilian employee of the Defence Department of the Government of India, having been appointed in 1924 in the Military Farms Department, subsequently called the Remount Veterinary and Farms Corps of the Defence Services. He was a permanent hand in the said Service and was promoted to the rank of temporary Manager in the year 1944, which post he held until 1951 when he was down-graded. In June 1950, the Deputy Assistant Director of Remount Veterinary Farms, Army Headquarters, paid a surprise check-up visit to the appellant's farm at Mhow where the appellant was the Manager and inspected

the stores. On the basis of the check-up results the appellant was suspended on 26-6-1950 and was simultaneously transferred to Namkum in Bihar. At Namkum, a charge-sheet dated 14-7-1950 was served on the appellant on 20-7-1950 and he was directed to submit his explanation by 24-7-1950. An inquiry was conducted into the charges and finally on 2-4-1951, the appellant was down-graded. On 14-5-1951, the appellant filed an appeal against his down-grading to the Defence Minister, Government of India, and the same was dismissed on 20-12-1951. The appellant was not given a reasonable opportunity to defend himself and the order of down-grading passed against him was unconstitutional, illegal and unwarranted and was contrary to principles of natural justice and offended against Article 311 (2) of the Constitution of India.

3. The appellant's further case was that by an order received by him on 14-12-1951 from the Assistant Director, Remount Veterinary & Farms Headquarters, Western Command, he was asked to report to the Officer Commanding, Military Hospital, since he was to be placed before a Medical Board for examination. The appellant was examined by a Medical Board on 24-12-1951 at Dehra Dun. The Civil Surgeon, Dehra Dun, wrote to the Assistant Director, Remount Veterinary and Farms, on 7-1-1952 certifying that the appellant was suffering from influenza, bronchitis and fever and recommended extension of leave by one month. To this, no reply was received. On 4-2-1952, the Civil Surgeon again wrote a similar letter recommending one month further extension of leave. Thereafter, the appellant received a letter dated 9/11-2-1952 from the Assistant Director, Remount Veterinary Farms to the effect that the appellant had already been invalidated by the Medical Board held at Dehra Dun on 24-12-1951, and therefore, the question of grant of further leave did not arise and it was then for the first time, the appellant learnt that his services had been terminated.

According to the appellant, with all his attempts to get a copy of the report of the Medical Board as to the ailment from which he was said to be suffering, it was not supplied to him and he was told that the proceedings of the Medical Board were confidential as per paragraph 399 of the Regulations for the Medical Services of the Army in India. The case of the appellant was that at that time, he had an accumulated furlough leave of about three years to his credit and he was within his rights to avail of the same on any ground and the failure to give him a copy of the opinion of the Medical Board prevented him from preferring an appeal against the opinion of

the Medical Board and canvassing its correctness. The contention of the appellant was that there was no occasion for him to be placed before a Medical Board and when he questioned the competency of the authorities to place him before the Medical Board, he was informed that since he repeatedly asked for medical leave, arrangements were made to place him before a Medical Board with reference to Regulation 197-C, Note 1 of Civil Service Regulations.

The representations made by the appellant against his termination of services based upon the said report of the Medical Board proved of no avail to him. The case of the appellant was that the termination of his services was illegal, contrary to law and principles of natural justice and also against Article 311 of the Constitution of India. With these averments and allegations, the appellant filed a suit (No 516 of 1954) on the file of a Sub-Judge, I Class, Delhi, praying for a declaration that the appellant's services were wrongfully terminated and he was wrongfully down-graded and that he had always continued in his service as temporary Manager of Military Farms (Remount Veterinary and Farm Corps) and was entitled to all rights, emoluments, privileges, benefits and concessions in respect of his cadre, appointment, promotions etc.

4. The Union of India which was the defendant in the suit filed a written statement, wherein it was contended that as far as the down-grading was concerned, the action against the appellant was taken by way of disciplinary action and the procedure laid down in Army Instructions No 212 of 1949 was followed in dealing with the case of the appellant and no irregularities were committed in the said procedure. With regard to the termination of the appellant's services, it was contended that the authorities were within their rights in so terminating the services and they were also within their rights in not giving the appellant a copy of the proceedings of the Medical Board since they were confidential according to paragraph 399 of the Regulations for the Medical Services of the Army in India. It was further contended that the disciplinary case of the appellant as well as his subsequent appeals were dealt with in accordance with the procedure laid down in Army Instructions No 212 of 1949 and the Ministry of Defence Gazette Notification No. 95 of 1952 and a proper show-cause notice was issued before the final order of his down-grading and as such, the provisions of Article 311 of the Constitution were not contravened.

There was one further contention in the written statement, viz., that in matters of defence personnel the jurisdiction of

the Civil Courts is impliedly barred under Section 9, Civil Procedure Code. (This appears to have been raised by way of amendment to the written statement applied for and allowed by the Court.) With reference to this written statement, one thing may be noticed. It was not the case of the defendant in the written statement that since the appellant belonged to Defence department, Article 311 was not applicable to him.

5. On the basis of these pleadings of the parties, a learned Sub-Judge, I Class, Delhi, framed the following 13 issues:

1. Was the convention of the Medical Board on 24-12-1951 beyond the ambit of the Rule 197, note 1 C. S. R.? If not, was it in bad faith or unnecessary?

2. Is Article 311, Constitution of India, applicable to a case of invalidment on medical grounds?

3. Was the plaintiff invalidated by a competent authority and when was that order first communicated to the plaintiff?

4. Was any show-cause notice necessary to be issued to the plaintiff before his invalidment?

5. Is the plaintiff entitled to the declaration that his down-gradation vide letter dated 2-4-51 was wrongful?

6. Has the court no jurisdiction to try the suit?

7. Can jurisdiction on this court be conferred on ground of violation of the principles of natural justice, equity and good conscience, if the court's jurisdiction is barred otherwise?

8. Was the plaintiff given a reasonable opportunity to show-cause against his invalidment?

9. Was the plaintiff's invalidment conceived in bad faith or for a collateral purpose? If so, with what effect?

10. Was the Ministry of Defence not competent to deal with the memorial of the plaintiff?

11. Was the procedure adopted in regard to the plaintiff's invalidment contrary to the principles of natural justice, equity and good conscience?

12. Was the plaintiff's down-grading wrongful?

13. Relief.

The learned Sub-Judge decided Issue No. 1 in favour of the appellant by holding that the authorities had no power in the circumstances to convene a Medical Board for the examination of the appellant, and in view of this conclusion, he held that the second part of the issue did not arise. With regard to issue No. 2, he held that the invalidment of the appellant amounted to his removal from service, and consequently, before his discharge he was entitled to a notice and a hearing. With reference to issue No. 3, he held that the competent authority to

discharge the appellant was only the Quarter Master General in view of the Gazette Notification No. 95 of 1952 and since the appellant was discharged from service not by the Quarter Master General, he was not removed from service by a competent authority. He also gave a finding that the date of communication of the order of termination of service of the appellant was 9/11-2-1952 as evidenced by Ex. P. 42. Following the finding on issue No. 2, with reference to issue No. 4, he held that a show cause notice was necessary to be issued to the appellant before his invalidment.

With regard to issue No. 5, he took the view that since the appellant was down-graded from the post of temporary Manager to that of his permanent post of Assistant Supervisor, Art. 311 was not attracted and he was apparently of the view that the provisions of Article 311 were applicable to permanent appointments only and not to temporary appointments. Regarding issue No. 6, he came to the conclusion that it was not established on record that the appellant was a servant connected with Defence, and therefore, the jurisdiction of the Civil Court was not barred. In view of his finding on issue No. 6 he came to the conclusion that issue No. 7 did not arise for decision. In relation to issue No. 8, the learned Sub-Judge recorded the finding that it was conceded on the defendant's side by the Defence's counsel at the Bar, and hence, decided the issue in favour of the appellant. With reference to issue No. 9, he came to the conclusion that even if any officer of the department was unsympathetically disposed to the appellant still the administration had the right to place its employee at any stage of the service before a Medical Board during his service to see whether the employee was or was not physically fit to perform his duties or for a like purpose, and therefore, decided the issue against the appellant.

With regard to issue No. 11, the learned Sub-Judge took the view that it was not the duty of the Medical Board to inform the appellant about their opinion and offer him any opportunity to produce any evidence like certificates to the contrary from other competent doctors, but it was the duty of the department in whose employ the appellant was, to duly inform the appellant of the medical opinion, and therefore, the issue was held not proved and was decided against the appellant. In view of his finding on issue No. 5, he held that Article 311 (2) was not attracted to the appellant's down-grading, and consequently, decided the issue against the appellant. In the end, the learned Sub-Judge by a judgment and decree dated 28-5-1957 decreed the appellant's suit with costs and grant-

ed him declaration that the termination of his services was wrongful and that he was deemed to continue as Assistant Supervisor. Thus, it will be seen that the appellant succeeded in part and failed in part.

6. To the extent to which the trial Court granted the decree in favour of the appellant regarding his invalidment on medical grounds, the Union of India, filed an appeal. In that appeal, the appellant filed cross-objection in so far as his suit for declaration that his downgrading was wrongful was not decreed. The appeal as well as the cross-objection were disposed of by the First Additional District Judge, Delhi, by a judgment and decree dated 20-1-1959. The learned First Additional District Judge pointed out in his judgment that the learned counsel for the defendant-appellant during the course of his arguments solely laid stress on two points viz., that Article 311 of the Constitution of India was not applicable to the facts of this case since the appellant herein at the time of his invalidment from service was holding a post connected with Defence, and further that the appellant was neither dismissed nor removed from the service but was compulsorily retired on account of physical disability.

On the first point, the learned First Additional District Judge came to the conclusion that Article 311, Constitution of India, did not apply to the appellant since he was holding a post connected with Defence. On the second point, the learned First Additional District Judge came to the conclusion that the appellant was really removed from service and was not compulsorily retired, and therefore, but for his finding that Article 311 did not apply to the appellant's case, the appellant would be entitled to the relief he prayed for. In this view, he allowed the appeal of the Union of India and dismissed the cross-objection of the appellant. With regard to demotion of the appellant, the learned Judge recorded as follows:

"The learned counsel for the defendant-appellants conceded, and rightly too, that the department did not furnish the plaintiff-appellant with copies of the report and proceedings of the Enquiry Officer while serving him with a notice to show cause as to why he should not be demoted. In the absence of this step, the plaintiff-respondent cannot be said to have been afforded a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

7. The present second appeal has been preferred against this judgment and decree of the learned Additional District Judge. Shri Vohra, the learned counsel

for the appellant, contended that both with regard to the down-grading of the appellant and with regard to the termination of the appellant's services, no reasonable opportunity was given to the appellant either to defend himself or to show cause against the action proposed against him. Even if Article 311 was not applicable to the appellant, Army Instruction No. 212 of 1949 and the Government of India Gazette Notification No 95 of 1952 which were said to have been followed by the defendant in dealing with the case of the appellant were actually contravened, and consequently, the appellant is entitled to the declaration prayed for by him. His contention was that both the Army Instruction No 212 of 1949 and the Government of India Notification No 95 of 1952 were promulgated for the protection and benefit of a person like the appellant, and consequently, the appellant was entitled to the protection and safeguards provided therein and to the extent to which such protection and safeguards were denied to him, he was entitled to come to a Civil Court asking for the declaration he prayed for.

According to Shri Vohra, the down-grading of the appellant was inflicted on him avowedly by way of punishment and even the termination of the services of the appellant on the ground of his medical unfitness would amount to the removal of the appellant from service and would constitute a penalty, and consequently, he was entitled to the protection afforded by the Government of India Notification No 95 of 1952. He also faintly suggested that even Article 311 of the Constitution would be applicable to the appellant.

8. The contention of Shri Saharya, who appeared for the respondent, was that with regard to the down-grading of the appellant, even if there had been a contravention of Army Instruction No. 212 of 1949 that will not enable the appellant to approach the Civil Court for relief since those Army Instructions were merely administrative directions not conferring any right on a person like the appellant, and therefore, the appellant cannot institute a suit for the relief which he prayed for under Section 9, Civil Procedure Code. Secondly, with regard to the termination of the services of the appellant on the ground of his having been found medically unfit, the contention of Shri Saharya was that such termination of services could not be said to amount to removal by way of punishment and since there was no element of punishment present in such termination and since the termination was not by way of penalty, the Government of India Gazette Notification No. 95 of

1952 did not apply to the termination of the services of the appellant, and therefore, the appellant cannot claim any relief on the ground of contravention of any provision contained in such Notification. As a preliminary to both these contentions Shri Saharya contended that Article 311 has no application to a person like the appellant.

9. Both the counsel cited number of authorities in support of their respective contentions. Before I deal with the other contentions, I shall first dispose of the contention regarding the applicability of Article 311 to the appellant.

10. Article 309 of the Constitution uses the expression 'the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State'. Article 310 (1) uses the expression 'every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union.' Thus, it will be seen that while Article 309 uses the general expression 'public services and posts in connection with the affairs of the Union, Article 310 categorises them as defence service, civil service, all-India service, any post connected with defence or any civil post. On the other hand, Article 311 uses the expression, 'a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State...'. Thus, out of the five categories mentioned in Article 310, viz. (1) defence service (2) civil service of the Union or civil service of a State (3) all-India Service (4) posts connected with defence and (5) any civil post under the Union or under a State, only three, viz. (1) civil service of the Union or a State (2) all-India service and (3) civil post under the Union or a State have been set out in Article 311.

The consequence of this is that a member of a defence service or a person who holds any post connected with defence is outside the scope of Article 311 of the Constitution of India though he falls within the scope of Articles 309 and 310. Admittedly, the appellant was not a member of the defence services. The only other question is whether he held any post connected with defence. On the materials available on record, there is no doubt whatever that the appellant was holding a post in connection with defence. The case of Kapoor Singh Harnam Singh v. Union of India, AIR 1960 Madh Pra 119, related to a case of a Supervisor in the Military Dairy, Jabalpur. The learned Judge of the Madhya Pradesh High Court, in that case, took the view that the appellant in that case

exceed the amount awarded by the Collector.

* * * * *

It follows therefrom that sub-section (2) of Section 25 of the Act would operate in case sub-section (1) is complied with. Sub-section (1) of Section 25 requires that a notice under Section 9 must have been served on any such applicant in order to enable him to make a claim for compensation. In other words, before invoking the bar contemplated under Section 25(2) of the Act by the Government, it has to show that a notice required to be given under section 9 to the claimant was served on him. From the papers on record, we find nothing which would show that the applicant has been so served with the notice required to be given under Section 9 of the Act. Apart from that position, if we were to turn to the written statement filed by the respondents before the Court, no such plea has at all been raised. The material question raised appears to be that the claimant is not entitled to get compensation at the rate of Rs. 150/- and that the compensation of Rs. 50/- per one mango tree awarded by the Special Land Acquisition Officer was perfectly proper. Even no such issue was sought for by the respondent and none raised by the Court as well. If any issue were raised, it would have been open to the claimants to even show some sufficient reason which may justify the Court to allow them to claim additional compensation as contemplated under section 25(2) of the Act. They have had no such opportunity to meet any such ground. Whenever any such bar is claimed, it is essential that a plea to that effect is raised. Besides, an issue is raised by the Court in that respect so as to enable the other party to meet the same. Not only that, but the person who claims such a bar must show that the conditions required to be fulfilled before the bar is available, are established by evidence on record. Nothing of the kind is shown, and in those circumstances, it would be too much to act upon the statement made by the claimant in his evidence about his having not claimed Rs. 150/- or any amount before the Land Acquisition Officer so as to necessarily justify the Court to hold that no additional claim was permissible under Section 25 of the Act. In our view therefore, the learned Judge was not right in holding that the additional claims made before him by the claimants in both the cases was barred under Section 25(2) of the Act.

6. The next point raised was that since the lands over which these trees were standing were submerged in water by about the time before the notification for acquisition of this property under section 4 was issued, the trees cannot be said to be existing on those lands, so as to

entitle them to claim any compensation for the same. Those trees were on the land though no doubt submerged in water. The existence of the trees cannot, therefore, be denied and the mere fact that they were in water at the material time cannot justify rejection of their claims in respect of those trees. In fact no such plea was raised and no issue was sought for even in regard to this point. It was that way hardly proper for the trial Court to reject the claim on some such points in respect of which no issues were raised enabling the parties to focus their attention to lead evidence on that account. The finding on that point appears to be erroneous and on that basis the claims cannot be rejected.

7. * * * * *

8. Mr. Desai, the learned Govt. Pleader, then urged that such a claim would be in the nature of damages in respect of trees and the compensation awarded to them would, therefore, fall under clause secondly of section 23(1) of the Act. That being so, according to him, sub-section (2) of Section 23 would not help the appellants in getting any amount by way of solatium at the rate of 15% on the amount awarded in respect of the mango trees. Such an amount can be only had provided the claim of compensation is awarded under clause first in section 23(1) of the Act. In support thereof, he invited a reference to the case of the Collector, Raigarh v. Chaturbhuj Pande, AIR 1964 Madh Pra 196, where it was held as follows:—

"The additional sum of 15% admissible under Section 23(2) is not available on items covered by all clauses of Sec. 23(1). The additional sum is available on the items covered by clause firstly only. The other clauses do not deal with market price. The sum awarded under them is by way of damages. The amount of damages awarded in accordance with clause secondly to sixthly is not to be increased by adding 15%."

In order to consider this point, it would be necessary to refer to the relevant provisions of Section 23. They are :—

"23. (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—

First, the market value of the land at the date of the publication of the notification under section 4, sub-section (1);

Secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

* * * * *

(2) In addition to the market-value of the land as above provided, the Court

shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition."

Now it is true that the effect of sub-section (2) of Section 23 of the Act is to award a sum of 15% on such market-value of the land as above provided, and that it is contemplated in respect of cases which fall under the first clause of Section 23(1) of the Act. The point to be considered is as to whether the claim of compensation in respect of trees falls under clause secondly as urged by Mr. Desai, or under clause first which relates to the fixing of market-value of the land. If the trees in question fall under clause firstly of section 23(1) of the Act, and not under the second clause, the claimants would be entitled to an amount of compensation at the rate of 15% by way of solatium as is ordinarily called, on the market value thereof by virtue of sub-section (2) of Section 23 of the Act. Now, the expression "land" used in clause firstly of section 23(1) of the Act, as defined in Section 3(a) of the Act, "includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." The trees can no doubt be called things attached to the earth and consequently, the expression "land" used in Section 23(1) would include trees also. It follows, therefore, that the compensation in respect of the lands acquired would also carry with it the compensation for any such trees standing thereon. When that is so, the solatium at the rate of 15% on the market-value of the land would have to be awarded as compensation awarded for the trees standing thereon.

9. If we now refer to clause 'secondly' in Section 23(1) of the Act, it refers to "the damage, if any, sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof". In the 1st place since the expression "land" includes trees standing thereon, the second clause in so far as it refers to trees would appear to be redundant. That clause, therefore, must be taken as independent and dealing with damages in respect of trees under different head. That it is independent of the first clause in Section 23(1) of the Act, becomes clear from the words "at the time of the Collector's taking possession thereof" occurring in the second clause. Those words give an indication of a different period and that is after the notification under Section 4 of the Act is issued in respect of the land in question as against the compensation to be fixed at the date of the notification issued, in clause first. The reference to trees is along with standing

crops and that again at the time when possession is taken. Damages are therefore contemplated to be given for the standing crops or trees on any such land acquired arising after the notification and before possession is taken. Thus, on a consideration of both the clauses, it appears clear that the claim for compensation for trees standing on land at the date of the notification under Section 4 of the Act falls under clause firstly in Section 23(1) of the Act.

10. We find support for this view from some of the decisions of different High Courts as against the one of Madhya Pradesh High Court relied upon by the learned Government Pleader. In Sub-Collector of Godavari v. Seragam Subbaroyadu, (1907) ILR 30 Mad 151, it was held that trees are 'things attached to earth' and are thus included in the definition of land in Section 3(a) of the Land Acquisition Act, and this definition must be applied in the construction of Section 23 of the Act. It was further held that the value of such trees as are on the land when the declaration is made under Section 6 is included in the market value of the land on which the allowance of 15 per cent. is to be calculated under Section 23(2) of the Land Acquisition Act. This decision has been followed in the case of Collector of Bareilly v. Sultan Ahmad Khan, AIR 1926 All 689. As observed in that case in the judgment delivered by Boys, J: "Damage, if any, for taking trees under S. 23(1), secondly, would similarly appear as an item altogether independent of the market value of the land and of the "value" of the trees as part of the market value of the land". In the case of Bhusan Chandra Samanta v Secretary of State for India in Council, reported in (1936) 40 Cal WN 1034, clause secondly of Section 23(1) came to be considered and it was held that it contemplates the value of the crops or trees that may have grown on the land between the date of the declaration of the intention to acquire and the date of the Collector's taking possession. In other words, the claim that was set up is altogether independent from the one that would fall under clause firstly of Section 23(1).

11. The decision of the Madhya Pradesh High Court has not considered the effect of both the clauses relating thereto, and there has been no reference to any of the decisions referred to above. With respect, we are unable to agree with that view, and on the other hand we agree with the other view expressed by three other High Courts when they hold that the amount by way of solatium under Section 23(2) of the Act must be awarded on the claim of compensation awarded in respect of the trees since that forms a part of the land which came to be acquired by the Government. It makes no

difference whether the trees belong to the same person who owned the land on which they stand, or to another person as we have in the present case. There is no justification for making any such distinction in order to deprive the claimant of his legitimate right to claim the amount by way of solatium on the value of the trees under section 23(2) of the Act.

XX XX XX
JHS/D.V.C. Appeals partly allowed.

AIR 1969 GUJARAT 195 (V 56 C 36)

N. G. SHELAT, J.

State of Gujarat, Petitioner v. Vora Saifuddin Akbarali and another, Opponents.

Cri. Ref. No. 49 of 1966, D/- 30-4-1968, from order of Sessions J., Ahmedabad (Rural) at Narol in Sessions Case No. 45 of 1966.

(A) Criminal P. C. (1898), Ss. 195 (1)(c), 476, 479A — Penal Code (1860), Ss. 471, 467 — Suit based on forged cheque — Criminal Court taking cognisance of offence under S. 471 — Sanction of the Civil Court not necessary under S. 195(1)(c).

Clause (c) of S. 195 (1) is confined only to those cases where the offences mentioned in the clause are committed in respect of documents after they are so produced or given in evidence. In other words, the offence in respect of that document already produced in the Court must have been committed while it remained in custody of the Court. It does not refer to any offence already committed in respect of that document outside and later on produced in Court in a proceeding between the same parties. (1968) 9 Guj LR 1 (FB), Majority view though approving the dissenting view, Followed. Apparent opposite view in 1963 (2) Cri LJ 698 (SC), Explained; AIR 1965 Guj 70, Disting.; (1902) 4 Bom LR 268, Ref.

(Para 5)

Thus where a suit brought on the basis of a cheque which was a forged one is dismissed, for taking cognisance by the criminal court of the forgery under Ss. 467, 471 Penal Code, committed by the plaintiff, a complaint in writing by the Civil Court is not necessary. (Para 5)

From the mere fact that the Civil Judge did not take any action under S. 479A Criminal P. C. it could not be said that no action at all could be taken against the plaintiff accused. AIR 1964 SC 725, Foll.

(Para 4)

(B) Civil P. C. (1908), Pre. — Judicial precedents — Finality — Reconsideration of previous Full Bench decision.

LL/BM/G574/68

Ordinarily reconsideration of any Full Bench decision of one's own High Court cannot arise on a mere ground that one does not agree with that view. Such an approach would take away the finality of decisions in such matters. However, it is not that it cannot be done at all. It can only be done provided, at any rate two conditions are satisfied. The first is that the decision is found to be manifestly wrong or that it has lost sight of important decisions of the same High Court, or of the other High Courts on the same point. But more important is about the satisfaction of that Judge that the public interest of a very substantial character is seriously affected or jeopardised by allowing any such decision to stand.

(Para 9)

Cases Referred: Chronological Paras
(1968) 9 Guj LR 1=ILR (1967) Guj.

1091 (FB), State of Gujarat v.

Ali

5, 7

(1965) AIR 1965 Guj 70 (V 52)=
1965 (1) Cri LJ 428, The State

v. Bhukhubhai

5

(1964) AIR 1964 SC 725 (V 51)=

(1964) 1 Cri LJ 555. Babu Lal v.

State of Uttar Pradesh

4

(1963) 1963 (2) Cri LJ 698=1963

(3) SCR 376, Budhu Ram v. State

of Rajasthan

6, 7

(1936) AIR 1936 Bom 221 (V 23)=38

Bom LR 440=37 Cri LJ 814, Em-

peror v. Rachappa Yellappa

5

(1902) 4 Bom LR 268, Noor Mahomed Cassum v. Kaikhosru Maneckjee

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M. A. Trivedi for N. H. Bhatt, for Original Complainant; G. T. Nanavaty Asst. Govt. Pleader, for the State; A. D. Shah for R. N. Patel, for Opponent No. 2.

ORDER:— The facts giving rise to this reference, broadly stated, are that one Patel Laljibhai Somabhai of village Juval Rupavati, filed Civil Suit No. 11 of 1964 in the Court of the Joint Civil Judge (J. D.) at Dholka, against Vora Safakathusein Yusufali, the complainant in the present case, and his brother Vora Ahmedhussain Yusufali for recovering a sum of Rs. 2000 on the basis of a cheque dated 22-11-63 drawn in the name of self under the signature of the complainant Vora Safakathussain Yusufali Lakdawala on the Bombay Mercantile Co-operative Bank Ltd., Ahmedabad Branch. In that suit, the defence of the complainant and his brother Vora Ahmedhussain Yusufali was that the cheque in question and certain coupons which were produced and relied upon in that suit were forged and a false suit in collusion with the accused in this case was filed. That suit came to be dismissed on 30-1-1965 by Shri R. K. Atodaria, Joint Civil Judge (J. D.) Dholka. Thereafter on 16-11-1965 the complainant Vora Safakathussain Yusufali Lakdawala filed a complaint in the Court of the Judicial

Magistrate, First Class, Dholka, against the two accused for offences punishable under Sections 467 and 471 of the Indian Penal Code. After making the necessary inquiry, the learned Magistrate committed both the accused to the Court of Sessions, Ahmedabad (Rural) at Narol, to stand their trial for offences under Sections 467 and 471 read with section 34 of the Indian Penal Code. That Sessions Case No 45 of 1966 was transferred to the Court of the Assistant Sessions Judge, Ahmedabad (Rural) at Narol for disposal in accordance with law.

2. Before the trial began, the accused No 2 presented an application *inter alia* contending that the provisions contained in Sections 195(1)(c), 476 and 479A of the Criminal P. C. were not complied with and consequently the committal proceedings were bad in law. He, therefore, prayed that the order of commitment should be quashed. Since the learned Assistant Sessions Judge was not authorized under section 438 of the Code of Criminal Procedure to report the case to the High Court, he addressed a letter to the Court of Session in that regard and consequently that Sessions Case No. 45 of 1966 was withdrawn from his file and taken over on his file. That application was then heard by the learned Sessions Judge, Ahmedabad (Rural) at Narol. Before him, the learned Assistant Public Prosecutor conceded that having regard to the fact that the provisions contained in Sections 195(1)(c), 476 and 479A of the Criminal Procedure Code were not complied with, the order of commitment was bad in law and that it required to be quashed. The learned Sessions Judge also found that the complaint filed in the Court of the Judicial Magistrate, First Class, against the accused in the case was bad inasmuch as no sanction was obtained from the Court of the Civil Judge where the alleged forged cheque was produced. That being so, the commitment order was also bad in law and he has consequently referred the matter to this Court for quashing the order of commitment made under Section 215 of the Criminal Procedure Code.

3. Mr. Nanavaty, the learned Assistant Govt. Pleader, opposes the acceptance of the reference whereas Mr. Shah, the learned advocate for the accused, supports the reference. Mr. Trivedi, the learned advocate for the complainant, joins hands with the arguments advanced by the learned Assistant Govt. Pleader in this Court.

4. Now the allegations made in the complaint are clearly to the effect that the cheque dated 22-11-63 for a sum of Rs. 2000/- on the Bombay Mercantile Co-operative Bank Ltd., Ahmedabad Branch, was a forged one and that the accused had produced the same in the

Court of the Joint Civil Judge (J. D.) Dholka in a suit filed against the present complainant for recovering a sum of Rs. 2000/- thereunder. That was the basis of a claim made by the plaintiff-accused in that suit and since they had collusively and in furtherance of their common intention to obtain a decree for the claim and for that purpose, since they had produced and made use thereof knowing or having reason to believe the cheque to be a forged one, they were liable for the offences under Sections 467, 471 read with section 34 of the Indian Penal Code. Now as the learned Civil Judge had not chosen to take any action while dismissing the suit, for fabricating such evidence in the form of a cheque produced by the party-plaintiff, under Section 479A of the Criminal Procedure Code, the learned Sessions Judge found that no proceedings can now be taken in respect thereof by the complainant. Apart from the applicability of section 479A of the Criminal Procedure Code, having regard to the decision in *Babu Lal v. State of Uttar Pradesh*, AIR 1964 SC 725, such an offence punishable under Section 471, Indian Penal Code, being one of fraudulently or dishonestly using as genuine any document which the accused knows or has reason to believe to be a forged document, does not fall within the category of offences contemplated in Section 479A (1) of the Code of Criminal Procedure, cannot come in the way of any such complaint. It may be stated that there has been no application presented by the party for taking any action under Section 476 of the Criminal Procedure Code and, therefore, there would not arise any such consideration as thought by the learned Sessions Judge viz. that for want of taking any action under section 479A of the Criminal Procedure Code, no such action can at all be taken against the accused in the case. So far there is no dispute.

5. The material point, however, that requires to be considered is as to whether the Court was not entitled to take cognizance of any such offence said to have been committed by a party to any proceeding in Court in respect of a document such as a cheque dated 22-11-63 produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate as contemplated under Section 195 (1) (c) of the Criminal Procedure Code. Section 190 of the Criminal P. C. entitles any Presidency Magistrate and any Judicial Magistrate to take cognizance of any offence except as hereinafter provided. In other words, the cognizance of offences can be said to have been properly taken by the learned Judicial Magistrate unless it is shown that by any operation of Section in the

Criminal Procedure Code, no such cognizance can be taken. Section 195 (1) of the Criminal Procedure Code, therefore, serves as an exception to the general rule contemplated in Section 190 (1) of the Criminal Procedure Code, for it lays down that :—

"195. (1) No Court shall take cognizance —

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| (a) | * | * | * | * | * |
| (b) | * | * | * | * | * |

(c) of any offence prescribed in section 463 or punishable under Section 471, Section 475 or Section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate."

The contention of Mr. Shah was that all the conditions contemplated in Section 195 (1)(c) of the Code have been fulfilled so as to justify him to say that the cognizance of the complaint taken by the learned Magistrate was bad in law, for, that could only be taken provided a complaint in writing of such Court, or of some other Court to which such Court is subordinate was filed. Now it is true as pointed out by him, the cheque is said to have been forged and that had come to be produced in a civil proceeding in the Court of the Civil Judge (J. D.) at Dholka so that the offences in that regard fall under sections 463 and 471 of the Indian Penal Code. Then the person who produced the same or gave in evidence was a party-plaintiff to that suit before the Court. Consequently, he urged, that except on the basis of a complaint filed by that Civil Court, it was not competent for the Judicial Magistrate to entertain any such complaint in respect of those offences under Sections 467 and 471 read with Section 34 of the Indian Penal Code in respect of that document which was produced in that civil suit between the parties. On a plain and simple reading of Section 195(1)(c) of the Code, one feels inclined to so think, but it was pointed out by Mr. Nanavaty, the learned Assistant Govt. Pleader for the State, by a reference to a decision in the case of *State of Gujarat v. Ali*, (1968) 9 Guj LR 1 (FB), that this Section 195(1)(c) of the Criminal Procedure Code has been interpreted by the Division Bench of this High Court, and as laid down therein, no such complaint by the Court was essential to be filed, and that therefore the complaint was competent under Section 190(1) of the Code, and the committal proceedings made by the learned Magistrate were not vitiated by reason of non-compliance of Section 195(1)(c) of the Code. What ultimately appears to have

been held in that case was that under Section 195(1)(c) of the Criminal Procedure Code, sanction for prosecuting a party to a proceeding for an offence under Section 471 of the Indian Penal Code was not necessary "in respect of a use made outside" the Court to which the document was subsequently produced. That way the decision given in (1902) 4 Bom LR 268, *Noor Mahomad Cassum v. Kaikhosru Maneckjee*, was found to be correct as against the one in 38 Bom LR 440= (AIR 1936 Bom 221) *Emperor v. Rachappa Yellappa*. But while analysing and interpreting that part of the section, His Lordship Miyabhoy C. J. speaking for himself and Mehta J. (majority) has held as urged by Mr. Nanavaty, that only the offences which come within the mischief are those which were committed by a party in regard to a document which is 'already' produced or given in evidence in a proceeding in which the present accused is a party. Making that statement further clear, it has been observed that clause (c) is confined only to those cases where the offences mentioned in the clause are committed in respect of documents after they are so produced or given in evidence. In other words, the offence in respect of that document already produced in the Court must have been committed while it remained in custody of the Court. It does not refer to any offence already committed in respect of that document outside and later on produced in Court in a proceeding between the same parties. While so holding, his Lordship Miyabhoy C. J. has towards the end observed as under:—

"Under the circumstances, in our judgment, though we are conscious of the fact that the authorities of the Bombay and several High Courts, specially those dealing with offences connected with Section 463, take the wider view, on the whole, we have come to the conclusion that the narrower view which was expressed but without any reason in *Noor Mahomad Cassum's case*, (1902) 4 Bom LR 268 is the correct view and, therefore, we propose to answer the query put by the Division Bench by holding that, that case was correctly decided."

Desai J., however, has given a dissenting judgment in that case, and according to him, the correct interpretation of section 195 (1) (c) was that on the date on which the Criminal Court takes cognizance of the offence mentioned in the clause, the Court has to satisfy itself whether the offence in respect of which it is called upon to take cognizance is alleged to have been committed by a party to a proceeding in any Court and whether the alleged offence is in respect of document produced or given in evidence in such proceedings. If these conditions are satisfied, the Criminal Court

will have jurisdiction to entertain the complaint only if it is filed by the Court in which it is tendered in evidence by the party to the proceeding or by some other Court to which such Court is subordinate, irrespective of the fact whether the alleged offence of forgery was committed before the proceedings were initiated or thereafter. Much though I feel inclined to be in agreement with the view expressed in the dissenting judgment, since the decision of majority of the Full Bench of this Court binds, that must prevail as it governs the case. No offence of forgery was committed after the cheque was already produced in that civil suit, and that since it must have been committed outside the Court before it was produced, Section 195(1)(c) would not come in and bar the complaint in the case.

6. It was, however, pointed out by Mr. Shah that while interpreting this Section 195(1)(c) of the Criminal Procedure Code in the case referred to above, the effect of the two important decisions is not considered. The first is the decision of a Division Bench of this High Court in the case of the State v. Bhikhubhai, AIR 1965 Guj 70, and the other is of the Supreme Court in the case of Budhu Ram v. State of Rajasthan, 1963 (2) Cri LJ 698 (SC). In the first case of AIR 1965 Guj 70, the contention was that the learned Magistrate had committed an error of law in taking cognizance of the charge-sheet for the offences under Sections 420, 465, 468 471 read with Section 109 of the Indian Penal Code in view of the fact that the cognizance of the aforesaid offences was barred under Section 195 sub-section (1) clause (c) of the Criminal Procedure Code. The offence was in respect of a document, Ex. 83, dated 15th January 1954 produced before the Agricultural Lands Tribunal, and it was found that the cognizance of any offence in relation to that particular document could only be taken on a complaint filed by the Tribunal and that a charge-sheet without the complaint of the Tribunal was barred. On a reference made to this Court for quashing the committal order after analysing Section 195 (1) (c) of the Code, it was observed that the cognizance of the Criminal Court will be barred under Section 195 (1) (c) if the following conditions are satisfied.—

(1) The offence alleged to have been committed must be an offence described in section 453 or an offence punishable under section 471, section 475 or section 476 of the Indian Penal Code.

(2) Such offence must be alleged to have been committed by a party to any proceeding in any Court.

(3) The offence so alleged to have been committed must be in respect of a document produced or given in evidence in such proceeding.

If these conditions are satisfied, a Criminal Court cannot take cognizance of any of the aforesaid offences except on a complaint in writing by such Court or by some other Court to which such Court is subordinate. Then after finding that the first two conditions were already satisfied in that case, they referred to the third condition which was necessary to be satisfied as the offences must be alleged to have been committed in respect of a document produced or given in evidence in the proceeding before the Court. Then His Lordship Mirabhoj J. speaking for the Division Bench observed as under :—

"From the facts already recited, it is quite clear that the only document which was produced before the Tribunal was the Contract Exhibit 83. Therefore, it is quite clear that the charges of forgery, in so far as they are based upon the document, Ex. 83, would come within the purview of clause (1) (c) aforesaid. It was then held that it was hit by section 195 (1)(c) of the Code. But the other charge relating to a false entry in the stamp register was not so hit since that was not produced before the Tribunal. This case has laid down further that the offence must have been committed by a party to the proceeding and that it was not at all essential that the proceeding referred to in clause (1) (c) should be pending at the time when the cognizance of the crime was sought. Now the decision does appear to have proceeded on the basis that it did not matter whether the document in question was forged before the same was produced in a proceeding before the Court. This decision, it is also true, does not appear to have been considered in the Full Bench case. But this decision cannot be said to have laid down any such direct proposition contrary to the interpretation and decision given in respect of Section 195 (1) (c) in the Full Bench case. In fact no such interpretation was at all required to be made in that case so as to say that it would have any effect in weighing or giving interpretation to the section as done in the Full Bench case.

7. The other case of 1963 (2) Cri LJ 698 (SC) (supra) referred to above, does not also appear to have been placed before their Lordships when the decision came to be given by the Full Bench in the case reported in (1968) 9 Guj. LR 1 (FB). This decision also proceeds on the basis that any forged document when it is sought to be produced or given in any evidence in any proceeding by any party to the same and any offences in relation thereto are said to have been committed by him, a complaint would be essential as contemplated in Section 195 (1) (c) of the Code. Considerable stress was laid by Mr. Shah on the observations made by the Supreme Court in this case for show-

ing that section 195 (1) (c) would hit no sooner any such document alleged to have been forged is produced before a Court in any proceeding by a party thereto, and that therefore, it made no difference whether it was forged outside the Court or inside the Court at any time. After setting out Section 195 (1)(c) of the Code, the pertinent observations made by the Supreme Court ran thus:—

"It will be seen on a plain grammatical construction of this provision that a complaint by the Court is required where the offence is of forging or of using as genuine any document which is known or believed to be a forged document when such document is produced or given in evidence in court. It is clear therefore that it is only when the forged document is produced in Court that a complaint by the Court is required."

These observations are no doubt entitled to great weight and if they were brought to the notice of the Full Bench, they would have been certainly considered. But even in this case, the direct question for decision was as to whether the offences referred to in section 195(1)(c) of the Code related to the original document alleged to be a forged one, or to a copy thereof as well and it was held that it did not apply to a copy of any document said to have been forged. At any rate, the section does not appear to have been interpreted as we find it done in the Full Bench case.

8. Mr. Shah, then invited a reference to the report of the Select Committee, 1916 when amendments were made in this section by Act XVIII of 1923. The material part sought to be relied upon runs thus:—

"The provisions of Section 195 cause constant and great difficulty, and various amendments have been suggested which we have considered at length. We have no doubt that it will not be possible to remedy the evils which are connected with this section so long as private individuals are allowed to prosecute for offences connected with the administration of justice. In our opinion the only effective way of dealing with this section is to allow prosecutions to be launched only by the public servant or by the Court."

Apart from these citations, he also urged that Section 471 of the Indian Penal Code has not been properly considered in the Full Bench case for if one refers to that section, the offence relates to using as genuine a forged document. That section provides that whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document. The words "uses as genuine any document which he

knows or has reason to believe to be a forged document" presuppose the same having been already forged or at any rate known or having reason to believe the same to be a forged document by that party and having then made use thereof by producing the same or by giving in evidence in the proceeding before that Court. That in itself rules out any such interpretation, according to him, given by the Full Bench under Section 195(1)(c) of the Code, for it relates to an offence which must have been committed in respect of that document before it is used in that proceeding, and not necessarily and only in respect of a document already produced and then offence committed in that respect in the Court. With great respect, it is difficult to agree with the majority view in the Full Bench case referred to above, for the reasons stated above, and, if I may say so, I respectfully agree with the dissenting view expressed by Desai, J. in that Full Bench case. It finds considerable support from various authorities of different High Courts referred to therein. I need not repeat the same reasons given by him over again here. It is, however, enough to say that all that has no meaning as the decision of the Full Bench of this High Court binds this Court and I must abide by it as long as it stands.

9. It was, however, urged by Mr. Shah that the Full Bench decision requires to be reconsidered as it would be far too difficult for anyone to go in appeal to the Supreme Court against any such decision in the case. That cannot be helped. That is hardly a good ground for referring the matter for reconsideration by a larger Bench. Ordinarily reconsideration of any Full Bench decision of one's own High Court cannot arise on a mere ground that one does not agree with that view. Such an approach would take away the finality of decisions in such matters. However, it is not that it cannot be done at all. In my view, that can only be done provided, at any rate, two conditions are satisfied. The first is that the decision is found to be manifestly wrong or that it has lost sight of important decisions of the same High Court, or of other High Courts on the same point. But more important is about the satisfaction of that Judge that the public interest of a very substantial character is seriously affected or jeopardised by allowing any such decision to stand. I do not think both these conditions are so fully satisfied in this case, and therefore, I do not consider this to be a fit case for any such request being granted.

10. In the result, therefore, the reference is not accepted and the order passed by the learned Magistrate committing the accused to the Court of Session stands. MVJ/D.V.C. Reference rejected.

AIR 1969 GUJARAT 200 (V 56 C 37)
D A. DESAI, J.

Fulsinh Kesri Sinhi, Appellant v. Vallabhdas Hargovandas and another, Respondents

First Appeal No 318 of 1963, D/- 19-6-1968, against decision of Civil J., Sr. Division at Godhra in Spl. Darkhast No. 11 of 1956

Civil P. C. (1908), S. 73 and O. 21, R. 11 (2)(i) — Money decree — Execution application seeking assistance of Court by rateable distribution is in accordance with law. AIR 1929 Nag 148, Dissented from.

An application for execution of a money decree in which assistance of the Court is sought by rateable distribution of the assets of the judgment-debtor realised in another pending execution application and which in other respects is in conformity with the requirement of O 21, R 11 is an application for execution in accordance with law as envisaged by section 73 (Para 3)

Sub-clauses (i) to (iv) of O. 21, R. 11(2) (i) enumerates the various modes in which assistance of the Court could be sought and sub-clause (v) is enacted in wide terms to enable the executing Court to grant its assistance in consonance with relief granted in the decree under execution. In a money decree the assistance of the Court would be sought to realise the decretal amount. The decretal amount or a part of it could be realised by rateable distribution. Section 73 empowers the Court to grant rateable distribution between decree-holders against the same judgment-debtor. There is nothing in the language of sub-rule (2) (i) of O 21, R. 11 which would show that the relief by way of rateable distribution in execution application is not the one which would not be covered by sub-clause (v) of sub-rule 2(i). Case law discussed. AIR 1929 Nag 148, Dissented from. (Para 3)

Cases Referred: Chronological Paras

- (1961) AIR 1961 Madh Pra 145 (V 48) = 1961 MPLJ 256 (FB), Mt. Saraswati-bai v Govindrao Keshavrao Mahajan 7
(1959) AIR 1959 Cal 566 (V 46) = 63 Cal WN 983, Kashi Prosad Khaltan v. Moti Lal 4
(1957) AIR 1957 Andh Pra 1017 (V 44) = 1956 Andh WR 1047, M. Jambanna v Honnappa 6
(1935) AIR 1935 SC 376 (V 42) = 1955 (1) SCR 1369, Jugal Kishore Saraf v Raw Cotton Co Ltd. 8
(1943) AIR 1943 Bom 353 (V 30) = 45 Bom LR 707, Gopal Parsharam v Damodar Janardan 11
(1931) AIR 1931 All 92 (V 18) = ILR 53 All 125, Mt. Deoraji Kuer v. Jadumandan Rai 5, 6

(1929) AIR 1929 Nag 148 (V 16) = 25 Nag LR 94, Balaji v. Gopal 4, 7, 9, 10 (1910) ILR 34 Mad 25 = 7 Ind Cas 856, Arunachellam Chettiar v. Haji Sheek Meera Rowthar 10

B. M. Vin, for Appellant; M. I. Patel, for Respondents.

JUDGMENT: — This is an appeal against an order passed on Ex. 167 in Special Darkhast No 11 of 1956 on the file of the Civil Judge, Senior Division, Panch Mahals at Godhra.

2. Shortly stated the facts leading to the present appeal are: that the appellant obtained a decree against respondent No 2 for Rs. 33,476-75. Respondent No 1 filed Special Darkhast No. 11 of 1956 for executing the decree obtained against respondent No. 2. In this Darkhast some of the properties of respondent No 2 judgment debtor were attached and sold at a court auction and the sale proceeds were deposited in the court and the sales were confirmed. In the meantime, the present appellant who had obtained a decree against respondent No. 2, the same judgment-debtor filed special Darkhast No 7 of 1962 on 28-3-1962 for executing the decree. In this Darkhast the relief claimed was that the amount should be awarded by rateable distribution from the amount recovered by attachment and sale of the properties of the judgment-debtor in Special Darkhast No. 11 of 1956 filed by respondent No 1. It was also prayed that Special Darkhast No. 7 of 1962 filed by the present appellant should be kept and heard along with Special Darkhast No 11 of 1956 filed by respondent No 1 against respondent No 2. Respondent No 1 in his Special Darkhast No 11 of 1956 gave an application Ex. 167 inter alia contending that the execution application filed by the appellant against respondent No. 2 is not legal and is not maintainable and the appellant would not be entitled to rateable distribution from the assets of the judgment-debtor realised in the Darkhast filed by respondent No 1. Two contentions were raised in this application: (1) that the decree obtained by the appellant against respondent No 2 is a collusive decree and (2) that the application for execution in which the only prayer made is one for rateable distribution is not an application for execution according to law and it is not maintainable. A notice of this application was served upon the present appellant and after hearing both the sides, the learned Judge held on the first contention that the decree is not collusive. On the second contention, the learned Judge held that where a decree-holder in his application for execution claimed the only relief of rateable distribution out of the sale proceeds of the assets of the judgment-debtor in another pending execution application against the same judgment-debtor, it is not a mode of

execution for which assistance of the Court is sought as envisaged by O. XXI, R. 11 and therefore, it is not an application for execution according to law and in accordance with this finding dismissed Darkhast No. 7 of 1962 filed by the present appellant. The appellant having been dissatisfied with this order has preferred this appeal.

3. A narrow but interesting question relating to the interpretation of O. XXI, R. 11(2)(i) and Section 73 of the Code of Civil Procedure arises in this appeal. The question for consideration is whether an application for execution of a money decree in which the mode in which assistance of the Court is sought is one for rateable distribution of the assets of the judgment-debtor realised in another pending execution application could be said to be an application for execution in accordance with law as envisaged by Section 73. Order XXI, Rule 11(2) provides that every application for execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case and shall contain in a tabular form the particulars mentioned in sub-rules 2(a) to 2(j). Sub-clause (j) which is relevant for our purpose is as under :—

“(j) the mode in which the assistance of the Court is required, whether—

(i) by the delivery of any property specifically decreed;

(ii) by the attachment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief may require.”

The provision contained in sub-rule (2) would show that the application for execution must be in a tabular form in which the details as set out in sub-rule (2) must be mentioned. The heading of the last column of the tabular form is: ‘the mode in which the assistance of the Court is required’. Clause (j) provides different modes of assistance of the Court which a decree-holder can seek in execution application. Section 73 postulates the filing of an execution application in accordance with law before rateable distribution could be ordered by the Court. Relying on the different modes in which Court could grant assistance to a decree-holder as set out in clause (j), it was urged that an application for execution to be in accordance with law must seek assistance of the Court in one of the modes provided for in clause (j) and the Court could grant its assistance only in one or more of the modes as set out in clause (j). It was also urged that clause (i) is exhaus-

tive and the Code does not envisage the grant of assistance by the Court in execution of a decree by a mode which would not fall in any of the sub-clauses (i) to (v) of Clause (j). It was more specifically contended that if the assistance of the Court is sought in a mode not falling within any of the sub-clauses of Clause 2(j), the Court would have no jurisdiction to grant it and, therefore, such an application for execution would not be in accordance with law. Now, sub-clause (v) of clause (j) of sub-rule (2) provides that the decree-holder can seek assistance of the Court in any other mode as the nature of the relief granted may require. Sub-cl. (v) is couched in very wide terms. It would enable a decree-holder to seek assistance of the Court for executing a decree in consonance with the relief granted in the decree. The language of sub-clause (v) would negative the contention that it is exhaustive and the Court is precluded from granting its assistance in a mode not covered by sub-clauses (i) to (iv). It appears that sub-clauses (i) to (iv) enumerates the various modes in which assistance of the Court could be sought and sub-clause (v) is enacted in wide terms to enable the executing Court to grant its assistance in consonance with relief granted in the decree under execution. Now, if the decree is a money decree, the assistance of the Court may be sought for realising money. While realising the money, belonging to the judgment-debtor it may become necessary to attach it in the hands of a third person or recover from the Court where it is lying. If against the same judgment-debtor another execution application is pending and in which the property of the judgment-debtor is brought to court auction and sold, there is no reason both on principle or on authority why the decree-holder cannot seek the assistance of the Court by only praying for rateable distribution. Section 73 empowers the Court to grant rateable distribution between pending execution application against the same judgment-debtor. Mr. Patel, the learned Advocate for respondent No. 1 however contended that even if sub-clause (v) of Rule 11(2)(j) is very wide in terms it has to be interpreted ejusdem generis with sub-clauses (i) to (iv) and therefore the mode in which assistance may be sought must be analogous or similar to the modes set out in sub-clauses (i) to (iv) of sub-rule 2(j). At one stage, Mr. Patel attempted to urge that a decree-holder can seek assistance of the Court in the manner set out in the first four modes in sub-clauses (i) to (iv) of sub-rule (2)(j) and sub-clause (v) of sub-rule 2(j) would not enlarge the scope and ambit of the rule so as to grant assistance of the Court in any other mode entirely different and unconnected with those set out in sub-

clauses (i) to (iv). In my opinion, there is nothing in the language of sub-rule 2(j) and its sub-clauses (i) to (iv) which would control or abridge the meaning or scope of sub-clause (v). In fact, the Legislature has very wisely enacted sub-clause (v) in wide terms so that a decree-holder would be able to seek the assistance of the Court while executing the decree by a mode which would be in consonance with the reliefs granted to him and would be able to realise the fruits of the decree. In a money decree the assistance of the Court would be sought to realise the decretal amount. The decretal amount or a part of it could be realised by rateable distribution. Section 73 empowers the Court to grant rateable distribution between decree-holders against the same judgment-debtor. Therefore, an execution application in which the assistance of the Court is sought for rateable distribution in the assets of the judgment-debtor by a decree-holder is one of the modes in which the assistance of the Court sought would be covered by sub-clause (v) being the mode required by the nature of the relief granted in the decree. If the construction suggested by Mr. Patel is to be placed on sub-clause (v) it would lead to an absurd position. Mr. Patel conceded that under S 73 the Court can grant rateable distribution. But Mr. Patel urged that even though the decree-holder seeks rateable distribution he must seek the assistance of the Court in one or more of the modes specified in sub-clauses (i) to (iv) and only then Court can grant rateable distribution. It is difficult to conceive that in order to obtain rateable distribution the decree holder must seek assistance in other modes knowing full well that in the circumstances of the case it is not likely to be available. I see nothing in the language of sub-rule 2(j) of O XXI, R 11 which would show that the relief by way of rateable distribution in execution application is not the one which would not be covered by sub-clause (v) of sub-rule 2(j). Therefore, an application for execution of a money decree in which assistance of the Court is sought by rateable distribution and which in other respects is in conformity with the requirement of O XXI, R 11 is an execution application in accordance with law. This is also borne out by a catena of decisions to some of which I would now refer.

4. Mr. Vin first referred to Kasi Prasad Khaitan v. Moti Lal, AIR 1939 Cal 566 in which exactly an identical question was raised before the Division Bench of the Calcutta High Court. The question for consideration that was raised in that case was whether an application for execution in which the mode in which the assistance of the Court is required does not mention attachment or sale of property but says that the decree-holder

prays for realisation of the decretal dues by rateable distribution of the money that will be realised in another execution application of that Court, can be considered to be an application for execution validly made within the meaning of Section 73 of the Code of Civil Procedure. After considering the provisions contained in O XXI, R 11(2)(j), it was held that a mere application for rateable distribution which does not contain the particulars mentioned in sub-rule (2) of R 11, is not an application for execution but where there is an application which is in all other respects a proper application for execution under O XXI, R 11(2), it does not cease to be a valid application merely because the mode in which the assistance of the Court required is mentioned as rateable distribution of money that will be realised in another execution case. While reaching this conclusion, the Division Bench of the Calcutta High Court referred to the case of Balaji v. Gopal, AIR 1929 Nag 148 in which a contrary view is taken and observed that they were unable to agree with the view that where there is an application which is in all other respects a proper application for execution under O XXI, R 11(2), it ceases to be a valid application merely because the mode in which the assistance of the Court required is mentioned as rateable distribution. I am referring to this aspect specifically because the other side has relied upon the case of AIR 1929 Nag 148 (Supra).

5. Mr. Vin next referred to the case of Mt. Deoraji Kuer v. Jadunandan Rai, AIR 1931 All 92. In that case, the application for execution was in a printed tabular form and all the particulars required for an application for execution were filled in, in columns 1 to 9 and in the last column which is column No 10 has a heading "the mode in which the assistance of the Court is required". It was stated that the only property which the judgment-debtor had, has already been attached in execution of the other decrees and was to be put up for sale and it was therefore prayed that the decree-holder should be paid his decretal amount by rateable distribution of the amount realised at the auction sale. A contention was raised whether this application was one for execution in accordance with law and also whether a separate and independent application for rateable distribution under Section 73 is necessary. Disposing of this contention, it has been held that the application is a proper application for execution because one can read an implied prayer for the sale of the property and rateable distribution. It was further held that section 73 does not require a separate application for rateable distribution and accordingly there can be no objection to include

a prayer for the rateable distribution of the assets in the application which is really for execution of the decree itself. The case of AIR 1929 Nag 148 (supra) was referred to in this case. It was distinguished on the ground that while the application before the Nagpur High Court was for rateable distribution simpliciter, the application in the case before their Lordships of the Allahabad High Court was one in which all the particulars as required under O. XXI, R. 11(2) were set out and therefore, it was held that it is an application for execution in accordance with law. It was further observed that even if there was slight defect in the language in which the prayer clause was worded at best it would be an irregularity and on this account alone, it would not be proper to reject the application as one not in conformity with law.

6. Mr. Vin next referred to *M. Jambanna v. K. Honnappa*, AIR 1957 Andh Pra 1017. In that case, the decree-holder filed an application for execution in the tabular form and set out therein all the details and particulars as required by O. XXI, R. 11. In column No. 10 headed "mode in which assistance of the Court is sought" the decree-holder stated that he should be paid rateable share from and out of the proceeds to be realised on sale and deposited in Court. The executing Court did not grant the relief holding that there was no execution application before the Court and one filed is not one in accordance with law. Negating this contention, it was held by Subba Rao C. J. (as he then was) that as the decree-holder has filed an application in tabular form setting out therein all the particulars required by O. XXI, R. 11, it is manifest that the petitioner satisfied both in form and substance the requirements of O. XXI, R. 11 of the Civil Procedure Code. The case of AIR 1931 All 92 (supra) was referred to and observed that such an application is one in accordance with law.

7. The next case referred to by Mr. Vin was in the matter of *Mst. Saraswati-bai v. Govindrao Keshavrao Mahajan*, AIR 1961 Madh Pra 145. The question that was canvassed before a Full Bench of the Madhya Pradesh High Court was whether an otherwise good application for execution can be regarded, for the purposes of Section 73 of the Civil Procedure Code, to be one made in accordance with law even if the only mode in which the assistance of the Court stated to be required is rateable distribution of the assets to be received in another execution case pending in the same Court. After reviewing the case law on the subject it has been held as under:—

"that being so we are of the view that recovery of the money decree by rateable

distribution of assets, being a permissible mode of execution is within the ambit of clause (j)(v) of O. 21, R. 11(2) of the Code and an execution application which specified it as the mode in which the assistance of the Court is required is one in accordance with law for purposes of Sec. 73 of the Code."

Now, it may be mentioned that while reaching this conclusion, the Full Bench of the Madhya Pradesh High Court referred to the case of AIR 1929 Nag 148 (supra) and differed from it and took a contrary view.

8. Mr. Vin also incidentally referred to *Jugalkishore Saraf v. Raw Cotton Co. Ltd.*, AIR 1955 SC 376. The contention that was raised in that case was that the application for execution was defective inasmuch as it did not specify any of the several modes in which the assistance of the Court was required. Disposing of this contention, it was held that even if the application was defective, the Court could have returned the application for amendment but on this account alone, it cannot be said that there was no valid and proper application for execution.

9. As against this, Mr. M. I. Patel learned Advocate for the respondents referred to AIR 1929 Nag 148. Unfortunately, this was the case which was cited before the learned Judge and though there are number of other cases just taking a contrary view relied upon by Mr. Vin, none was pointed out to the learned Judge and the learned Judge was constrained to observe that no contrary authority had been shown to him. The matter came up before a Division Bench of the Nagpur High Court on a reference made to it. The relevant portion of the question referred to it was as under :—

"Is it necessary for a creditor, claiming on the strength of a money decree rateable distribution from the proceeds of a sale of his debtor's property about to take place at the instance of another creditor, to ask himself for attachment and sale of that property, or is it sufficient to merely ask for rateable distribution?"

The Division Bench of the Nagpur High Court answered the reference as under:—

"We are of opinion, then, that an application that only prays for rateable distribution is not a valid application for execution within the meaning of O. XXI, R. 11, that Civil Procedure Code does not recognise an application for rateable distribution as such and that, in order to obtain rateable distribution under S. 73, a decree-holder must have made an application for execution to the Court, praying for execution of his decree in one of the ways mentioned in O. XXI, R. 11, before the receipt of assets by the Court."

It appears that a contention was put forth before the Division Bench that sub-

clause (v) of Rule 2(j) is of widest amplitude and would cover the relief by way of rateable distribution. This contention appears to have been negatived by a mere observation. "Nor do we think that it can be included in clause (j)(v)" But even apart from this that case can be distinguished on another cogent ground. The application that was made in that case was not one in a tabular form as envisaged by O XXI, R. 11 setting out details and particulars as required by O XXI, R. 11, but it was an application simpliciter for rateable distribution. Such an application could by no stretch of imagination be said to be an application for execution at all and that aspect has considerably weighed with their Lordships. With respect, I am unable to accept the interpretation put by the Division Bench of the Nagpur High Court on sub-clause (v) of sub-rule (2)(j) of Rule 11 of O XXI by which it was held that an application praying only for rateable distribution is not a valid application for execution. It may be that this conclusion was reached because what was before the Court was a mere application for rateable distribution and not an application for execution in a tabular form with the prayer clause seeking rateable distribution.

10. Mr Patel also referred to A. I. A. R. Arunachellam Chettiar v P. S. K. Hajj Sheek Meera Rowthar, ILR 34 Mad 25 which has been considered in the case of AIR 1929 Nag 148 (supra).

11. The last case referred to by Mr. Patel is Gopal Parsharam v. Damodar Janardan, AIR 1943 Bom 353 Relying on this case, Mr. Patel attempted to urge that the settled view of the Bombay High Court is that an application for execution in which the assistance of the Court is sought by rateable distribution is not one in accordance with law. A cursory reading of this case is likely to support the contention of Mr. Patel. But a close and minute study of this case would show that this conclusion has been reached after recording a finding that the decree that was under execution was not a money decree. The decree under execution in that case was passed on an award and the decree directed the judgment-debtor to pay Rs. 2178/- within five years with running interest at 6% and past interest of Rs. 272/- within one year and if the judgment-debtor committed default the decree-holder would be entitled to recover the whole amount by sale of certain immovable property on which a charge in respect of Rs. 2178/- was created. An application for executing this decree was filed and it was resisted on diverse grounds including amongst others, on the ground that it is barred by limitation. In support of their contention it was urged that the previous Darkhast No 465 of 1934 was not an application made in

accordance with law as the decree holder had prayed for rateable distribution alone. It is in these circumstances that the question came up before the High Court whether the execution application in which the assistance of the Court is sought by rateable distribution is an application for execution in accordance with law. With reference to the question whether it was a decree for payment of money within the meaning of Section 73 it has been held that the decree should be regarded as on the same footing as a decree for sale for enforcement of a mortgage or charge and, it is on this footing that the decree had been dealt with in the Courts below. Before finding out whether the particular Darkhast in which the assistance of the court was sought by way of rateable distribution was an execution application filed in accordance with law, the Court has to find out whether it was for execution of a decree for payment of money. It was held in that case that decree under execution was not a money decree but a decree for sale for enforcement of a mortgage or charge. Having first reached this conclusion it was further held that in respect of such a decree if the assistance of the Court is sought by way of rateable distribution, it is not a proper relief which the executing Court could grant and therefore, it was not an application for execution in accordance with law. The test in order to find out whether a particular application for execution is in accordance with law or not is laid down as under:—

"From the above authorities, the main test of an application for execution being in accordance with law would appear to be whether it is possible for the Court to issue execution upon it, i. e. whether it is within the power of the Court to grant the kind of relief asked for, though in the particular case the relief may not on the merits be granted, e. g. owing to some finding on facts, not to the nature of the application itself."

As per the above test where the decree is for enforcement of a charge or realisation of mortgage dues by sale of security, if the assistance of the Court is sought by way of rateable distribution, certainly the Court would not be able to grant the assistance and the application for execution would not be in accordance with law. It must be remembered that Section 73 is confined to money decree only. The Court in that case having reached the conclusion that the decree under execution was not a money decree, the darkhast in which the assistance of the Court was sought for rateable distribution was held not in accordance with law. This decision therefore is not an authority for the proposition as urged by Mr. Patel that an application for execution of a money decree otherwise in conformity

with Rule 11(2) but seeking the assistance of the Court for rateable distribution could not be said to be in accordance with law for the purpose of Section 73. The ratio of the decision is that if the decree under execution is a money decree rateable distribution would be one of the modes in which assistance of the Court could be sought. Therefore, the trend of authorities also indicate that an application for execution of a money decree otherwise in conformity with Rule 11(2) but in which assistance of the Court is sought for rateable distribution is an application in accordance with law as envisaged by Section 73 of the Code of Civil Procedure.

12. In the instant case, there is an application for execution of a decree for payment of money. It is in a tabular form. It sets out all the details as required by O. XXI, R. 11 sub-rule (2). The only defect that was pointed out was that the assistance of the Court was sought by way of rateable distribution and on this account alone, it was held that the application is not in accordance with law. In my judgment, when a money decree is being executed and the assistance of the Court is sought by way of rateable distribution, it would be seeking one of the reliefs which would be covered by sub-clause (v) of sub-rule (2)(j) and the application would be one in accordance with law. If the application for execution is thus in accordance with law, the decree-holder would be entitled to rateable distribution. With respect, therefore, the learned Judge was in error in holding that the application was not in accordance with law and in dismissing Darkhast No. 7 of 1962.

13. The order of the executing court dismissing Darkhast No. 7 of 1962 is set aside and the Darkhast is remanded to the executing Court to proceed further in accordance with law. In the facts and circumstances of this case, the parties to bear their respective costs of this appeal. Costs of Darkhast will be costs in the cases.

LGC/D.V.C.

Appeal allowed.

AIR 1969 GUJARAT 205 (V 56 C 38)

J. M. SHETH, J.

Madhavji Khatau Katira and another, Appellants v. Trikamdas Narandas Tanna, Respondent.

Second Appeal No. 715 of 1964, D/- 28-6-1968, against decision of Dist. J., Bulsar at Navsari in C. A. No. 78 of 1964.

Civil P. C. (1908), O. 22, Rr. 3, 9 and 11 — Suit for dissolution of partnership — All partners are necessary parties — Fail-

LL/AM/G577/68

ure to bring representatives of deceased parties on record in appeal — Appeal abates as a whole.

In a suit by an expelled partner for a declaration that his expulsion from the partnership firm was wrong and that he continued to be a partner of the firm and for dissolution of the firm and taking of accounts a preliminary decree was passed. An appeal against it was dismissed. During the pendency of second appeal one of the appellants died. His legal representatives were not brought on record.

Held that the appeal had abated as a whole. All the partners were necessary parties and in case one of the partners was dead, his legal representatives were the necessary parties. The test that had to be applied would be that the Courts would not proceed with an appeal when the success of the appeal might lead to the Court's coming to a decision which would be in conflict with the decision between the appellant and the respondent and therefore which would lead to the Court's passing a decree which would be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the respondent. In the instant case, if the appellant No. 2 succeeded in the appeal, the decisions arrived at by the Court would be in conflict with the decision between the deceased appellant and the respondent. The decree that would be passed, if the appeal was allowed would be a decree which would be contradictory to the decree which had become final with respect to the same subject-matter between the deceased appellant and the present respondent. AIR 1958 Bom 51 & S. A. No. 996 of 1960, D/- 14-3-1967 (Guj) & AIR 1962 SC 89 & S. A. Nos. 270, 271 of 1960 with C. A. Nos. 1898 of 1965 and 1234 of 1960, D/- 9/10-1-1967 (Guj), AIR 1966 SC 1427, Rel. on; AIR 1961 Raj. 223, Dist. (Para 20)

Cases Referred: Chronological Paras

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| (1967) S. A. Nos. 270 and 271 of 1960 with C. A. Nos. 1898 of 1965 and 1234 of 1960, D/- 9/10 Jan. 1967 (Guj) | 21 |
| (1967) S. A. No. 996 of 1960, D/- 14-3-1967 (Guj) | 18, 19 |
| (1966) AIR 1966 SC 1427 (V 53) = (1966) 3 SCR 451, Sri Chand v. Jagdish Prasad | 21 |
| (1962) AIR 1962 SC 89 (V 49) = (1962) 2 SCR 636, State of Punjab v. Nathu Ram | 20, 21 |
| (1961) AIR 1961 Raj 223 (V 48) = ILR (1961) 11 Raj. 354, Gajanand v. Sardarmal | 22 |
| (1958) AIR 1958 Bom 51 (V 45) = ILR (1957) Bom 871, Yakub Ibrahim v. A. Gulamabbas | 17 |
| B. J. Shelat, for Appellant No. 2; N. V. Karlekar, for Respondent. | |

JUDGMENT:— The plaintiff-respondent filed a Regular Civil Suit No 66 of 1962 against the appellants Nos 1 & 2 (defendants) for the following reliefs in the Court of the Civil Judge, Junior Division, Navsari at Navsari:

1 The plaintiff be declared to have continued as a partner in the firm of Vijay Sewing Machine Co., as constituted under the agreement, dated 23rd July, 1960 and 15th December, 1960.

2 It may be declared that the said firm of Vijay Sewing Machine Co stood dissolved on 27th February, 1962 on or such date as the Court thinks fit taking the evidence on record;

3 The affairs of the said firm of Vijay Sewing Machine Co be wound up finally after taking all accounts under the direction of this Court and the profits or loss whatever become due at the foot of final account be apportioned between the suit partners according to their respective shares;

4. The defendants (appellants) be restrained from preventing the plaintiff from exercising his right as a partner of the said firm;

5 The defendants (appellants) be restrained from carrying on any business in the name of the said firm, and

6 That he (plaintiff) be awarded the costs of the suit.

2. The material allegations made in the plaint in brief were as under :—

3. The respondent, appellants, and one Dhirajlal Dhanjibhai Thakkar, as partners had agreed on 29th June, 1960 to constitute the firm in question and to do business in the name of Vijay Sewing Machine Co. at Navsari on the terms referred to in the partnership-deed, dated 23rd July, 1960. The partner Dhirajlal retired from it with effect from 7th December, 1960. On his retirement, a supplementary partnership-deed, dated 15th December, 1960 was executed and the partnership business was continued between the appellants and the respondent on the same terms and conditions as contained in the original partnership-deed, dated 23rd July, 1960, save and except the change in the shares of the parties. It was alleged by the plaintiff-respondent that with a view to deprive him of his legitimate right in the assets of the suit firm, purporting to rely upon clause 25 of the said agreement, dated 29th June, 1960, by their attorney letter dated 15th July, 1961, without assigning any reason intimated to the respondent that he had been expelled from the suit firm. He has been wrongfully expelled. It is a mala fide act of the appellants and it is in contravention of the statutory provisions of the Indian Partnership Act. After the suit notice Ex. 28, the respondent was not allowed to take part in

the affairs of the suit firm by the appellants. The respondent tried to settle the dispute through arbitration but the appellants did not agree to it. On the contrary, he was served with a notice to pay Rs 48,561 65 nPs. with interest without settling final accounts. In short, the allegations of the respondent were that the expulsion was wrong and eventually he continued to be a partner of the said firm. He prayed for the aforesaid reliefs in the suit.

4. The appellants, by their joint written statement, Ex. 57, contended inter alia that the firm had incurred loss due to the mismanagement of the respondent. They have expelled the plaintiff-respondent in the bona fide exercise of the power of expulsion vested in them in view of the provisions of the partnership agreement referred to, in the plaint. That the suit was misconceived and not maintainable. The suit should be dismissed.

5. The learned trial Judge found that the expulsion was wrong. It was not bona fide. Notice of expulsion was ultra vires, illegal and unenforceable. Clause 25 of the partnership agreement is consistent with Section 33(1) of the Act provided it is exercised in good faith by majority of partners. That the respondent was not expelled by the appellants in good-faith. The firm is dissolved from 27th February, 1962 as contended by the plaintiff-respondent. In view of his findings, the learned trial Judge made the following decretal order:

"1. It is hereby declared that the proportionate shares of the suit parties in the partnership are as follows:

The plaintiff, Re. 0/31 nP in rupee of 100 nPs. defendant No 1. Re. 0.50 nPs. in a rupee of 100 nPs. in the profit and losses of the company while in the goodwill of the company share of the defendant No. 1 is 63 nPs. in a rupee of 100 nPs and of the plaintiff at Re. 0.37 in a rupee of 100 nPs as per deed, Ex. 28.

2. It is further declared that the suit partnership shall stand dissolved from 27-2-1962 and it is ordered that the dissolution thereof as from that date be advertised in the gazette of Gujarat State.

3. It is further ordered that Shri A. A. Usmani the pleader is hereby appointed as Commissioner-cum-receiver of the partnership estate and effects and he is ordered to go into possession of this estate forthwith and to get in all the outstanding book debts and claims of the partnership.

And it is further ordered that the following accounts be taken from the defendants:

1. An account of the credits, properties and effects now belonging to the said partnership.

2. An account of the debts and liabilities of the said partnership.

3. An account of all dealings and transactions of this partnership from 29-6-1960 till the management of the company taken over by the Commissioner be taken from the defendants in view of the accounts being never settled between the suit parties from its inception.

4. And it is hereby ordered that goodwill of the business hereto be carried over by the defendants as mentioned in the plaint and the stock-in-trade be sold on the premises and the commissioner may on the application of any of the parties fix a reserved bidding for all or any of the lots at such sale and that either of the parties is to be at liberty to bid at the sale.

5. And it is ordered that the above accounts be taken and all other acts required for effective winding up of the company be completed on or before 31st November, 1963 (sic) and that he do certify the results of the accounts and that all other acts are completed and have his certificates in that behalf ready for the inspection of the parties.

And the commissioner is further ordered to submit his final report determining the final liabilities of suit parties inter se proportionate to their shares in partnership as already found on or before 31-11-1964 (sic).

6. That the defendants are restrained forthwith from carrying on any business in the firm, name and style of 'Vijay Sewing Machine Co.' or from disposing of any of its assets, business or properties or accounts books, vouchers, etc.

7. That the plaintiff is ordered to deposit Rs. 750/- at present for expenses of the Commissioner. Remuneration of Commissioner will be fixed later on.

8. That the defendants shall bear their own costs and do pay to the plaintiff. Separate order regarding the costs of the Commissioner, future costs of the suit etc. will be passed at the final decree.

9. And lastly it is ordered that this suit shall stand adjourned for making a final decree on 31-11-64 (sic) or on such date as may be found by the Court later on.

10. Preliminary decree be drawn accordingly under O. 20, R. 15, of the C.P.C."

6. Against that decree which was passed in favour of the plaintiff-respondent by the trial Court, the appellants-defendants filed a Regular Civil Appeal No. 73 of 1964 in the Court of the District Judge, Bulsar at Navsari. That appeal has been dismissed by the learned District Judge, Bulsar on 20th October, 1964. It, therefore, means that a preliminary decree that came to be passed in favour of the respondent and against the appellants by the trial Court has been confirmed by the District Court. Against that appellate decree, the present second appeal is filed by the appellants-defendants.

7. The appellant No. 1, who was the original defendant No. 1, Madhavji Khatav Katira, died during the pendency of this appeal on 9th June 1966. In spite of the fact brought to the notice of the parties to this appeal, that the appellant No. 1 had died on 9th June, 1960, the legal representatives of the deceased-appellant No. 1 have not been brought on the record. The legal representatives of the deceased-appellant No. 1 having not been brought on the record, so far as the deceased-appellant No. 1 was concerned, the appeal has abated. The matter was placed before the Registrar of this Court to consider the question whether the appeal abated partly or there was total abatement. As there was contest on that question, the matter has been placed before the Court.

8. The learned Advocate Mr. N. V. Karlekar, appearing for the plaintiff-respondent, contended that looking to the nature of the suits, all the partners of the suit firm were necessary parties to the suit. The deceased-appellant No. 1 and the appellant No. 2 (Defendant No. 2) had wrongfully expelled the plaintiff-respondent from the firm. The plaintiff-respondent, had, therefore, brought the suit stating that he continued to be a partner of the firm as the expulsion was wrong and illegal. He prayed for a declaration in that regard. He also prayed for an injunction. He also prayed for the dissolution of the firm and for accounts. According to him, the firm came to be dissolved from 27th February, 1962, the date of the notice. He succeeded and the preliminary decree came to be passed in his favour against the appellants-defendants. The appeal against that decree, filed by the appellants in the District Court came to be dismissed. The result was that the trial Court's preliminary decree came to be confirmed. All the partners being necessary parties, this second appeal cannot be proceeded with further in the absence of the legal representatives of the appellant No. 1. The surviving appellant did not choose to bring them on record. The consequence was that the appeal has automatically abated so far as the deceased-appellant No. 1 is concerned. In view of the nature of the suit and the decree that came to be passed, the right to appeal does not survive to the surviving appellant No. 2. He urged that if this appeal is proceeded with further and the appeal is allowed, the result would be that there would be two conflicting inconsistent decrees. The appeal having abated against the appellant No. 1, the preliminary decree that has been passed by the trial Court and confirmed by the District Court will survive in favour of the respondent so far as appellant No. 1 is concerned. The position, therefore, would be that the respondent would be a

person who has been wrongfully expelled from the partnership and eventually he continues to be a partner in the firm. He would, therefore, continue to have rights as a partner in the firm. A relief for dissolution of the firm was prayed for and the date of dissolution was shown to be 27th February, 1962. That relief has been granted to him. The two defendants, i. e. the two appellants are made liable to render accounts. The accounts are ordered to be taken. Several directions have been given by the trial Court in the preliminary decree which has been referred to by me, in the earlier part of the judgment. He, therefore, contended that if the appeal is allowed, the net result would be that there would be two conflicting inconsistent decrees. He, therefore, contended that that being the position, the right to appeal does not survive to the surviving appellant No. 2. Such an appeal cannot be proceeded with further in the absence of legal representatives of the deceased appellant No. 1. In support of his argument, he invited my attention to several decisions to which I will make reference at an appropriate stage.

9. In reply to these arguments, the learned Advocate Mr. Shelat, who originally appeared for the appellants and who could now appear as an Advocate for the appellant No. 2 urged that in view of the alteration in the relevant Rule No. 3 of Order 22 of the Civil Procedure Code, an appeal would abate only against the appellant No. 1 (the deceased appellant). It cannot abate against the appellant No. 2. In brief, his argument was that there would not be a total abatement of the appeal. He contended that if such an appeal was not proceeded with further, it is likely that the respondent may suffer for no fault of his. He laid stress on the reliefs claimed by the plaintiff-respondent in regard to a declaration and injunction. He urged that in any case, so far as those two reliefs are concerned, the appeal can be proceeded with further even though the legal representatives of the deceased appellant No. 1 are not brought on the record.

10. Before I advert to the authorities cited at the Bar and refer to the comments made by the learned author Mr. Mulla in his book — Code of Civil Procedure, 13th Edition, Volume (II), pages 1233 to 1235, I first propose to refer to Order 22, Rule 3 of the Code of Civil Procedure, 1908, which is material for our purposes. It runs as under :—

"(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the court, on an application made in that behalf shall cause the legal

representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

Order 22, Rule 11 states:

"In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an "appeal."

We have, therefore, to read these two rules 3 and 11 of Order 22 of the Code of Civil Procedure together as we are dealing with a question in appeal. Admittedly, in the present case there are two appellants and one of them, namely, the appellant No. 1 has died and his legal representatives have not been brought on the record within the time limited by law.

11. In view of the provisions of sub-rule (2) of Rule 3 of Order 22, read with Rule 11 of Order 22 of the Code of Civil Procedure, it is evident that so far as the deceased-appellant No. 1 is concerned, the appeal has abated. Further question that arises for consideration is whether in this case where one of the two appellants has died, the right to appeal survives to the surviving appellant No. 2 or not.

12. The learned Author Mr. Mulla in the aforesaid book of his, in para 5 under the Caption — The suit shall abate — so far as the deceased-appellant No. 1 is concerned, has made the following comments at pages 1234 and 1235

"Sub-rule (2) provides that where no such application is made the suit shall abate 'so far as the deceased plaintiff is concerned.' The words italicized (underlined (here in ' ')) above mean that the suits shall primarily abate so far as the deceased plaintiff is concerned but they do not mean that the suit shall in no case abate as a whole. If the suit is of such a nature that it can proceed in the absence of the legal representative of the deceased-plaintiff, it will abate so far only as the deceased plaintiff is concerned. A suit by the partners of a firm to recover a partnership debt is a suit of this nature so that if one of the partners dies pending the suit, and his legal representative is not brought on the record, the suit will abate only so far as the deceased partner is concerned."

The present suit is not a suit of that nature.

13. It is further commented by the learned Author Mr. Mulla:

"But if it is of such a character that it cannot proceed in the absence of the legal representative, it will abate as a whole. A suit by some of the partners of a firm against the other partners for dissolution and for accounts is a suit of this character so that if one of the plaintiffs (or defendants) dies, and his legal representative is not brought on the record, the suit will abate as a whole. (See notes above, "alterations in the rule" No. 1)."

These comments made by the learned Author Mr. Mulla clearly indicate that in a suit like the present suit, so far as it is a suit for dissolution and accounts, the suit will abate as a whole if one of the plaintiffs or one of the defendants has died and the legal representatives are not brought on the record.

14. The learned Advocate Mr. Shelat, for the appellant No. 2 urged that the learned Author has specifically referred to "Alterations in the rule" No. 1 and referred to Note No. 1. That alteration in the rule is that the words in sub-rule (2) at present are :—

"the suit shall abate so far as the deceased plaintiff is concerned."

The learned Author pointedly invited the attention of the readers to it by making that reference. Mr. Shelat, therefore, contended that the comments made by the learned Author by referring to the decisions which may have been given prior to this alteration in the rule, will not be good decisions. In my opinion, this argument is not well founded. The learned Author has referred to these very wordings in the beginning in this para 5 and thereafter made the comments that in a suit like the present suit, the suit will abate as a whole. The learned Author has in clear words stated that the words italicized (herein " ") namely: "the suit shall abate so far as the deceased plaintiff is concerned" mean that the suit will primarily abate so far as the deceased plaintiff is concerned. "But that does not mean that the suit shall in no case abate as a whole."

15. The learned Author Mr. Mulla, in para 6 under the caption — This rule applies to appeals — has made the following comments at page 1235:

"The provisions of this rule apply not only to the case of a deceased plaintiff, but to the case of a deceased appellant (see sec. 107 and rule 11 below). Therefore, where one of two or more appellants dies and the right to appeal does not survive to the surviving appellant alone, the legal representative of the deceased appellant ought to be brought on the record. If this is not done, the appeal will abate so far as the deceased appellant is concerned. But the appeal will abate as a whole, if the case is of such a nature that the appeal cannot proceed in the absence of the legal representative of the

deceased appellant."

The crucial test in my opinion is whether looking to the nature of appeal, could it be said that the right to appeal survives to the surviving appellant No. 2. The question, therefore, that is posed for consideration is whether the case is of such a nature that the appeal cannot proceed in the absence of the legal representatives of the deceased appellant No. 1. In my opinion, looking to the nature of the case, one has to answer that this appeal cannot proceed in the absence of the legal representatives of the appellant No. 1. In my opinion, that is not the position only so far as the relief of dissolution and accounts is concerned, as contended by the learned Advocate Mr. Shelat. The appellants had expelled the respondent from the partnership relying upon Clause (25) of the partnership agreement. The respondent made a grievance about it and said that this expulsion was wrong and he continued to be a partner in the firm. He had, therefore, sought for a declaration and he succeeded. The result was that he continued to be a partner of the firm in spite of that expulsion notice. He, therefore, claims certain rights as a partner. A preliminary decree came to be passed in his favour. He further succeeded in getting a preliminary decree that the firm is dissolved from 27th February, 1962. Accounts between the partners were to be taken accordingly. Rights and liabilities in favour of the partners would ensue accordingly. If the argument of the learned Advocate Mr. Shelat is accepted and it is held that the appeal can proceed even though the legal representatives of the deceased appellant No. 1 are not brought on the record, there would be two conflicting inconsistent decrees. As the appeal has abated against the appellant No. 1, the decree passed in favour of the respondent against him has become final. Expulsion order is found to be illegal and wrong and eventually the respondent continues to be a partner in the firm, his rights flow as a partner and the firm is dissolved from 27th Feb. 1962. He is entitled to injunction. If now the appeal is allowed and the expulsion is found to be legal, the result would be that he would cease to be a partner in the firm and would have no right after that expulsion and the question regarding dissolution and taking of accounts would not survive. It cannot, therefore, be gainsaid that the two inconsistent decrees will come into existence if this argument of the learned Advocate Mr. Shelat is accepted. In my opinion, therefore, on both these grounds, this appeal cannot be proceeded with further in the absence of the legal representatives of the deceased appellant No. 1.

16. This conclusion of mine gets support from the decisions cited by the

learned Advocate Mr. Karlekar in support of his argument.

17. In the case of Yakub Ibrahim v. A. Gulamabbas, AIR 1958 Bom 51, S. T. Desai J., as he then was, has made the following instructive observations:—

"The subject matter of a partnership suit generally is the severance of the jural relationship and the determination of the mutual rights of the partners. There being mutual agency and mutual obligation to render accounts the position of parties in a partnership suit is in some particulars different from that of parties in an ordinary suit. Each of the partners, in a partnership suit, is really in turn plaintiff and defendant and in both capacities comes before the Court for the adjudication of his rights or liability relatively to the other partners which the Court endeavours to determine by its decree. In such a suit it is well established that a decree can go either in favour of the plaintiff against the defendant or in favour of any defendant or defendants against any other party or parties to the suit. In a partnership suit all the partners or their legal representatives must be made parties because all the parties necessary for the disposal of the subject-matter of the suit including taking of accounts must be before the Court or the suit will fail. Proper and complete accounts cannot be taken as between some only of the partners. The necessary corollary of this is that if a necessary party has been omitted and added at a time when the suit against him is barred, the whole suit will be dismissed. The same consideration must apply where in a partnership action by a partner against his other partners, the claim is barred against some of those partners but the bar of limitation is saved against some other or other partners by virtue of any acknowledgment and this is for a simple reason that when accounts are taken in any such suit, all the partners would not be before the Court."

This decision lays down that in a partnership suit all the partners or their legal representatives must be made parties because all the parties necessary for the disposal of the subject-matter of the suit including taking of accounts must be before the Court or the suit will fail.

18-19. In an unreported decision of this Court in Second Appeal No 996 of 1960, D/- 14-3-1967 (Guj), Bakshi J., had to deal with a similar question. It was contended before Bakshi J. by Mr. S. N. Patel.—

"Respondent No. 4, original defendant No. 4 was dead during the pendency of this appeal and the appellant had taken no steps to join the legal representatives of defendant No. 4. He also stated that respondent No. 7, original defendant No.

7 was also deleted as a party to this appeal by the appellant and that the appeal could not proceed in absence of the legal representatives of respondent No. 4 and in absence of respondent No. 1.

Both the contentions of Mr. Patel must be upheld. The suit was a suit for dissolution of partnership and in proceedings relating to partnership, all partners or their legal representatives must be made parties as all the parties necessary for the disposal of the subject-matter of the suit must be before the Court. If, therefore, such a necessary party as a partner, has been omitted, the proceedings against him would be barred and the whole suit would be liable to be dismissed. In a suit for dissolution and for taking accounts of partnership, the shares of each of the partners have to be determined and the accounts of each of the partners would require to be settled. It is possible that a partner might be found to be a creditor or a debtor according to the result of the accounts when they are settled and if anyone who is such a necessary party as a partner has not been brought before the Court, such a suit, in the absence of the partner, cannot legitimately be proceeded with. In the case before us, respondent No. 4 who was a partner is dead and his legal representatives have not been joined. Similarly, respondent No. 7 was also a partner in the firm and his name has been deleted from the parties to the appeal. The decision of the learned District Judge cannot, therefore, be disturbed so far as they are concerned. In the circumstances, it would not be possible to take accounts of the partnership even if the appellant succeeded in this appeal. This appeal, therefore, cannot legitimately be proceeded with in the absence of the legal representatives of the respondent No. 4 and in absence of respondent No. 7. The appeal must, therefore, be dismissed for that reason."

With great respect, I agree with the principle enunciated in this decision and by Desai J. in the aforesaid Bombay decision.

20. In State of Punjab v. Nathu Ram, AIR 1962 SC 89, the Supreme Court had to deal with a similar question. No doubt, it was not a case of partners. The facts of that case which the Supreme Court had to deal with were as under:—

"Certain land belonging to two brothers L and N jointly was acquired for military purposes and on their refusal to accept the compensation offered by the Collector, the State Government referred the matter for inquiry to an arbitrator under Rule 10 of the Punjab Land Acquisition (Defence of India) Rules, 1943. The arbitrator passed a joint award granting a higher compensation and also certain sum on account of income-tax. The State Govt.

appealed against the award to the High Court. During the pendency of appeal L died and as his legal representatives were not brought on record, the appeal abated against him. The question was whether the appeal also abated as against N.

It was held that the appeal against N alone could not proceed. To get rid of the joint decree it was essential for the appellant State to implead both the joint decree-holders and in the absence of one the appeal was not properly constituted. The subject-matter for which the compensation had been awarded was one and the same land and the assessment of compensation, so far as L was concerned having become final, there could not be different assessments of compensation for the same parcel of land. The mere record of specific shares of L and N in the revenue records was no guarantee of their correctness and the appellate Court would have to determine the share of N and that of L in the land in absence of L's legal representatives which was not permissible in law

The only question is whether the appeal can proceed against them. The provisions of Order 1, Rule 9, C. P. C. also show that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it.

The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary reliefs against

those respondents alone who are still before the Court and (c) when the decree against the surviving respondents if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed."

Keeping in mind the tests laid down in the aforesaid decision of the Supreme Court, the present case will be covered by the test No. (a), namely, the Courts will not proceed with an appeal when the success of the appeal may lead to the Court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent. In the instant case, if the appellant No. 2 succeeds in this appeal the decision arrived at by the Court will be in conflict with the decision between the deceased appellant No. 1 and the respondent. The decree that will be passed, if the appeal is allowed, will be a decree which will be contradictory to the decree which has become final with respect to the same subject-matter between the deceased appellant No. 1 and the present respondent. Furthermore, as said earlier, in a suit like the present suit, which is a suit between the partners for reliefs referred to earlier, all the partners are necessary parties and in case one of the partners is dead, his legal representatives are the necessary parties. The present case is a case where that question is to be considered.

21. In Second Appeals Nos. 270 and 271 of 1960 with C. A. Nos. 1898 of 1965 and 1234 of 1960, decided on 9th and 10th of January, 1967 (Guj), Mehta, J. had to deal with this question regarding conflicting decrees: Mehta J. has referred to the decision of the Supreme Court in AIR 1962 SC 89 and also a later decision of the Supreme Court in *Sri Chand v. Jagdish Prasad*, AIR 1966 SC 1427. The relevant observations quoted by him are at page 1430 and they are as under :—

"If the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it; otherwise it will have to refuse to proceed further with the appeal and therefore dismiss it. Ordinarily the consideration which will weigh with the Court in deciding upon the question whether the entire appeal had abated or not will be whether the appeal between the appellants and the respondents other than the deceased respondent can be said to have all the necessary parties for the decision of the controversy before the Court and the tests to determine this

have been described thus: (a) when the success of the appeal may lead to the Court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent,

(b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court, and

(c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed

The abatement of an appeal against the *deceased respondent means not only* that the decree between the appellant and the deceased respondent has become final, but also as a necessary corollary that the appellate Court cannot in any way modify that decree directly or indirectly

When the decree in favour of the respondents is joint and indivisible, the appeal against the respondents other than the deceased respondent cannot be proceeded with if the appeal against the deceased respondent has abated."

Further proceeding, their Lordships pointed out that the three tests suggested by Raghubar Dayal J. in *Nathuram's case* were not cumulative tests. Even if one of them was satisfied, the Court might, having regard to all the circumstances, hold that the appeal had abated in its entirety."

"In view of these settled tests, we will have to consider in the present case as to whether there would be two inconsistent decrees. The appeal having abated in so far as the deceased appellant Khumaji Kasuji was concerned and his legal representatives had not been brought on the record, the decree of the trial Court dismissing the suit for ejecting the defendants had become final. The necessary corollary of this was that it was not thereafter open to the appellate Court to allow the appeal of the surviving appellants and pass an inconsistent decree by decreeing their claim of ejectment based on the same title. Test (a) laid down in *Nathu Ram's case* would be clearly fulfilled and so, if the appeal abated against the deceased appellant Khumaji Kasuji, it could not be proceeded with even by the surviving appellants because they had all made a joint claim in the trial Court for ejecting the defendants and the decree which had been passed in the suit was a joint and indivisible decree."

In the instant case also, the test (a) is satisfied. If the appeal is allowed, there will be two inconsistent decrees. Furthermore, as said earlier, the present suit is

of such a nature that in the suit the partners or the legal representatives of the deceased-appellant are the necessary parties for the disposal of the present appeal. The present appeal, therefore, in the absence of the legal representatives of the deceased-appellant No 1, cannot be proceeded with further

22. The learned Advocate Mr. Shelat invited my attention to a decision of *Rajasthan High Court* in the case of *Gajanan v. Sardarmal*, AIR 1961 Raj 223 and urged that the present appeal could be proceeded with further. It was a case where the suit was not instituted in the name of the firm but in the name of individual partners, the firm being at the time a foreign firm. After the institution one of the plaintiffs died and his legal representatives were not brought on the record. A question arose as to what has to be considered under Order 22, Rule 2. What has to be considered is whether the right to sue survives to the surviving plaintiffs alone, i. e. whether the surviving plaintiffs were competent to carry on the suit in the absence of the deceased plaintiff without joining the legal representatives of the deceased as plaintiffs or defendants or whether the remaining plaintiffs were entitled to represent the deceased plaintiff for purpose of prosecuting the suit. The suit was a suit to recover the debt due to the firm. It was, therefore, observed.

"Under Section 47, Partnership Act after the dissolution of a firm, the remaining partners may represent the dissolved firm including the interest of the deceased partner to recover any debt due to the firm. This being the position, they may be taken to represent the deceased partner in a suit for the recovery of any amount due to the firm."

It is, therefore, evident that it was a suit by the partners to recover the debt. In the present case the suit is not of that nature. It is a suit by the plaintiff-respondent for a declaration that the expulsion of his from the partnership by the two appellants was wrong and he continued to be a partner of the firm. He sought for that declaration. He also sought for an injunction and asked for a relief of dissolution of the firm, stating that the firm was dissolved from 27th February, 1962 and for accounts. The rights and liabilities of the partners were to be decided. As said earlier the decree became final so far as the deceased appellant No 1 is concerned. If the appeal is proceeded with further and the appeal is allowed, the result would be that there would be two conflicting decrees. Taking into consideration the nature of the case, therefore, this appeal cannot be proceeded with further in the absence of the legal representatives of the deceased-appellant No. 1. The appeal

should, therefore, be dismissed for that reason. A question as to what would happen to the suit does not arise for a decision before me.

23. The learned Advocate Mr. Karlekar invited my attention to the commentary made by the learned Author Mr. Mulla in his aforesaid book of Code of Civil Procedure in para 16 under the Caption—Death of plaintiff after preliminary and before final decree—and submitted that the suit cannot abate as the death of the appellant No. 1 has taken place after the preliminary decree was passed in favour of the respondent by the trial Court and the decree had been confirmed by the appellate Court. I need not enter into that question as that question does not arise before me.

24. The question for consideration is only whether this appeal can be proceeded with further in the absence of legal representatives of the deceased appellant No. 1. It cannot be proceeded with further for the reasons given above.

25. The result is that the appeal abates as a whole and eventually for that reason the appeal stands dismissed. The appellant No. 2 to pay the costs of the respondent in this appeal.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 GUJARAT 213 (V 56 C 39)
J. M. SHETH, J.

Shri Chunilal Dahyabhai, Petitioner v. Dharamshi Nanji and others, Opponents.
Civil Revn. Appln. No. 372 of 1968, D/- 1-5-1968, against order of 2nd Joint Civil J., Jr. Division Rajkot, D/- 20-2-1968.

(A) Civil P. C. (1908), S. 115, O. 11, Rr. 18, 20 — “Any case which has been decided” — Words “case decided” include order relating to some error of procedure — Controversy between parties in regard to right or obligation in relation to inspection of documents—Decision of Court thereon held would amount to “case decided.”

If a material irregularity is committed by the subordinate Court as regards some error of procedure in the course of the trial which is material and may have affected the ultimate decision that order can be revised. Therefore the words “case decided” include an order relating to some error of procedure. (Para 9-A)

The word ‘controversy’ is used in the general sense and it has got to be given a comprehensive meaning unless there is something to indicate that a narrow and restricted meaning was intended.

(Para 12-A)

A filed suit for rendition of accounts in relation to the acts done by B in his capacity as a power-of-attorney holder of the opponents and for recovering the sum that may be found due on taking accounts. B challenged the factum of his holding a power of attorney for the opponents. A sought for discovery of documents on an affidavit. The Court ordered B to file an affidavit of documents and accordingly discovery was made. Thereafter A filed application for inspection of the documents referred to in the affidavit of documents and to permit him to take copies. B raised an objection in regard to inspection of those documents. The court overruled his objection and passed the order directing B to give inspection of all documents referred to in his affidavit.

Held, that the decision would amount to a case decided, as a controversy between the parties in regard to the right or obligation in relation to inspection of certain documents in a proceeding had been decided by the Court. Hence revision application against such order was maintainable. (Para 12-A)

(B) Civil P. C. (1908), S. 115, O. 11, Rr. 18, 20 — Exercise of jurisdiction illegally or with material irregularity — Court's power to order for inspection of documents under O. 11, Rr. 18, 20 — Extent of — Court ignoring those provisions acts illegally or with material irregularity.

Order 11, Rule 18 clearly indicates that there is no power vested in the Court to order for inspection of documents if the Court is of opinion that it is not necessary either for disposing fairly of the suit or for saving costs. The court has, therefore, got to find that the order is necessary either for disposing fairly of the suit or for saving costs. If that is not the position, the court has no power to order for inspection. Furthermore, the Court cannot exercise such powers in certain cases for the time being, if the case is covered by Rule 20 of Order 11 of the Civil Procedure Code. If the Court ignoring these provisions or in the absence of anything in the order to indicate that it has applied its mind to those provisions, he has passed an order, it can be said that the Court has acted illegally or with material irregularity in the exercise of its jurisdiction. (Paras 13, 16, 17)

A mere error of law in the exercise of jurisdiction is not enough. What is necessary is that the subordinate Court must have acted illegally, that is, in breach of some provision of law or with material irregularity, that is, by committing some error of procedure in the course of trial which is material in that it may have affected the ultimate decision. This is the test which must be applied in order to determine whether the case falls within clause (c) of Section 115. AIR 1968 Guj

235 & AIR 1949 PC 156, Foll. Case law discussed. (Para 18)

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(1931) AIR 1931 Nag 17 (V 18)=
27 Nag LR 251, Laxmandas v. Chunnilal 12
(1929) AIR 1929 Lah 257 (V 16)=
30 Pun LR 17, Sadaqat Ali v. Mohammed Sajjad Ali 11
(1927) AIR 1927 All 358 (V 14)=
ILR 49 All 454, Babu Ram v. Munnalal 9
(1917) AIR 1917 PC 71 (V 4)=44
Ind App. 261, Balakrishna Udayar v. Vasudeva Aiyar 9
(1915) AIR 1915 Bom 269 (V 2)=
17 Bom LR 1097, Bai Atrani v. Deep-singh Baria 11
(1885) ILR 9 Bom 432, Hari Bhikaji v. Naro Vishvanath 9
(1833-84) 11 Ind App. 237=ILR 11 Cal 6 (PC), Amir Hassan Khan v. Sheo Buksh Singh 9

Suresh M. Shah, for Petitioner; J. R. Nanavati, for Opponent No 1; H. M. Mehta and R. H. Pandya, for Opponent No 4.

ORDER:— This is a revision petition filed by the Petitioner (Original defendant No. 1) against the opponents. The opponent No. 1 is the original plaintiff and the opponents Nos. 2 to 4 are the original defendants, Nos. 2 to 4. This revision petition is filed under Section 115 of the Civil Procedure Code against the order passed by the learned 2nd Joint Civil Judge, Junior Division, Rajkot in a Civil Suit No. 427 of 1967 below exhibit 37 directing the petitioner to give inspection of all documents referred to in his affidavit Exh. 23 to the plaintiff and to take copies thereof on or before 7-3-1968.

2. The advocates appearing on behalf of the opponents M/s. J. R. Nanavati and H. M. Mehta raised a preliminary objection regarding the maintainability of this revision petition under Section 115 of the Civil Procedure Code. The preliminary objection is raised on two grounds:—
(1) It cannot be said that it is a case decided.

(2) If it is a case decided, it cannot be said that the Court has acted illegally or with material irregularity in the exercise of its jurisdiction.

In brief the second objection is that there has been no illegality committed by the Court in the exercise of its jurisdiction. It also cannot be said that the Court has acted with material irregularity in the exercise of its jurisdiction. At the most it could be said that there has been an error of law committed in the decision given and hence Clause (c) of Section 115 of Civil Procedure Code could not have any application. In support of the preliminary objection, reliance is mainly placed on the decision of a Division Bench of this Court in the case of Shah Prabhudas Ishwardas v. Shah Bhogilal Nathalal, 1967-8 Guj LR 649=(AIR 1968 Guj 236).

3. Before I advert to the decision cited above, in support of the contention regarding preliminary objection, I first propose to refer to the relevant provisions of Order 11, Rule 18 and Order 11, Rule 20 of the Civil Procedure Code which are material for our purposes. Material part of Order 11, Rule 18 runs as under:—

"Where the party served with notice under Rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."

(2) "Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."

4. The material part of Order 11, Rule 20 for our purpose runs as under:—

"Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection."

In the instant case, it is the case of the opponents that the petitioner is the power of attorney holder. The suit is for rendition of accounts in relation to the acts done by the petitioner in his capacity as a power of attorney holder of the opponents and for recovering the sum that may be found due on taking accounts. The petitioner has challenged the factum of his holding a power of attorney for the opponents. It is significant to note that the opponent No. 1 has filed the suit in question. The opponent No. 1 had sought for discovery of documents on an affidavit. The Court ordered the petitioner to file an affidavit of documents and accordingly discovery was made. Thereafter the opponent No. 1 gave an application Exh. 37 for inspection of the documents referred to in the affidavit of documents and to permit him to take copies. The petitioner raised an objection in regard to inspection of those documents. The Court overruled his objection and passed the impugned order.

5. In regard to the preliminary objection on the first ground, the learned Advocates for the opponents strenuously contended that the interlocutory order must be an order deciding directly or indirectly, a right or obligation pleaded in a suit meaning thereby a claim made in the plaint and denied in the written statement or vice versa. In brief an impugned order must be an order which must have an effect on such right or claim directly

or indirectly and if such a controversy is the subject matter of the impugned decision, it could be said that it is a case decided within the meaning of those words referred to in Section 115 of the Civil Procedure Code. The learned advocate Mr. Mehta urged that the word 'controversy' referred to in the decision of a Division Bench of this High Court was not a controversy of the nature contemplated by the provisions of Order 11 Rules 18 and 20. In brief his contention was that the controversy contemplated was a controversy which is likely to be the subject-matter of the decision in regard to the rights or obligations arising out of the pleadings meaning thereby that it must be a controversy in relation to the rights pleaded or obligations arising in the suit itself. There are several matters which could be the subject-matters of controversy, as for example a right to recover the suit amount, a right to take accounts, an obligation to render accounts meaning thereby a liability to render accounts. If there is any such controversy and the court has decided such a controversy arising between the parties, that decision could be said to be a case decided within the meaning of Section 115 of the Civil Procedure Code. The present controversy is not of that nature; it is a controversy where one party claims a right of inspection and the other objects to it on the ground that it is not necessary for disposing fairly of the suit or for saving costs. It could not, therefore, amount to a case decided.

6. Before I advert to the decision of a Division Bench of this Court relied upon by the learned advocate for the opponents, I first propose to refer to the decision of the Supreme Court in the case of S. S. Khanna v. F. J. Dillon, AIR 1964 SC 497, as a Division Bench of this Court also has laid down a certain ratio relying upon the said decision of the Supreme Court. His Lordship Shah J. speaking for himself and Sarkar J. after referring to clauses (a), (b) and (c) of Section 115 of the Civil Procedure Code has observed as under:—

"The section consists of two parts, the first, prescribes the conditions in which jurisdiction of the High Court arises, i. e. there is a case decided by a subordinate Court in which no appeal lies to the High Court, the second, sets out the circumstances in which the jurisdiction may be exercised. But the power of the High Court is exercisable in respect of "any case which has been decided." The expression "case" is not defined in the Code, nor in the General Clauses Act. It is undoubtedly not restricted to a litigation in the nature of suit in a Civil Court. But it includes a proceeding in a Civil Court in which the jurisdiction of the Court is invoked for the determination of

some claim or right legally enforceable. On the question whether an order of a Court which does not finally dispose of the suit or proceeding amounts to a "case which has been decided", there has arisen a serious conflict of opinion in the High Courts in India and the question has not been directly considered by this Court."

After referring to several decisions of the various High Courts in Para (87) it has been observed as under —

"An analysis of the cases decided by the High Courts—their number is legion—would serve no useful purpose. In every High Court from time to time opinion has fluctuated. The meaning of the expression "case" must be sought in the nature of the jurisdiction conferred by Section 115, and the purpose for which the High Courts were invested with it."

At page 501 in para. 11, it has been observed.—

"The expression "case" is a word of comprehensive import, it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceedings in a Civil Court. To interpret the expression "case", as an entire proceeding only and not a part of proceeding would be to impose a restriction upon the exercise of powers of superintendence to which the jurisdiction to issue writs and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice."

No doubt their Lordships had to deal with a case in relation to a decision given by the subordinate Judge by an interlocutory order that the suit filed by the plaintiff, for recovery of the amount advanced to the defendant, was not maintainable, it was manifestly a decision having a direct bearing on the right of the plaintiff to a decree for recovery of the loan alleged to have been advanced by him which he says the defendant agreed to repay, and if the expression "case" includes a part of the case, the order of the Subordinate Judge must be regarded as a "case which has been decided." At the same time it could not be said that it is a ratio of the Supreme Court decision that the controversy decided must be a controversy of the nature as has been sought to be urged by the learned advocate appearing on behalf of the opponents.

7. Mr. Mehta invited my attention to the observations made by his Lordship Shah J. at p. 503. Those observations are as under :—

"This general power as shown above was intended to be used otherwise and the word "case" does not mean a con-

cluded suit or proceeding but each decision which terminates a part of the controversy involving a matter of jurisdiction. Where no question of jurisdiction is involved, the Court's decision cannot be impugned under Section 115 for it has been said repeatedly, a court has jurisdiction to decide wrongly as well as rightly."

These observations in my opinion do not restrict the meaning of the word controversy as has been sought to be urged. In the decision of a Division Bench of this Court after referring to the observations made in the aforesaid Supreme Court decision, at pages 653-654 (of Guj LR)=(at p. 238 of AIR), the following observations have been made by Bhagwati J (as he then was) speaking for the Division Bench —

"These observations clearly show that a case decided within the meaning of sec. 115 is not confined to an entire suit or proceeding but includes an issue or a part of a suit or proceeding and if an order decides an issue or a part of a suit or proceeding, it would be a case decided within the meaning of Section 115"

It is evident that the present case is not a case where the said impugned order decides an issue or part of a suit or proceeding. However, material observations made further therein are as under—

"If an order decides some right or obligation which is in controversy between the parties in the suit or proceeding, a part of the suit or proceeding, whether it forms the subject-matter of a separate issue or not, would be decided and that would be a decision of a case as contemplated by Section 115. Such an order may decide the right or obligation expressly in so many terms or it may decide the right or obligation as a matter of direct and necessary consequence as in the case before the Supreme Court. But in either case it would be a case decided, as the right or obligation would be determined and a part of the suit or proceeding relating to the controversy as to such right or obligation would be decided"

8. The learned advocate Shri Mehta has laid emphasis on these observations and urged relying upon certain observations made in para 5 to which I will make reference presently that the said controversy must be in regard to the right or obligation claimed or pleaded by the party in a suit meaning thereby in the plaint or in the written statement. There are observations in para 5 as under—

"Applying this test let us see whether the order impugned in the present case can be said to be a case decided within the meaning of Section 115. Does the order decide an issue or a part of the suit by determining some right or obligation in controversy between the parties in the

suit? The answer must clearly be in the affirmative. The question whether the document Exhibit 4/1 was a promissory note and therefore, inadmissible in evidence by reason of insufficiency of stamp formed the subject-matter of issue No. 3 and the decision of this question had a direct bearing on the right of the plaintiffs to recover the settled amount from the defendants. The document exhibit 4/1 being the foundation of the plaintiff's claim, the direct and inevitable consequence of it is that the plaintiff's claim must fail and the order, therefore, determined by its direct and immediate impact the right of the plaintiffs to recover the amount claimed by them from the defendants which right was in controversy in the suit."

It is no doubt true that in that case, the decision which was sought to be revised was a decision which would have a direct and immediate impact on the right of the plaintiffs to recover the amount claimed. The case had to be decided in relation to the facts of that case. In my opinion the ratio laid down in that decision does not necessarily indicate that in a case like the present case where the controversy between the parties is in regard to a right to inspection or an obligation of giving inspection, a decision in regard to such controversy will not amount to a case decided. The decision does not expressly lay down such a position of law and that position is also not by necessary implication indicated in that decision.

9. The learned advocate Mr. Shah appearing for the petitioner relied upon a decision of Raju J. in the case of Shantilal Chunnilal Shah v. Shantilal Fulchand, 1963-4 Guj LR 698=(AIR 1963 Guj 195). It has been observed in that decision that an order passed on an interlocutory application amounts to a "case decided." The fact that the third clause of Section 115 Civil Procedure Code, refers to the powers of revision where the subordinate Court acted in the exercise of its jurisdiction illegally or with material irregularity would show that the words "case decided" would include an order passed by a subordinate Court in the exercise of its jurisdiction and which is not the final order. In the body of the judgment at p. 699 (of Guj LR)=(at p. 196 of AIR), decisions of several High Courts have been referred to by Raju J. and the following observations have been made:—

"The question whether the decision of a Court on an interlocutory petition amounts to a case decided has been the subject of conflict. The learned Judges of the Full Bench of the Allahabad High Court considered that the word 'case' could not be given a wide meaning so as to cover an interlocutory order passed by a Court during the trial of the suit. But

the Calcutta High Court and the Madras High Court are of the contrary view."

After referring to the provisions of Section 115 of Civil Procedure Code at p. 700 (of Guj LR)=(at p. 197 of AIR) it has been observed that the words 'case decided' have not been defined in the Civil Procedure Code. The word 'case' is also not defined in the Civil Procedure Code. But the fact that the third clause of Section 115, Civil Procedure Code, refers to the powers of revision where the subordinate Court acted in the exercise of its jurisdiction illegally or with material irregularity would show that the words 'case decided' would include an order passed by a subordinate Court in exercise of its jurisdiction and which is not the final order. It has been observed by their Lordships of the Supreme Court in *Chaube Jagdish Prasad v. Ganga Prasad*, AIR 1959 SC 492 at p. 497 as follows:

"Section 115 Civil P. C. empowers the High Court, in cases where no appeal lies, to satisfy itself on three matters: (a) that the order made by the subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise its jurisdiction; (c) that in exercising the jurisdiction the Court has not acted illegally, that is, in breach of some provision of law or with material irregularity that is by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. Per Sir John Beaumont in *Venkatagiri Ayyangar v. Hindu Religious Endowment Board, Madras*, 76 Ind App 67 at p. 73=AIR 1949 PC 156 at p. 158. Therefore if an erroneous decision of a subordinate Court resulted in its exercising jurisdiction not vested in it by law or failing to exercise the jurisdiction so vested or acting with material irregularity or illegality in the exercise of its jurisdiction the case for the exercise of powers of revision by the High Court is made out. In *Joy Chand Lal Babu v. Kamalaksha Chaudhury*, 76 Ind App 131=AIR 1949 PC 239 the subordinate Court gave an erroneous decision that the loan was a commercial loan and, therefore, refused to exercise jurisdiction vested in it by law and the Privy Council held that it was open to the High Court to interfere in revision under Section 115. Sir John Beaumont said at p. 142 (of Ind App)=(at p. 242 of AIR):—

"There have been a very large number of decisions of Indian High Courts on S. 115 to many of which their Lordships have been referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate court does not by itself involve that the subordinate Court has acted illegally or with material irregular-

ity so as to justify interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b) and sub-section (c) can be ignored. The cases of *Babu Ram v. Munnalal*, ILR 49 All 454—AIR 1927 All 353 and *Hari Bhikaji v. Naro Vishwanath*, (1885) ILR 9 Bom 432 may be mentioned as cases in which a subordinate Court by its own erroneous decision (erroneous that is, in view of the High Court), in the one case on a point of limitation and in the other on a question of *res judicata*, invested itself with a jurisdiction which in law it did not possess; and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result. In the present case their Lordships are of the opinion that the High Court on the view which it took that the loan was not a commercial loan had power to interfere in revision under sub-section (b) of Section 115. In *Keshardeo Chamria v. Radha Kissen*, 1953 SCR 136—AIR 1953 SC 23, both these judgments of the Privy Council as also the previous judgments in *Amir Hussan Khan v. Sheo Buksh Sing.*, (1883-84) 11 Ind App 237 (PC) and *Balakrishna Udayar v. Vasudeva Aiyar*, 44 Ind App 261—AIR 1917 PC 71, were reviewed and it was held that Section 115, C. P. Code applied to matters of jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. Thus if a subordinate Court has jurisdiction to make the order it made and has not acted in breach of any provision of law or committed any error of procedure which is material and may have affected the ultimate decision then the High Court has no power to interfere but if on the other hand it decides a jurisdictional fact erroneously and thereby assumes jurisdiction not vested in it or deprived itself of jurisdiction so vested then the power of interference under Section 115, Civil P. C. becomes operative”.

5-A. It is, therefore, clear that if a material irregularity is committed by the subordinate Court as regards some error of procedure in the course of the trial which is material and may have affected the ultimate decision that order can be revised. This clearly shows that the words “case decided” include an order relating to some error of procedure. This decision lends support to the argument advanced by the learned advocate Shri Shah and negatives the contention urged on behalf of the opponents. I do not find that this decision runs in any manner counter to the ratio laid down by the Division

Bench of this Court in the aforesaid decision.

10. In a later decision in the case of *Lallubhai Virchand v. Ratilal Bhikhabhai*, 1967-8 Guj LR 851, Raju J. has observed:—

“An interlocutory order passed in the course of a proceeding in a suit or appeal may be a case decided. It may not amount to a case decided under Order 13, Rule 3 of the Civil Procedure Code. Whether it may amount to a case decided would depend upon the facts of each case.”

No doubt that case was decided by Raju J. on 8-2-1963. The ratio of that decision is the same as that in the earlier decision of his.

11. A Division Bench of the Lahore High Court in the case of *Sadaqat Ali v. Mohammed Sajjad Ali*, AIR 1929 Lah 257 has observed:

“The question as to whether a particular person should or should not be next friend is really ancillary to the suit itself and, it is a case finally decided for that particular proceeding. It stands on the same footing as giving or refusing leave to sue as a pauper, and therefore, under Section 115 High Court has to interfere.”

The Bombay High Court has also taken the same view in the case of *Bai Atrani v. Deepsing Baria*, 17 Bom LR 1097—(AIR 1915 Bom 269). A Division Bench of the Bombay High Court has observed:

“The application to the High Court against the order granting the temporary injunction was competent under Section 115 of the Civil Procedure Code; since the order was a “case decided in which no appeal lies,” within the meaning of the section. The word “case” in Section 115 of the Civil Procedure Code of 1908, is a word of wide or comprehensive import and clearly covers a far larger area than would be covered by such a word as “suit or appeal”. “Inasmuch as Section 115 is merely an empowering section granting certain jurisdiction to the High Court and as the use or exercise of that jurisdiction will, within the prescribed limits, be regulated by the discretion of the High Court, the section ought to receive rather a liberal than a narrow interpretation.”

The Lahore High Court has also in the case of *Harichand Anand & Co. v. Singer Manufacturing Co.*, AIR 1933 Lah 1046, observed:—

“The proceedings for a temporary injunction are taken under Order 39 and must be deemed to be “a case” and therefore open to revision as they do not directly affect the ultimate decision of the suit one way or the other.”

12. A single Judge of the Nagpur High Court had an occasion to interpret the word “case” referred to in section 25 of the Provincial Small Cause Courts Act in the case of *Laxmanrao Trimbakrao v.*

Gayadın Sheo Prasad, AIR 1937 Nag 136. At p. 137 observations made in 27 Nag LR 251=(AIR 1931 Nag 17) have been quoted and it is held "the word 'case' in Section 115 Civil Procedure Code, is wide enough to cover an interlocutory order and therefore it should also be wide enough in Section 25, Provincial Small Cause Courts Act."

12-A. I am, therefore, of the opinion that the word 'controversy' need not be given a restricted meaning as has been contended by the learned advocates appearing on behalf of the opponents. The word 'controversy' in my opinion is used in the general sense and it has got to be given a comprehensive meaning unless there is something to indicate that a narrow and restricted meaning was intended. It was urged by Mr. Nanavati that if the word 'controversy' is given such a wide meaning, the logical consequence would be that in case a court decides an adjournment application and grant an adjournment or refuses an adjournment it could be said that there was a decision in regard to a controversy between the parties. The controversy would be only whether the adjournment should be given or refused, and hence the question would be whether such order of decision could be revised by this court in the exercise of its revisional jurisdiction under Section 115 of the Civil Procedure Code. While deciding such an application no procedural right is even decided. It cannot be said that in a proceeding some controversy regarding some right which arises in relation to the procedure has been decided. A query was made by me to M/s. Nanavati and Mehta to consider a following hypothetical case and take into account the consequence that will follow, if their arguments are accepted as well-founded arguments. In a summary suit, a part of the suit claim is admitted by the defendants. The relevant rules require that a Court should immediately pass a decree for a part of the suit claim if admitted and should not postpone passing of a decree for that part of the claim till the rest of controversy in regard to which leave to defend is granted is decided. The Court refuses to allow those provisions, and postpones that the passing of a decree, such controversy will not be a controversy in regard to the right or obligation of the nature urged by M/s. Nanavati and Mehta. (Sic) The question that would arise would be whether such an order passed by the Court refusing to pass a decree ignoring the provisions contained in the Civil Procedure Code could be revised by this court or not. In my opinion, the answer should be clearly in the affirmative. I am of the opinion that the present decision would amount to a case decided, as a controversy between the parties in regard to the right or obli-

gation in relation to inspection of certain documents in a proceeding has been decided by the Court. I, therefore, hold that this preliminary objection is not maintainable on the first ground.

13. It has been next contended that it cannot be said that the Court has acted illegally or with material irregularity in exercise of its jurisdiction and eventually the provisions of clause (c) of Section 115 of the Civil Procedure Code could not be pressed into service. It was contended that it could be at the most said that there was an erroneous decision given by the subordinate Court. It may be an error of law. It may be that the decision may be a wrong decision. It may be that the discretion vested in the Court under Order 11, Rule 18 of the Civil Procedure Code may have been wrongly exercised. In brief it was urged that it was a question relating to the erroneous exercise of discretion vested in the court and this Court, therefore, cannot revise the order in question. Emphasis was laid on the wordings of Order 11, Rule 18 which I have referred to in an earlier part of the judgment. I need not repeat the same. It is urged that the Court has got the initial jurisdiction to make an order for inspection or to refuse to make an order for inspection. For exercise of the jurisdiction two conditions were necessary;

(1) Giving of notice — contemplated,

(2) The documents for which inspection has been sought should be the documents referred to in the pleadings or affidavits of the party.

If both these conditions are satisfied and they have been satisfied in the instant case, the Court has jurisdiction to pass an order for inspection. That being the position it could only be said that the Court committed an error in making an order for inspection. It could, therefore, be at the most said that it is wrong decision. It may be that the discretion has been wrongly used. It is urged that the proviso referred to in sub-rule (1) of Order 11, Rule 18 or in sub-rule (2) of it postulates that the court has jurisdiction to make such an order. Proviso only deals with the manner in which the discretion is to be used. It states that the order shall not be made when and so far as the Court shall be of the opinion that it is not necessary either for disposing fairly of the suit or for saving costs. It is, therefore, contended that the order is really an order in relation to the exercise of the discretion vested in the Court. The provisions of clause (c) of Section 115 cannot, therefore, have any application. In my opinion a careful reading of the relevant wordings of this Rule 18 of Order 11 does not indicate this contention to be a well-founded contention. It is true that two conditions referred to have been satisfied. If those two conditions are satis-

fied, the Court has been given a discretion to make an order for inspection in such place and in such manner as it may think fit. It is left entirely to the discretion of the Court as to whether inspection be given and as to how it should be given. At the same time by inserting a proviso, the power of the court is circumscribed by the proviso. It is stated that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs. It is not necessary either for disposing fairly of the suit or for saving costs. It is in my opinion a clear indication that there are fetters to the exercise of power by the Court. The Court has to keep this proviso in its upper-most mind. It is only when those fetters are not there, that court can order inspection in such place and in such manner as it may think fit. In my opinion the powers vested in the Court are circumscribed. Before the court therefore, makes any such order, the court must find that the order of inspection is necessary either for disposing fairly of the suit or for saving costs, as the Court is enjoined not to pass such an order if it is of opinion that it is not necessary either for disposing fairly of the suit or for saving costs. Furthermore, the Court has to take into account the provisions of Order 11, Rule 20. If it is a case of premature discovery, the court is empowered to pass an order of inspection in the manner referred to in this Rule 20. It indicates that in certain circumstances referred to therein passing of an order for inspection has got to be postponed till the determination of any issue or question in dispute. It is also necessary to see whether for any other reason it is desirable that any issue or question in dispute should be determined before deciding upon the right to the discovery or inspection. If it is so the Court has to order that such issue or question be determined first and reserve the question as to discovery or inspection. If the Court ignores these provisions that restrict and circumscribe the powers vested in the Court, in my opinion, it is not merely a case of wrong decision on a question of fact or law or a case of erroneous exercise of discretion. It is really a case where the court has acted illegally or with material irregularity in the exercise of its jurisdiction.

14. The learned Advocate Mr. Nanavati invited my attention to the case of *Razia Begum v Sahabzadi Anwar Begum*, AIR 1958 SC 886. It has been observed therein.—

"the question of addition of parties under Rule 10 of Order 1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be

exercised in view of all the facts and circumstances of particular case, but in some cases, it may raise controversies as to the power of the Court, in contradistinction to its inherent jurisdiction or in other words of jurisdiction in the limited sense in which it is used in Section 115 of the Code. In a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest in the subject matter of the litigation."

In my opinion this decision on its careful reading does not lend support to the argument advanced by Mr. Nanavati. On the contrary it lends support to my conclusion. It is stated therein:—

"In some cases, it may raise controversies as to the power of the Court in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in Section 115 of the Code"

The controversy may be as well in regard to the power of the Court in regard to certain matters like present one.

15. Mr. Nanavati also invited my attention to the comments made by the learned author Mr. Mulla in his book — Code of Civil Procedure, Thirteenth Edition, Vol. 1, page 515 under the caption "No revision from discretionary orders." The comments to which reference was made by him are as under:—

"Where the propriety of an order made in the exercise of a discretion is challenged in revision, the limitation imposed by section 115 should be taken into account. In AIR 1958 SC 886, discussing the power of the High Court to interfere in revision with an order made under Order 1, Rule 10, the Supreme Court observed:

"The question of addition of parties under Rule 10 of Order 1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances in a particular case; but in some cases, it may raise controversies as to the power of the Court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in Section 115 of the Code," and that where the order was within the power of the Court, a discretion exercised judicially by it could not be questioned under Section 115"

16. Still the question remains whether the order was within the power of the Court. Order 11, Rule 18 to which reference is made earlier clearly indicates that there is no power vested in the Court to order for inspection if the Court is of opinion that it is not necessary either for disposing fairly of the suit or for saving costs. The court has, therefore, got to find

that the order is necessary either for disposing fairly of the suit or for saving costs. If that is not the position, the court has no power to order for inspection. Furthermore, the Court cannot exercise such powers in certain cases for the time being, if the case is covered by Rule 20 of Order 11 of the Civil Procedure Code. If the Court ignoring these provisions or in the absence of anything in the order to indicate that it has applied its mind to these provisions, he has passed an order, it could be said that the court has acted illegally or with material irregularity in the exercise of its jurisdiction. The present case is a case of that type.

17. The learned Advocate Shri Nana-vati invited my attention to the observations made by a Division Bench of this Court in the aforesaid decision 1967-8 Guj LR 649 para 8=(AIR 1968 Guj 236 para 8). The relevant observations are as under :—

"But the question may then be asked: what about clause (c) of Section 115? That clause empowers the High Court to interfere where the subordinate Court has acted illegally or with material irregularity in the exercise of jurisdiction. Can the High Court not interfere in revision under this clause where it finds that the subordinate Court has wrongly decided a question of law in the exercise of its jurisdiction? If the question is asked in general terms, the answer is plainly 'No'. Section 115 is not directed towards correcting errors of law in the exercise of jurisdiction. As held by the Supreme Court in Pandurang v. Maruti, AIR 1966 SC 153 (supra), it is only if the error of law has relation to the exercise of jurisdiction illegally or with material irregularity by the subordinate Court, that the High Court can correct such error of law in revision. What then is the meaning of the expression 'has acted illegally or with material irregularity in the exercise of jurisdiction'? This question is also no longer open to doubt or debate. In AIR 1953 SC 23, the Supreme Court quoted with approval the observations of Bose J. in his order of reference in Narayan Soneji v. Sheshrao Vithoba, AIR 1948 Nag 258 and observed that :—

... 'the words 'illegally' and 'material irregularity' do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with.'

18. It is clear from these observations that a mere error of law in the exercise of jurisdiction is not enough. What is necessary is that the subordinate Court must have acted illegally, that is, in breach of some provision of law or with

material irregularity, that is, by committing some error of procedure in the course of trial which is material in that it may have affected the ultimate decision. Vide also 76 Ind App 67=(AIR 1949 PC 156). This is the test which must be applied in order to determine whether the case falls within clause (c) of Section 115. That ratio indicated by a Division Bench of this Court is a ratio indicated in several decisions of the Supreme Court. The Division Bench had to deal with a case where the question was, whether the document Ex. 4/1 was a promissory note within the meaning of Section 2(22) of the Stamp Act; it would be clearly an error of law but that error of law did not have relation to and was not concerned with the jurisdiction of the subordinate Court. In the present case, that is not the position. As stated earlier, the Court has been empowered to order inspection of documents referred to, in the pleadings etc., with a proviso added that the power shall not be used if the Court is of opinion that inspection is not necessary for disposing fairly of the suit or for saving costs. It is, therefore, evident that unless one of those conditions is satisfied, the Court has no power to order for inspection of such documents. If the Court ignoring these provisions and also ignoring provisions of Order 11, Rule 20, passes an order, it could be said without any doubt that the court has acted illegally or with material irregularity in the exercise of its jurisdiction. Clause (c) of Section 115 would, therefore, be attracted. I, therefore, overrule the preliminary objection and hold that this objection is not tenable.

19. The impugned order has been referred to in extenso in the earlier part of the judgment. The only ground mentioned by the learned Subordinate Judge in support of his order is that this provision for inspection is to avoid hardships to other parties. There is nothing in his order to indicate that he had applied his mind to the provisions that the Court had no power to order inspection if it is of opinion that it is not necessary either for disposing of the suit fairly or for saving costs. There is no mention made that the order of inspection passed is necessary either for disposing of the suit fairly or for saving costs. There is nothing also in the order itself which by necessary implication would indicate that these relevant and material provisions were kept in mind by the Court, when the impugned order was passed. Similar is the position regarding provisions found in Order 11, Rule 20. The Court has not applied its mind at all to these relevant and material provisions of Order 11, Rule 18 and Rule 20. The order, therefore, cannot be sustained in law. The learned Advocate Mr. Shah appearing on behalf

of the petitioner has fairly stated that this Court would be justified only in sending the matter back to the Court directing the Court to pass an appropriate order keeping in mind the provisions of these two rules. In support of his arguments on merits, he has invited my attention to the decision in the case of Bagyalakshmi Ammal v. Srinivasa Reddiar, AIR 1960 Mad 510. The relevant observations made therein are as under:—

"The mere fact that certain documents have been produced and filed in a suit by a party does not by itself give the other side a right to inspect the same as a matter of course when the party producing the same objects to their being inspected before the determination of a particular issue or question. That the documents are relevant for the purposes of the suit is not by itself a sufficient reason for ordering premature inspection. A party cannot be compelled to produce any document or to give inspection of the same for the purpose of facilitating cross-examination, or for enabling the opposite party to understand the genuineness or purport of the documents relied upon by the party producing them for proving its case.

Where the decision in any suit depends on the finding of a preliminary issue which goes to the very root of the plaintiff's case, such as whether a suit temple is a public temple or not, the Court cannot order the inspection of the defendant's documents before the determination of such an issue. In cases where the right to discovery in any form depends on the determination of any question or issue in dispute in a case or matter or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the question of discovery should be deferred till after the issue or question has been determined."

20. As the matter has got to be remanded for deciding whether inspection should be granted or not, keeping in view the provisions of Order 11, Rule 18 and Rule 20 of the Civil Procedure Code, it will not be proper for this Court to indicate its mind on this controversial question. The Court has to consider whether in a suit like the present suit where the factum of holding of power of attorney by the petitioner is challenged and the question whether there is a liability to render accounts is in issue, such inspection should be ordered or not or it should be postponed till that question is decided.

21. It was opponent No. 1 who had sought for inspection of the documents in question. It will, therefore, be proper to order him to pay the costs of the petitioner in this revision petition. It will not be proper to order other opponents to pay the costs of the petitioner in this

revision petition. They have appeared as they have been joined as opponents. No doubt, opponent No. 4 has sought to support the order of the Court below, but that will not make any difference.

22. The revision petition is allowed. The order passed by the Court below Ex. 37 dated 20-2-1968 is set aside and the Court below is directed to decide that application in the light of the directions given above. Rule is modified.

23. The opponent No. 1 to pay the costs of the petitioner in this revision petition. The opponents to bear their own costs.

SSG/D.V.C.

Petition allowed.

AIR 1969 GUJARAT 222 (V 56 C 40)

J. M. SHETH, J.

Bai Jayaben Girjashanker Oza, Appellant v. Bai Bhanumati Damji and another, Respondents.

Appeal No. 653 of 1961, D/- 13-2-1968, from decision of Dist. J. Rajkot, in C. A. No. 130 of 1961.

(A) T. P. Act (1882), S. 73 — Suit by prior mortgagee — Puisse mortgagee not a party to suit intervening at the stage of sale — Property sold subject to puisne mortgage — Puisse mortgagee cannot claim payment out of surplus sale proceeds. AIR 1937 Pat 307 held no longer good law in view of AIR 1938 Pat 179 — (Civil P. C. (1908), O. 34, Rr. 1, 12 & 13).

In a suit by the first mortgagee to recover the mortgage money, the puisne mortgagee was not a party. The suit was decreed and the decree-holder applied for sale of mortgage property at which stage the puisne mortgagee intervened and the property was sold subject to the puisne mortgage. After the first mortgagee was paid off, there remained some surplus in the Court deposit. A decree creditor of the mortgagor obtained attachment of the surplus amount and sought satisfaction of his decree from out of the surplus amount. The creditor contended that what was sold was the equity of redemption of the mortgagor, i. e., the interest which would be left in the mortgagor after satisfaction of the mortgage dues of the subsequent mortgagees including the puisne mortgagee. The puisne mortgagee claimed preference over the attaching creditor, alleging that the surplus sale proceeds represented substituted security for his mortgage dues. It was further argued that she could also proceed against the property in the hands of the purchaser.

Held upholding the contention of the attaching creditor, that since the puisne mortgagee intervened in the execution proceedings at the time of the sale and the property was sold subject to her mortgage

dues which were also notified in the sale proclamation, the puisne mortgagee must be held to have exercised her option to proceed against the security in the hands of the purchaser and therefore she had no right to have her claim satisfied from out of the surplus amount. S. 73 of the T. P. Act merely protects the mortgagee's interest in the secured property and it does not confer any additional benefit on the mortgagee. The right to get the mortgage dues satisfied from the surplus sale proceeds and the right to keep the mortgage security intact in the hands of the purchaser are alternative and mutually exclusive rights and only one of them could be availed of by the puisne mortgagee. To say that the puisne mortgagee has both the rights would obviously be to go beyond the scope of the mortgage security. Such a situation gives the mortgagee an additional benefit at the cost and suffering of the mortgagor, which is not contemplated. (Paras 8 & 20)

O. 34, R. 1 of Civil P. C. is subject to the provisions of the Code. If a puisne mortgagee is not made a party to the suit filed by a prior mortgagee for recovery of his mortgage dues, he will not be affected by a decree that may be passed. He can ignore the suit proceedings as well as the execution proceedings. AIR 1938 Pat 179 & AIR 1962 Punj 402 & AIR 1928 Lah 593, Foll. AIR 1926 Mad 101 & AIR 1934 Pat 209 Dist. AIR 1937 Pat 307 Held no longer good law in view of AIR 1938 Pat 179. (1880) 6 Ind App 145 (PC) Ref. (Para 9)

(B) Civil P. C. (1908), O. 34, Rr. 12 & 13 — R. 13 has got relation to R. 12.

O. 34, R. 13 of the Civil P. C. states about the application of sale proceeds. It means that it has also got relation to Rule 12. Both the rules have to be read together. (Para 11)

Cases Referred: Chronological Paras

- (1962) AIR 1962 Punj 402 (V 49)=
ILR (1962) 2 Punj. 227, Ratanchand
v. Prite Shah 6, 17, 18
(1938) AIR 1938 Pat 179 (V 25)=
ILR 16 Pat 299, Krishna Chandra
v. Bipin Behari 13, 17
(1937) AIR 1937 Pat 307 (V 24)=
169 Ind Cas 805, Mukhram Marwari
v. Bateswar Mahton 7, 12
(1934) AIR 1934 Pat 209 (V 21)=
15 Pat LT 95, Kapuri Sahu v.
Mathura Das 12, 13
(1928) AIR 1928 Lah 593 (V 15)=
108 Ind Cas 173, Gian Chand v.
Gopi Chand 17, 20
(1926) AIR 1926 Mad 101 (V 13)=
90 Ind Cas 410, K. N. Krishnaswami
Bhagavathar v. N. A. Thirumalai
Iyer 6, 14, 15, 16, 17, 19, 20
(1914) 41 Ind App 45=ILR 41 Cal
654 (PC), Brahamdeo Prasad v.
Tarachand 17, 20

(1906) ILR 33 Cal 92 = 9 Cal WN

989, Brahamdeo Prasad v. Tara-

chand 20

(1906) ILR 33 Cal 878, Gobind Sahai

v. Sibdu Ram 12

(1880) 6 Ind App 145=ILR 5 Cal

198 (PC), Raja Kishendatt Ram

v. Raja Mumtaz Ali 15

D. U. Shah, for Appellant; C. H. Doshi,

for Respondent No. 1.

JUDGMENT :— In this second appeal, a short but interesting question of law arises.

2. The facts giving rise to this second appeal are briefly stated as under :—

3. The respondent No. 1 Bai Bhanumati is a second mortgagee. The respondent No. 2 Harjivan is an original mortgagor, a judgment-debtor. One Damodar Chattrabhuj was a first mortgagee. He had filed a Civil Suit No. 46 of 1960 against the respondent No. 2 Harjivan for recovery of his mortgage dues and he had obtained a decree for recovery of his dues from the sale of the mortgaged property. The respondent No. 1 Bai Bhanumati in whose favour the second mortgage was executed by the said judgment-debtor was not a party to that suit. It means that the subsequent mortgagee was not a party to the suit filed by a prior mortgagee for recovery of his mortgage dues. The aforesaid suit was filed on 26th September, 1960. The said first mortgagee filed a Regular Darkhast No. 290 of 1960 to recover Rs. 7,654.01 by a sale of the mortgaged property described in the Darkhast in the Court of the Joint Civil Judge, Junior Division, Rajkot on 31-12-1960. He also filed Darkhast No. 295 of 1960 in the same Court for the execution of that very decree. The present appellant Bai Jayaben had filed a Civil Suit No. 839 of 1959 and had obtained money-decree in that suit in her favour against the respondent No. 2 on 2nd September, 1960 for Rs. 1,421.21 nPs. She filed a Darkhast No. 131 of 1961 against the respondent No. 2 to recover Rs. 1,589.11 nPs. for execution of the decree obtained by her, by attachment of the surplus amount lying in Regular Darkhasts Nos. 290 of 1960 and 295 of 1960 which were filed by Damodar Chattrabhuj, the first mortgagee against the second respondent, on 17th June, 1961. The learned Joint Civil Judge issued attachment warrant under Order 21, Rule 52 of the Civil Procedure Code for attaching the amount lying in the Court in the aforesaid Darkhasts. It will be proper to note at this stage that in execution of the aforesaid mortgage decree, the mortgaged properties were sold subject to the second mortgage with which we are concerned in this appeal and other subsequent mortgages also, and after satisfaction of the decretal dues of the first mortgagee who

had obtained a decree, the surplus amount of the sale proceeds was lying in the Court and that amount was attached by the present petitioner as referred to above. The present respondent No 1 Bai Ehanumati, the second mortgagee filed an application in Darkhast Nos 290 and 295 of 1960 on 27th June, 1961 requesting the Court to give the surplus amount lying in the said Darkhast to her as she was a second mortgagee in relation to the property which was auctioned in the said Darkhast. The said application was forwarded by the learned Civil Judge, Senior Division, Rajkot to the learned Judge concerned for favour of necessary action. The respondent No 1 Bhanumati gave another application on 28th June, 1961 (Ex 5 of the present proceedings of the Executing Court), in the Darkhast filed by Damodar Chattrabhuji against Harjivan Ravjibhai, stating that she was a second mortgagee and the decree-holder (first mortgagee) had been paid off and, therefore she was entitled to the surplus amount lying in the Court. She also urged that the present petitioner Jayaben had filed a Darkhast No 131 of 1961 and got this amount attached, but it was not legal and she was not entitled to that amount and eventually, the said amount should be given to her. The learned 3rd Joint Civil Judge, Junior Division, Rajkot kept this application for hearing on the date of Civil Regular Darkhast No 131 of 1961 on 7th July, 1961. The learned 3rd Joint Civil Judge, Junior Division, Rajkot, rejected that application on the ground that Bai Bhanumati who is a second mortgagee can recover the amount from the property which has been sold. He also passed an order below the Darkhast that the surplus amount lying in the Darkhast No 290 of 1960 be paid to the present appellant. A cheque for Rs. 1,400 34 nPs. was issued on 7th July, 1961 in the name of the present appellant. The respondent No 1 Bhanumati got an interim stay and eventually that cheque was not encashed.

4. Being dissatisfied with that order passed by the Executing Court, the respondent No 1 Bhanumati filed a Civil Appeal No 130 of 1961 in the District Court at Rajkot. The learned District Judge, Rajkot Mr P. H. Parikh, relied upon a decision of the Madras High Court to which I will make a reference at an appropriate stage, and found that the present respondent No 1, being a second mortgagee was entitled to the surplus sale proceeds in preference to the present appellant who was an attaching creditor of the respondent No 2 and eventually, allowed the appeal and set aside the order passed by the Executing Court.

5. Being dissatisfied with that order and decree, the attaching-creditor Bai

Jayaben has preferred the present second appeal to this Court.

6. The learned Advocate Mr D. U. Shah, appearing for the appellant, urged that in view of the position that the puisne mortgagee having intervened in the execution proceedings at the time of the sale and the property having been sold subject to her mortgage dues and the dues of other subsequent mortgagees the respondent No 1 is not entitled to get the surplus of the sale proceeds that remained in the Court after the dues of the first mortgagee were satisfied from the sale proceeds of the mortgaged property in execution of the mortgage decree obtained by her for sale. He urged that the property having been admittedly sold, in such a mortgage decree for sale, as puisne mortgagee was not a party to that suit, she had an option to ignore the suit proceedings and execution proceedings. She had that option in law. If she had ignored those proceedings and had not intervened in the execution proceedings at the time of the sale and the property had been sold in execution of a decree obtained by the first mortgagee in a suit to which the second mortgagee was not made a party, the second mortgagee, i. e. the respondent No 1 had two alternative remedies. She could proceed to get her mortgage dues satisfied from the surplus sale proceeds or she could keep her mortgage security intact, and proceed to get her mortgage dues satisfied by the sale of the mortgage property. The present case is not a case of that type. The second mortgagee intervened in the execution proceedings at the time of the sale. Her mortgage dues were duly notified in the sale proclamation. The property that was sold was subject to her mortgage dues and other mortgage dues with which we are not concerned in the present appeal. He therefore, contended that what was sold was the equity of redemption of the mortgagor, i. e. the interest which could be left in the mortgagor after the satisfaction of the mortgage dues of the subsequent mortgagees including the present respondent No 1, the second mortgagee. The purchaser, therefore, paid the price only for the purchase of that interest. If the present respondent No 1 is allowed to get her mortgage dues satisfied from the surplus sale proceeds of a sale which has taken place in the aforesaid circumstances, she would be getting the surplus sale proceeds that would be the amount to which the mortgagor would be really entitled. The reason is that the security of the present respondent No 1 was kept intact, the property having been sold subject to her mortgage. The present appellant had obtained a decree against the mortgagor and had attached the said surplus sale

Advisory Board constituted under Section 9 of the said Act and the Board having reported that there was in its opinion sufficient cause for the detention of the petitioner, the Government acting under Section 12(1) of the said Act passed order No. ISD 594 of 1968 dated 26-6-1968 confirming the order of detention of the petitioner and further directing the continuance of his detention upto 30th April, 1969. As a result of this order, the petitioner, has continued to be detained under the Preventive Detention Act.

3. In petition No. 4 by order No. DIR DM/21/66 passed by the District Magistrate Srinagar on 17-2-1966, under Rule 30 of the Defence of India Rules, the petitioner Abdul Sattar Khanday was detained with a view to preventing him from acting in a manner prejudicial to the Defence of India, civil defence, the public safety and the maintenance of public order and peaceful conditions in the State of Jammu and Kashmir. The termination of proclamation of emergency being in view, the State Government revoked the aforesaid detention Order dated 12-7-1966 after considering the materials appearing against the petitioner and being satisfied that with a view to preventing him from acting in any manner prejudicial to the security of the State and the maintenance of public Order, it was necessary to detain him, passed a fresh order directing his detention under Section 3(1) of the Jammu and Kashmir Preventive Detention Act of 1964. This order was passed on 5-1-1968 and was served on the petitioner on 6-1-1968. After communicating the grounds of the fresh order of detention to the petitioner on 14-1-1968 and affording him an opportunity of making a representation against the order of detention, the Government referred the case of the petitioner to the Advisory Board on 20th Feb. 1968 as required by Section 10 of the Preventive Detention Act. The Advisory Board after consideration of the case communicated its opinion to the Government on 3-6-1968 and pursuant to the recommendation of the Board, the Government confirmed the order of detention passed against the petitioner and directed the continuance of his detention upto 30th April, 1968.

4. In petition No. 5 of 1968, the petitioner Abdul Samad Wani, it appears was first arrested in pursuance of Government order No. ISD-502 of 1965 dated 19-10-1965 under Rule 30(1) (b) of the Defence of India Rules, with a view to preventing him from acting in any manner prejudicial to the defence of India, Civil defence, the public safety and the maintenance of public order and peaceful conditions in the State of Jammu and Kashmir. In this case also, in view of termination of proclamation of emergency the aforesaid detention order dated

19-10-1965 was revoked and after considering the materials appearing against the petitioner and being satisfied that with a view to preventing the petitioner from acting in any manner prejudicial to public order, it was necessary to pass a fresh order of detention, the Government, vide its order No. 51 of 1968 dated 5th January 1968, directed the detention of the petitioner under Section 3(1)(b) of the Jammu and Kashmir Preventive Detention Act. In this case also a copy of this order was served on the petitioner on 6-1-1968. The grounds of detention were communicated to the petitioner vide No. ISD-220 of 1968 dated 12-1-1968 which was actually delivered to the petitioner through the Superintendent, Jail, Srinagar on 14-1-1968. The petitioner was also afforded an opportunity of making a representation against the order of his detention to the Government. Thereafter, the case of the petitioner was forwarded to the Advisory Board along with the requisite material on 20-2-1968. The Advisory Board made its report to the Government on 3-6-1968 and in pursuance of the recommendation of the Board, the order of detention of the petitioner was confirmed by the Government on 30-6-68. According to the affidavit of the Home Secretary, the detention of the petitioner is also to continue upto 30th April, 1968.

5. Mr. Tussaduq Hussain, appearing for the petitioners has submitted that the detention of his clients is invalid because: (1) The orders detaining them are bad on the very face of them inasmuch as composite orders under Sections 3 and 5 of the Preventive Detention Act containing directions as to the detention of the petitioners and the places of their detention could not have been passed specially in view of the fact that Section 5 of the Act comes into play only after an order under Section 3 of the Act has been made and conveyed to the persons sought to be detained.

(2) The orders of detention are bad as they merely reproduce the language of Section 3 of the Preventive Detention Act and do not disclose the information on which those orders are based.

(3) The Advisory Board constituted under Section 9 of the Preventive Detention Act is a judicial or a quasi-judicial body and has acted against the principles of natural justice by failing to give notice to the petitioners calling upon them to show cause why their detention should not be reported to be justified.

(4) Section 12 of the Preventive Detention Act which requires two notices to be given to the detenu, one prior to the reference of his case to the Advisory Board and the other after the receipt of the report from the Advisory Board but before confirming the order of detention has been violated.

(5) The Preventive Detention Act in so far as it provides for detention of a person for reasons of security of State is ultra vires and beyond the competence of the State Legislature.

(6) The present detention of the petitioners under the Preventive Detention Act particularly for security of the State is not covered by the reasons connected with the Defence of India for which their detention was originally ordered under the Defence of India Rules.

(7) The petitioners' activities as alluded to in the grounds of their detention being such as could be the subject matter of prosecution and punishment under the penal law of the land could not be made the subject matter of their detention.

(8) The petitioners being already under detention, fresh orders of their detention could not be passed and served on them in jail.

The Addl. Advocate General appearing for the State has on the other hand contended that composite orders are not bad, that the Preventive Detention Act does not require that the information on the basis of which the order of detention is passed should be disclosed in the order, that the Advisory Board does not exercise judicial or quasi judicial functions and that there is no question of violation of principles of natural justice or of any notice being given to the detenu by the Board or by the Government either before making the reference to the Advisory Board or after the receipt of the report from the Board, that Section 12 of the Preventive Detention Act does not require issue of the two notices as urged by the learned counsel for the petitioners, that the Preventive Detention Act, is not ultra vires of the powers of the State Legislature, that the reasons for which the present detention of the petitioners has been ordered are covered by the reasons for which the detentions were ordered under the Defence of India Rules, that it was open to the State Government to detain a person even though his unlawful activities may be punishable under the penal law of the land, that the fact that the petitioners were already in detention could not prevent the State Government from passing fresh orders of their detention, under the Preventive Detention Act.

I shall take up seriatim the various contentions advanced by the learned counsel for the petitioners.

6. Regarding the first contention of the petitioners' learned counsel it may be observed that the point sought to be made is not of vital importance so as to affect the validity of the orders of detention passed against the petitioners. None of these orders can be said to be bad simply because it is a composite order. The orders satisfy the requirements of law.

They clearly state the reasons for and the necessity of detention. In each case the order is clearly severable and can be split up in two parts, the first part of the operative portion of the order containing direction as to detention appears to have been passed in exercise of the powers conferred on the Government under Section 3 of the Preventive Detention Act and the second part specifying the place of detention appears to have been passed in exercise of the powers conferred on it under Section 5 of the Act. A composite order of this character cannot, in our opinion, render the order invalid. In fact, the failure to specify the place of detention would create difficulties and make the order of detention ineffective. In a similar matter the Bombay High Court in *Prehlad Krishna Kurana v. State of Bombay*, AIR 1952 Bom 1, observed as follows:—

..... "Of course both the directions viz. the direction as to the detention and the direction as to the place of detention may in some cases be contained in the same order i.e. the same order may direct (1) that a person shall be detained and (2) that the detention shall be in a particular place. In so far as it directs that person shall be detained, it will be an order under S 3 and in so far as it says that the detention shall be in a particular place it will be an order under Section 4. In other words, it will be an order separable in two distinct parts, one of which will fall under Sec. 3 of the Act and the other under S. 4."

In view of the foregoing, we find no substance in this contention of the learned counsel for the petitioner which is repelled.

7. The second contention of the learned counsel for the petitioner is also misconceived. The Preventive Detention Act, no doubt provides that grounds on which an order of detention has been made should be communicated to the detenu within ten days from the date of detention and the detenu should be afforded an opportunity of making a representation against the order to the Government but the Act nowhere provides that the information on which the order is based should be stated in the order of detention. Mr. Tassaduq Hussain asks us to read into the Act something which is not there. This we cannot do. The authority reported in 1958(1) All ER 679, and relied upon by the learned counsel for the petitioners has also no bearing on the point in question and does not help the petitioners. In this case the House of Lords was merely concerned with the nature of proof in a prosecution for an offence contrary to Section 56(1)(a) of the Mental Deficiency Act, 1913. The second contention of the learned counsel for the petitioner must also, therefore be rejected.

8. Let us now examine the third contention of the learned counsel for the petitioner that the Advisory Board is a judicial or a quasi judicial body and it should have given a notice to the petitioners before making a report to the Government about the sufficiency of the cause for the petitioners' detention. As held after exhaustive consideration of the judicial decisions bearing on the point in *Ridge v. Baldwin*, 1964 AC 40; *Rex v. Electricity Commissioner, Ex Parte, London Electricity Joint Committee Co.*, 1924-1 KB 171 (205) and *Rex v. Legislative Committee of the Church Assembly; Ex parte Haynes Smith*, 1928-1 KB 411, before it can be said that a body of persons have to act judicially it must be shown not only that the body had legal authority to determine the questions affecting the rights of the subjects but also that it has a duty to act judicially. As said by Lord Hewart C. J. in *Rex v. Legislative Committee of the Church Assembly; Ex Parte Haynes Smith*, 1928-1 KB 411, it is the obligation to act judicially that determines whether a body is a judicial or quasi judicial body.

9. The Privy Council expressed similar views in *Nakkuda Ali v. Jayaratne*, 1951 AC 66 at p. 77. While considering the order passed by the Controller of Textiles in Ceylon under a Defence Regulation which empowered him to cancel a license "where the controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" the Privy Council held that it did not follow from the words of the relevant Defence Regulation that the Controller must be acting judicially in exercising the power. It is a long step, said the Privy Council, in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that behalf (belief?) by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially, or quasi judicially when he acts under this regulation. If he is not under a duty so to act, then it would not be according to law that his decision would be amenable to review and if necessary to avoidance by the procedure of certiorari.

10. The illuminating observations made in *Board of High School and Intermediate Education U. P. v. Ghanshyam Das*, (1962) Supp (3) SCR 36=(AIR 1962 SC 1110) are also worth quoting. Their Lordships of the Supreme Court observed in that ruling as follows:—

"The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend

on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion, if any, to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute."

Now an examination of the relevant provisions of the Preventive Detention Act, and its scheme would show that the Advisory Board is not a judicial or a quasi judicial body. It has merely to consider whether there was sufficient cause for the detention of the person concerned. It has to form its opinion in the light of the order of detention, the grounds thereof, the representation, if any, made against his detention by the detenu and such further information as the Board may deem necessary to call. It is not obligatory on the Board to hear the person concerned unless he actually desires to be heard. In forming its opinion, there is no question of the Board taking into account any subsequent events of developments. The Board is merely concerned with the initial order of detention which is based on the subjective satisfaction of the Government. Further even in a case where the Board reports that there is in its opinion sufficient cause for detention of the persons the Government has still a discretion to confirm or not to confirm the order of detention. The Board does not, therefore, in our opinion discharge any judicial or quasi judicial function.

11. While repelling the contention of the detenu that the report of the Advisory Board is a judgment of a judicial or a quasi judicial tribunal, their Lordships of the Madras High Court in *Muthuramalinga Thevar v. State of Madras*, AIR 1958 Mad 425 observed as follows:—

"The endeavour of Mr. Kumaramangalam was to equate the report referred to in sub-sections (1), (2) and (3) of S. 10 and S. 11(1) of the Act to be a judgment of a judicial or a quasi judicial tribunal where the reasons on which the opinion of the Advisory Board was based were set out. We are unable to accept the contention of Mr. Kumaramangalam that the language of S. 10 of the Act warrants the imposition of such a statutory Board, that its opinion should be backed by or be based on a report containing the reasons for its opinion.

All that Section 10(1) requires is that the Advisory Board should submit its report within the time specified. What that report should contain, S. 10(1) itself does not prescribe. No doubt S. 10(2) draws an apparent distinction between the report and the opinion of the Advisory Board, which is also reported to the Government. While the opinion has to specify whether or not there is sufficient cause for the detention of the person con-

cerned, even S. 10 (2) does not prescribe what else the report should contain. Nor does S. 10(3) which guarantees the secrecy of the report but provides for the publication of the opinion of the Advisory Board even if that opinion forms an integral part of the report.

Mr. Kumarmangalam was right when he pointed out that while S. 11(2) of the Act left no discretion to the Government when the Advisory Board reported that in its opinion there was no sufficient cause for the detention, where the Advisory Board reported that in its opinion there was sufficient cause for that detention, Section 11(1) vested a discretion in the Government either to confirm the order of detention or to revoke it.

But we are not able to accept the further contention of Mr. Kumarmangalam that before exercising the statutory power under S. 11(1) of the Act at its discretion the Government was bound to take into account both the report and the opinion of the Advisory Board. What both sub-sections (1) and (2) of S. 11 require of the Government is that it should consider the opinion of the Advisory Board reported to it by that Board. It certainly could not be urged that where factually there was no report apart from the opinion, there was no sufficient cause for the detention, the Government could ignore the opinion and treat it as non est in law.

It is the opinion of the Advisory Board that is relevant both under sub-sections (1) and (2) of Section 11, the opinion of the Advisory Board reported by that Board to the Government. If the report, independent of the opinion, is not what the Government is bound by law to consider either under S. 11(1) or under Section 11(2) of the Act, the further question of what the report should contain to satisfy the statutory requirements cannot arise for consideration. The language of S. 11(1) in our opinion, gives no indication of what the "report referred to in Ss. 10 (2) and 10 (3) should contain."

In *Parkash Chandra v Union of India*, AIR 1965 Punj 270. It was held that the Advisory Board does not exercise the function of a Court. Its duty was merely to report about the sufficiency of the cause for detention.

12. In *Calcutta Dock Labour Board v. Jaffer Imam*, AIR 1966 SC 282, their Lordships have observed that the Advisory Board does not try the question about the propriety or validity of citizen's detention as a Court of law would and its function is limited to consider the relevant material placed before it and the representation received from the detenu and then to submit its report to the State Government within the time specified by Section 10(1) of the Act. While con-

sidering the matter their Lordships further went on to observe as follows—

"It is obvious that the Advisory Board does not try the question about the propriety or validity of the citizen's detention as a court of law would, indeed, its function is limited to consider the relevant material placed before it and the representation received from the detenu, and then submit its report to the State Government within the time specified by S 10(1) of the Act. It is not disputed that the Advisory Board considers evidence against the detenu which has not been tested in the normal way by cross examination; its decision is essentially different in character from a judicial or a quasi judicial decision. In some cases, a detenu may be given a hearing, but such a hearing is often, if not always likely to be ineffective, because the detenu is deprived of an opportunity to cross examine the evidence on which the detaining authorities rely and may not be able to adduce evidence before the Advisory Board to rebut the allegations made against him. Having regard to the nature of the enquiry which the Advisory Board is authorised or permitted to hold before expressing its approval to the detention of a detenu it would, we think, be entirely erroneous and wholly unsafe to treat the opinion expressed by the Advisory Board as amounting to a judgment of a criminal Court."

In *P. L. Lakhanpal v. Union of India*, AIR 1967 SC 908, their Lordships of the Supreme Court while considering the scheme of the Defence of India Rules and that of the Preventive Detention Act, observed at page 915 as follows—

"In the first place the scheme of the Preventive Detention Act is entirely different from the Act and the Rules before us. Section 3 of the Act confers power of detention. Section 7 requires the detaining authority to furnish grounds of detention to the detenu to make a representation. Section 8 requires the setting up of Advisory Board. Section 9 requires reference of the order passed by the authority to such Advisory Board together with the representation if any, made by the detenu. Under S 10 the Board has to make a report to the Government and the report would be whether there is sufficient cause for detention or not. Under Section 11 the Government may confirm the detention order and continue the detention where the report is that there is sufficient cause. But where the Board reports that there is no such sufficient cause, the Government has to revoke the detention order. It is clear from S 9 and the Section following it that the Government has to make the reference to the Board within 30 days from the order and the Board has to find whether there is suffi-

cient cause for detention or not. The review of the Board is thus almost contemporaneous. If, therefore, the Board finds that certain grounds furnished to the detenu did not in fact exist, it means that it did not make up its mind to pass the order. It is for that reason that the courts have held that since the order is based on subjective satisfaction it is not possible to say whether or not the grounds found not to have existed affected the process of satisfaction of the authority or not and to say that those only which existed had made up the satisfaction would be to substitute the court's objective test in place of the subjective satisfaction of the detaining authority. The scheme of Rr. 30(1) and 30A is totally different from that of the Preventive Detention Act. Where an order is made under R. 30(1)(b) its review is at intervals of periods of not more than six months. The object of the review is to decide whether there is a necessity to continue the detention order or not in light of the facts and circumstances including any development, that has taken place in the meantime. If the reviewing authority finds that such a development has taken place in the sense that the reasons which led to the passing of the original order no longer subsist or that some of them do not subsist, that is not to say that those reasons did not exist at the time of passing the original order and therefore, the satisfaction was on grounds which did not then exist. It is easy to visualise a case where the authority is satisfied that an order of detention is necessary to prevent a detenu from acting in a manner prejudicial to all the objects set out in R. 30(1). At the end of six months the reviewing authority on the materials before it may come to a decision that the detention is still necessary as the detenu is likely to act in a manner prejudicial to some but not all the matters. Provided such decision is arrived at within the scope of R. 30A the decision to continue the detention order would be sustainable. There is thus no analogy between the provisions of review in the two acts and therefore decisions on the Preventive Detention Act cannot be availed of by the petitioner."

In view of these authorities, we are unable to accede to the submission of the learned counsel for the petitioner that the Advisory Board is a judicial or a quasi judicial body.

13. That apart, there is no provision in the Preventive Detention Act requiring that an opportunity should be given to the detenu by the Board for making a representation to it. In this connection the following passage occurring in the aforesaid ruling of the Bombay High Court (i. e. AIR 1952 Bom 1) may be perused with advantage:

"The last contention of Mr. Sule is that after the case of the detenu was referred to the Advisory Board by the Government of Bombay under S. 9 of the Act no opportunity was given to him for making a representation to the Advisory Board. Now we have carefully considered the combined effects of Sections 9 and 10 of the Act and we find that the said sections do not contemplate that apart from the opportunity which the Act requires to be given to a detenu to make a representation under Section 7 any further opportunity is to be given to him to make a representation to the Advisory Board after his case is referred to the said Board by Government. If on his own accord the detenu makes another representation before the matter is put before the Advisory Board by Government, that representation has of course to be forwarded by Government to the Advisory Board under Section 9 of the Act. Section 9 says that in every case where a detention order has been made under the Act, the appropriate Government shall within six weeks from the date specified in sub-section (2) place before an Advisory Board the grounds on which the order has been made and the representation, if any, made by the person affected by the order. It is clear, therefore, that whatever, the number of representations which the detenu might have made to Government before his case is sent to the Advisory Board, Government is bound to forward them to the Board for consideration and examination. The Board is not called upon to ask for any representation from the detenu. Section 10 says that when the case is referred to the Advisory Board, the said Board shall after considering the materials placed before it and after calling for such further information as it may deem necessary from the appropriate Government or from the person concerned and if in any particular case it considers it essential after hearing him in person, submit its report to the appropriate Government.

It is clear, therefore, that the question whether the Advisory Board should call for any further information from the detenu or should give him an opportunity of being heard in person is left entirely to the discretion of the Advisory Board. It is not incumbent upon the Board to give an opportunity to the detenu to make a representation to them, nor is it incumbent upon them to hear him in person."

The following observations made in Jagan Nath Sathu v. Union of India, AIR 1960 SC 625, are also worth perusing in this connection:—

"Coming now to the submission that the respondent's case was heard before the petitioner's case and in his absence

and that copies of further materials placed before the Advisory Board by the respondent were not supplied to the petitioner, it is necessary to refer to the procedure to be adopted by the Advisory Board under the provisions of the Act. Under Section 9 in every case where a detention order has been made the appropriate Government must within thirty days from the date of detention place before the Advisory Board the grounds on which the order has been made, and the representation, if any, made by the detenus and in a case where an order has been made by an officer, also the report by such officer under sub-section (3) of Section 3. Section 10 sets out the procedure which the Advisory Board must follow when reference has been made to it under Section 9. Section 10(1) states:—

"The Advisory Board shall, after considering the materials placed before it, and after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if in any particular case it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person submit its report to the appropriate Government within ten weeks from the date of detention. It is clear from these provisions that the Advisory Board after considering the materials placed before it under Section 9 can call for further information from the appropriate Government, and that thereafter if in any particular case, it considers it essential so to do or if the detenu desires to be heard, after hearing him submit its report to the appropriate Government. In such a situation the Advisory Board must of necessity obtain further information from the appropriate Government before it hears the detenu. In our opinion, there is nothing in Section 10 which offends against the principles of natural justice."

Keeping in view the procedure to be adopted by the Advisory Board and the principles enunciated in the decisions set out above, we need not dilate on this point any further.

14. Mr. Tassaduq Hussain, learned counsel for the petitioners, has urged that the observations made by their Lordships of the Supreme Court in AIR 1966 SC 282 (supra) are obiter dicta and as such are not binding on this Court. After carefully going through the authority, we regret we are unable to accept this contention of the learned counsel for the petitioners. Moreover, it is well settled that the observations of the Supreme Court even if obiter dicta are entitled to the highest respect.

15. The learned counsel has also referred us to a ruling of the Supreme Court

reported as AIR 1965 SC 1767, but that ruling in our opinion does not help the petitioners. Their Lordships of the Supreme Court were, therein, considering a case where the State Government acting in exercise of its revisional powers under Section 7-F of the Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947, had issued a direction to the Commissioner to revise his order refusing permission to file a suit for ejectment against the tenants without issuing a notice to or giving an opportunity to them to place their version before it. After examination of the scheme of the Act and its relevant provisions their Lordships came to the conclusion that in revisional proceedings under Section 7-F of the Act, the State Government must adopt a judicial approach, considering the matter in a quasi judicial manner and follow the principles of natural justice before reaching its conclusions. In the instant case as already pointed out after examination of relevant provisions of the Preventive Detention Act, the Advisory Board does not discharge judicial or quasi judicial functions.

16. In connection with the contention regarding principles of natural justice to be followed by the Advisory Board, it would be relevant to refer to a ruling of the Supreme Court reported as AIR 1967 SC 122, where their Lordships quoted with approval their earlier observations made in Nagendra Nath Bora v. Commissioner of Hills Division, AIR 1958 SC 398 at p 409, that, "the rules of natural justice vary with varying constitutions of statutory bodies and the rules prescribed by the Act under which they function; and the question whether or not any rules of natural justice had been contravened should be decided not under any preconceived notion but in the light of the statutory rules and provisions." We, therefore, find ourselves unable to accept the third contention of the learned counsel for the petitioners.

17. The next contention of the learned counsel for the petitioners that under Section 12 of the Preventive Detention Act two notices one before making a reference to the Advisory Board and the other on receipt of the report from the Advisory Board, ought to have been given to the detenus is equally without any substance. Section 12 of the Act which sets out the procedure to be followed by the Government after the receipt of the report from the Advisory Board does not contemplate any such notice.

18. The Preventive Detention Act merely provides for one opportunity to the detenu to make a representation to the Government against the order of detention. There is no statutory provision or rule which prescribes that the Gov-

erament has to make a judicial approach or discharge judicial function while confirming the order of detention. The preventive detention as distinguished from punitive detention as observed in AIR 1951 Pat 389 at p. 396 has necessarily to proceed in all cases to some extent on suspicion or anticipation as distinguished from proof. The learned counsel for the petitioners has also referred to a ruling of the Supreme Court P. L. Lakhanpal v. Union of India, AIR 1967 SC 1507, to show that in confirming the order of detention the Government has to act judicially and the aforementioned notices ought to have been issued to the detenus before reference of their cases to the Advisory Board after the receipt of the reports from the Board but the authority is clearly distinguishable as their Lordships were therein considering the scope of the power of review under Rule 30-A (9) of the Defence of India Rules, after the detention of a detenu has gone on for a period of six months, which has no analogy to the question of confirmation of detention under Section 12 of the Preventive Detention Act. The learned counsel for the petitioners also tried to reinforce his submission by reference to Article 311 of the Constitution but here again there is no analogy between the provisions of Article 311 of the Constitution and Section 12 of the Preventive Detention Act. The fourth contention of the learned counsel for the petitioners must also therefore, be rejected.

19. The 5th contention of the learned counsel for the petitioners is also based on a misconception of the true constitutional position. Legislation with respect to preventive detention for defence of India no doubt falls within the competence of Parliament as it is covered by Entry 9 of the Union list but preventive detention for reasons connected with the security of State falls within the concurrent list and as such is within legislative competence of a State Legislature as well. It is also to be borne in mind that unlike other States of India, the residuary power of legislation vests in our State legislature and in peace times our State Legislature alone is competent to enact a law with respect to preventive detention for reasons of security of the State. All this would be evident from a combined study of Article 370 and Chapter 1 of Part XI of the Constitution of India read with Schedule 7 thereof as applied to the State.

A reference to that part of the Constitution of India which relates to the distribution of legislative powers between the Union and the States and to the Constitution (Application to Jammu and Kashmir) Order 1954 would show that whereas in the rest of India, the Union and the State Legislature have both concurrent

powers of legislation with respect to preventive detention for reasons connected with the security of a State i. e. both the Central and the State Legislature can operate in this common field, the position is peculiar so far as the State of Jammu and Kashmir is concerned. Entry 97 of List 1 (Union List) and Entry No. 3 of List 3 (Concurrent list) of the 7th Schedule having been omitted from applicability to the State of Jammu and Kashmir the State Legislature has exclusive power of legislation in respect of preventive detention for reasons connected with the security of the State. The provisions of the Jammu and Kashmir Preventive Detention Act in so far as they relate to detention for reasons of security of State cannot therefore, be struck down as ultra vires of the State Legislature. The Fifth contention of the learned counsel for the petitioners therefore, also falls.

20. We now pass on to the sixth contention of the learned counsel for the petitioners. It will be seen from the counter-affidavit filed on behalf of the State by the Secretary to the Government Home Department, that the detenus were initially detained under the Defence of India Rules, inter alia for reasons connected with the defence of India and the maintenance of public order. Now the expression 'Defence of India' in times of emergency appears to us to have a very wide connotation and is comprehensive enough to include within its sweep the security of the State as well. This is so because war or external aggression definitely affects and undermines the external and internal security of a State. Again the term 'public order' as held in AIR 1966 Guj 126 is of wide amplitude and comprehends within its ambit everything that may be connected with public safety and tranquillity. In this sense the security of State is closely allied to public order as well as any activity prejudicial to the security of the State is bound to jeopardise the public safety and tranquillity. In some decided cases it has also been held that the two objectives, maintenance of public order and the security of the State overlap to a certain extent. We are, therefore, unable to accede to the contention of the learned counsel for the petitioners that the detenu having been previously detained for reasons connected with the defence of India and the maintenance of public order could not now be detained for reasons connected with the security of State and the maintenance of public order.

21. The next contention of the learned counsel for the petitioners that since the activities referred to in the grounds of detention could be the subject matter of prosecution, the State should not have resorted to its extraordinary powers of detaining the detenus also does not ap-

pear to be sound. The fact that the Government can launch prosecution against a person for his unlawful or prejudicial activities, does not debar it from detaining a person if it is satisfied that the step will be more expedient and fruitful. As held in AIR 1966 Guj 126, a habitual criminal is not exempt from the operation of the Act and the mere fact that he can be amenable to ordinary law does not preclude the exercise of power under Section 3 of the Preventive Detention Act. Again in AIR 1957 Cal 74, it was held that there is no law which precludes the State from invoking the provisions of the Preventive Detention Act in respect of a matter as to which a criminal prosecution has been launched or can be launched. Further in AIR 1953 Pepsu 190 it was held that it cannot be stated as a rule of law that when a person is accused of an offence the only alternative is to prosecute him and there is no legal authority to detain him. Judicial decisions have even gone further and held that prejudicial activities can be the subject matter of parallel prosecution and detention. The right to prosecute a person under the ordinary criminal law and the right to detain him being mutually exclusive, the seventh contention of the learned counsel for the petitioners must also be rejected.

22. The last contention of the learned counsel for the petitioner is also without substance. Regarding the second part of his contention, it may be stated that there is nothing in law to debar an order of detention being served on the detenu in Jail. Reference in this connection may be made to:

Jagdev Singh v. State of Jammu and Kashmir, AIR 1963 SC 327, A. K. Gopalan v. Government of India, AIR 1966 SC 816, Ujjagar Singh v. State of Punjab, AIR 1952 SC 350 and Godavari Shamrao Parulekar v. State of Maharashtra, AIR 1964 SC 1128.

23. By these rulings it has now been conclusively settled that the mere fact that a person is under preventive detention as distinguished from punitive detention will not be a bar to the revocation of the previous order of detention and to the passing of a fresh order of detention although the person may not have been released in pursuance of the order of revocation. In all these rulings it has also been held that if the authority making an order is satisfied that the ground on which the detenu was originally ordered to be detained is still available and there is need for his detention, no mala fides can be attributed to the authority from the fact that the grounds alleged in the second detention are the same as those of the original detention. The rulings reported in AIR 1964 SC 334 and AIR 1964

SC 1120 and relied on by the learned counsel for the petitioners are not helpful to him as in these rulings the detenus were already under punitive detention in jail when orders for preventive detention were served on them. We, therefore, find no force in the 8th contention of the learned counsel for the petitioners as well.

24. For these foregoing reasons, these applications fail and are hereby dismissed. DGB/D.V.C. Applications dismissed.

AIR 1969 JAMMU AND KASHMIR 83 (V 56 C 18)

FULL BENCH

S MURTAZA FAZL ALI C. J.,
N. N. BHAT, JASWANT SINGH,
ANANT SINGH AND
R N GURTU, JJ

H. Wali Mohd. and others, Petitioners v. Administrator Municipality and others, Respondents.

Writ Petns. Nos. 216, 221, 222 and 223 of 1968, D/-19-7-1968.

(A) Jammu and Kashmir Public Premises (Eviction of Unauthorised Occupants) Act (13 of 1959), S. 5 (Prior to its amendment) and Section 15 — Validity — Provisions of Section 5 violate Art. 14 of the Constitution — Proceedings taken under the provisions are illegal — Subsequent amendment does not validate the proceedings — Section 15 is ultra vires the State Legislature — Being a post-Constitution amendment doctrine of eclipse does not apply.

Section 5 of the J. and K. Public Premises (Eviction of Unauthorised Occupants) Act suffered from two infirmities. In the first place Section 5 being couched in a directory form, it invested a discretion in the Estate Officer to evict one unlawful occupant and refuse to evict another at his own sweet will. Secondly, the jurisdiction of the Civil Court not being ousted the Government reserved two remedies for itself; one through the drastic machinery provided under the Act and the other the remedy of the Civil Court. The Government could in its own discretion choose to proceed against one person under the Act and against another in the Civil Court. Such a power was clearly discriminatory and violative of Art. 14 of the Constitution of India. Since it was ultra vires as being violative of Art. 14 of the Constitution of India, then the voidness was both complete and incurable and therefore, such an Act could not be revived even by a validating section, because so long as Art. 14 of the Constitution of India remains, the State Legislature would not be competent to vali-

date any law which contravenes the said Articles under any circumstances. Section 15 of the amended Act, therefore, to that extent falls beyond the legislative competence of the State Legislature and is, therefore, ultra vires. The said section cannot revive proceedings taken under S. 5 of the old Act, but it may revive other proceedings which are not violative of Art. 14 of the Constitution of India. The only other alternative for the State is to take fresh proceedings under the amended Act. Further the old Act was a post Constitution Act inasmuch as the constitutional provisions were applied to the State as far back as 1954. Doctrine of eclipse would also not, therefore, apply to the present case. AIR 1967 SC 1581, Rel. on. Civil Ref. No. 4 of 1967 (FB) (J. and K.) and AIR 1963 SC 1019, Ref.; AIR 1958 SC 468, Dist. Servai's Constitutional Law, p. 167 not foll.

(Paras 28 and 32)

(B) Jammu and Kashmir Lands Grant Act (23 of 1960), Ss. 6 and 13 and Rules, R. 21 — Possession from lessee can be taken only after paying compensation — So long as compensation is not paid possession of lessee continues to be lawful.

(Paras 6 and 25)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 1581 (V 54) =
(1967) 3 SCR 399, Northern India
Caterers (P) Ltd. v. State of
Punjab 28
- (1967) Civil Ref. No. 4 of 1967 (FB)
(J. and K.), Yashpal v. Dy. Commr.
Estate Officer 28, 33
- (1966) AIR 1966 SC 282 (V 53) =
(1965) 2 SCA 266, Calcutta Dock
Labour v. Jaffar Imam 55
- (1966) AIR 1966 SC 764 (V 55) =
(1966) 1 SCR 890, Jawaharmal v.
State of Rajasthan 35
- (1963) AIR 1963 SC 1019 (V 50) =
(1963) Supp 1 SCR 912, M. L.
Jaini v. State of U. P. 30
- (1963) 1963-2 All ER 66 = 1964 AC
40, Ridge v. Baldwin 54
- (1961) AIR 1961 SC 1570 (V 48) =
(1962) 2 SCR 69, Bishan Das v.
State of Punjab 42
- (1960) AIR 1960 SC 606 (V 47) =
(1960) 2 SCR 775, Shivjee Nathu-
bhai v. Union of India 55
- (1958) AIR 1958 SC 468 (V 45) =
1958 SCJ 459, Sundaramier and
Co. M. P. v. State of Andhra
Pradesh 30
- (1957) AIR 1957 SC 529 (V 44) =
1957 SCJ 489, Sohan Lal v. Union
of India 46
- (1955) AIR 1955 SC 123 (V 42) =
(1955) 1 SCR 613, Behram Khur-
shed Pushkara v. State of Bombay 29
- (1955) AIR 1955 SC 781 (V 42) =
(1955) 2 SCR 589, Bhikaji Narayan
Dhakras v. State of M. P. 29, 30

- (1940) 1940 Ch 70 = 109 LJ Ch 38,
Urban Housing Co. v. Oxford
City Council 54
- (1916) AIR 1916 Lah 420 (V 3) =
48 Pun WR 1916, Basheshar Nath
v. Ramkrishen Das 38
- (1908) 1908 Pun Re 85 = 1908 Pun
LR 130, Bhagat Singh v. Devi
Dial 38
- (1884) 9 App Cas 480 = 53 LJ Ch
812, Tivertor and North Deron
Rly. Co. v. Robert Francis Loose-
more 27
- (1863) 14 CBNS 180 = 143 ER 414,
Cooper v. Wandsworth 54
- Asoka Sen and R. N. Kaul, for Peti-
tioners; Amar Chand, Addl. Advocate
General, Isher Singh and T. N. Duleo, for
Respondents.

ALI, C. J.:— These four petitions raise common questions of law and fact and would, therefore, be decided by one judgment, indicating individual cases wherever necessary.

2. All the petitioners are purchasers of the premises in dispute which were originally owned by Dewan Bishan Das, an ex-Prime Minister of the State who, according to the petitioners, was in possession of the property for more than 76 years. The vendor of the petitioners had after acquiring the land constructed several huge buildings and structures as a result of which the properties were rendered very valuable. A portion of the property was in possession of the tenants of Bishan Das who were asked to attorn to the new purchasers after the heirs of Bishan Das sold the property to the petitioners. The property in question is situate in Magharmal Bagh and consists of residential houses, buildings and sheds and open lands. The Petitioners, Haji Abdul Aziz Shah, his wife, one Abdul Salam Shah and H. Mohd. Ramzan Shah purchased 8 and 9 Marlas and 10,000 sq. ft. of the property bearing Khasra Nos. 885 and 890 by two separate sale deeds registered on 12-1-67 and 8-12-67. Similarly Haji Wali Mohd. by a sale deed dated 7-12-67 purchased land measuring 25704' 5" along with buildings garages situate in Sarai Pain near the exhibition ground. After purchasing the aforesaid property, this petitioner started his own commercial establishment and business headquarters.

3. It is not disputed by the State that the premises were purchased by the petitioners in the writ petitions mentioned above, nor is it denied that prior to the demolition of the buildings the premises in dispute were in possession of Parnesh Chandra and others who were the heirs of Dewan Bishan Das.

Thus prima facie it would appear that the undisputed possession of the vendors of the petitioners has been clearly admitted by the State in all the petitions.

The concerned officers however, alleged that the lands were Wasidari Land (Government Lands) and were leased out to Dewan Bishan Das for purposes of constructing buildings. The lease granted to the said Bishan Das was governed by Wasidari Rules which were later on amended by the Lands Grants Act of 1960 and under the provisions of his Act as also the rules framed thereunder the State had the right to resume the lands for a public purpose after paying compensation to the lessees. Although the State has by no means adduced sufficient evidence to prove that the lands in question were Wasidari Lands inasmuch as they have neither produced the counterpart of the lease deed nor have they produced the Nazool register to show that the lands in question were Nazool lands, yet for purposes of this case we shall assume that the lands in question were Wasidari and Nazool lands leased out to Bishan Das a long time back. In fact the only documentary evidence produced by the State before us consists of a copy of Jamaband where the lands are shown as Khalsa Sirkar, i.e., lands owned by the State and Bishan Das is shown as a tenant in possession. As the petitioners also do not want us to go into the question of title but decide this case on the assumption that the lands are Wasidari lands, we would refrain from making any observations regarding the title of the petitioners or of their vendors in these writ petitions. Any casual observation made in these petitions will not, therefore, prejudice the rights of either party.

4. The petitioners have contended that the State wanted to resume the lands under the Land Grants Act of 1960 but without taking necessary action as required by law and with a view to seizing the property of the petitioners taking advantage of a fire that broke out on 5-1-68. Respondents 1 and 2 of petitions Nos. 216 and 221 in collusion with each other tried to forcibly dispossess the petitioners and succeeded in demolishing a major portion of the buildings constructed by the petitioners' vendors. The petitioners further alleged that without any semblance of title or right the respondent fenced the whole area containing the premises in dispute without the permission of the petitioner and thus clearly invaded the petitioners' fundamental rights.

5. In order to appreciate the contentions raised by the counsel for the petitioners a few admitted facts which have been collected from the unrebutted assertions made by the petitioners and also from the Government file No 561 produced by the Addl. Advocate General may be stated here.

The story begins with the decision of the Government to acquire lands in ques-

tion under paragraph 21 of the rules for grant of lands in Jammu and Kashmir for building purposes which have been kept alive by virtue of Ss. 6 and 13 of the Jammu and Kashmir Land Grants Act of 1960. This rule runs as under:—

"On the expiry of the period of lease or in the case of lease being renewed on the expiry of the period of the renewal of the lease, His Highness the Maharaja in Council shall acquire possession of the land covered by the lease and all buildings erected thereon or appurtenances belonging thereto after making such compensation to the lessee for the cost of buildings erected by him as may be determined by the State Engineer. If the lessee does not accept the compensation so determined by the State Engineer, His Highness the Maharaja in Council may require the lessee to remove the materials of houses and buildings erected by him and to vacate the land within a reasonable time to be fixed after due regard to the circumstances of each case. If the order is not complied with by the lessee within the time so fixed His Highness the Maharaja in Council may enter in possession of the land and other buildings or houses that may be standing thereon at the time and all rights of the lessee for compensation for such houses or buildings, as may be so taken possession of, shall be deemed to have been finally determined and extinguished."

6. Analysing the ingredients of this rule, it would appear that the State would be competent to resume possession from the lessee at any time provided the following conditions are satisfied:—

- (1) That the land is required for a public purpose.
- (2) That compensation is assessed by the Government in accordance with the mode laid down in the rules.
- (3) That the said compensation has been paid to the lessee.

7. It is manifest therefore, that unless the Government pays compensation to the lessee, it is not entitled either in law or in fact or on principle to take possession of the property. We might further mention here that under the Land Grants Act the procedure for assessing compensation has been slightly changed and under those rules the Divisional Engineer P. W. D. has to assess the compensation and the lessee has been given a right of appeal against the aforesaid assessment of compensation to the Chief Engineer whose order has been made final.

But the language of S 6 of the Land Grants Act clearly shows that the provisions of the Act and manifestly of the rules made thereunder would apply only to leases created after the passing of the Act. Thus all leases created before the Act

would continue to be governed by the old rules quoted above. The leases in these petitions have been executed long before the said Act was passed and is, therefore, clearly governed by the old rules.

8. By Government order No. LA/74 of 1957 dated 22-9-57 the Government decided to resume the lands in question bearing Khasra Nos. 890 min and 937 min situate in Bagh Magharmal for a public purpose. The Government order runs thus:—

"Whereas Khasra Nos. 890 min and 937 min measuring 10 kanals and 16 marlas, 239 cft. situate in Bagh Magharmal Mauza Narsingarh, Srinagar, held in lease by the successor in interest of late Dewah Bishan Das are required for a public purpose namely for setting up a tonga and lorry stand, it is ordered that the said land shall be taken possession of and all appurtenances and structures standing therein shall be acquired by the Director Land Record in terms of R. 26 of the Building Site Rules of 1976".

9. It would appear from a perusal of this order that the premises in question were resumed because they were required for purposes of constructing tonga and lorry stand which according to the Government, was a public purpose in order to justify them to acquire the said land. We might also mention here that this order was passed before the Land Grants Act of 1960 has come into force and the relevant provision which governed such lands was the Buildings Site Rules of 1976 (Bikrami) as mentioned above. This order was slightly modified by substituting some khasra Nos. by virtue of Government order No. 380 of 1960 dated 3-10-1960.

10. It appears that in pursuance of the orders passed in 1957 and then in 1960 as referred to above another Government order No. 281 of 1961 dated 22-1-65 was passed by which the lands which had been sought to be resumed by the previous orders were sought to be transferred in favour of the Roads and Buildings department for Government purposes. This order runs thus:—

"Sanction is according to the transfer of the Nazool land measuring 11 ks 2 ms and 3 sq. ft. comprising khasra Nos. 890 min and 937/min and 885/min. situate in Baghi-Magharmal Mauza Narasingarh Srinagar resumed vide Government order No. LA-74 of 1957 dated 28-9-57 read with Government order No. 380 of 1960 dated 3-10-60 in favour of Roads and Buildings department for Government purposes.

The Dy. Commr. Srinagar will proceed immediately to acquire possession of the lands mentioned above and buildings and structures, if any, erected

thereon and appurtenances belonging thereto, after paying compensation to the lessees for such building and appurtenances and also for such other improvements as may have been effected on the lands by the lessees and hand over the same to the R. & B. Department. The compensation shall be assessed by the Div. Engineer who shall notify in writing the assessment made to the parties".

This order clearly enjoins on the Dy. Commr. to acquire possession of the land resumed only after paying compensation to the lessee for the building and the improvements made by him. The order further directs that the compensation was to be assessed by the Div. Engineer who would notify his assessment to the parties. In pursuance of this order there has been a lot of correspondence between the Dy. Commr., the Chief Engineer and the Div. Engineer for assessment of compensation. We might here refer to one of the letters of the Tehsildar Nazool dated 18-9-1961 which is contained in the file produced by the Government. In this letter it is clearly mentioned that the Government had directed the Dy. Commr. to acquire the land only after paying compensation and therefore, the Tehsildar has requested the Dy. Commr. to see that the evaluation of the properties was made and compensation was paid before possession was taken.

11. There is another letter by the then Dy. Commr. to the Financial Commr. dated 22-8-61 which states that steps may be taken to make available funds to the tune of Rs. 110276 which appears to be the compensation assessed by the concerned authority. While the Government order dated 22-1-1961 (Supra) clearly states that the lands in question after being resumed were to be transferred to the P. W. D. yet there is a letter dated 10-9-1961 by the Administrator Municipality to the Chief Engineer requesting him to intimate if possession of the lands was taken over by the P. W. D. in order to be transferred to the Municipality. This letter appears at page 12 of the Government file and is rather important to show the allegations of collusion between the first and the second respondents as alleged by the petitioners. This letter would clearly show that the P. W. D. was to take possession of the lands for purpose of the Municipality, who was to use the same.

12. Then there are a number of letters in the said file from the Dy. Commr. to the Financial Commr. and other authorities making a grievance that the funds for payment of compensation to the parties had not been made available and possession had not been taken. Ultimately there is a letter dated 30-12-1961 appear-

ing on page 17 of the file from the Chief Engineer to the Revenue Secretary intimating to him that the compensation had been assessed at Rs. 1,02,127 and that funds may be made available. It is also mentioned in this letter that the Government Architect may be deputed to prepare plans of shop cum flats to be built on the lands. This explains why the land was required by the Municipality.

13. It appears that the original compensation of Rs. 1,02,127 was later on enhanced to Rs. 1,39,260 because certain structures had not been taken into consideration while making the previous assessment. At page 21 (ibid) is a letter by the Chief Engineer P. W. D. to the Dy. Commr. requesting him to make arrangements for payment of the compensation mentioned above.

14. It, however, appears that no action was taken on the basis of the said Government order in the matter of payment of compensation despite a long correspondence, with the result that a fresh Government order No ND-305 of 1963 dated 31st August 1963 had to be passed. This order runs as under—

"It is ordered that land measuring 9 ks. and 5 ms 173 sq. ft. comprising khasra Nos. 885/min. 890/min. and 887/min. situate at Bagh Maghar Mal Srinagar at present under the wasidari of Shri Purnesh Chander and other legal heirs of late Dewan Bishan Das which is required for public purpose namely, for development of the city and proper planning of buildings be resumed.

The Dy. Commr Srinagar will get the evaluation of the superstructures etc. if any standing on the land in question made by the Chief Engineer P. W. D. after having it notified to the parties as required under rules".

It may be pertinent to note that whereas under the previous Government orders the public purpose was construction of tonga and Lorry stands, under the later Government order the public purpose mentioned was the development of the city and proper planning of buildings. Under this order the Dy. Commr. was directed to get the evaluation of the buildings constructed by the lessees made and compensation to be paid to the parties in accordance with rules. Previous to this government order there is another letter at page 30 of the file from the Dy. Commr Srinagar to the Dy. Commr. Jammu enclosing some notices for service on the persons indicated in the notices. This letter runs thus:—

"Herewith I am sending you three notices for service on the person indicated in each notice. Government are very eager to take over the land whose lease has been resumed some time back. I

shall feel personally grateful if proper service of the notices is arranged."

Sd/Noor Mohd,

D C. Srinagar.

15. The notices which were issued pursuant to this letter were notices regarding the assessments made by the Divisional Engineer.

16. It appears that the lessees accepted the notices and filed an appeal as required under the rules to the Chief Engineer where they challenged the assessment as also the resumption of the land on the ground that no public purpose was involved. This appeal was filed under the rules framed under the Land Grants Act of 1960, i.e. under para 7 of the rules framed under the Act. The appeal was rejected on 6-12-1963. By virtue of letter No 25937 40 dated 6-12-63 Dewan Parnesh Chandra heir of D. Bishan Das was informed of the rejection.

17. We have already pointed out that the lease in the present case was not governed by the rules made under the Land Grants Act, yet it appears that both the parties were suffering from a mistaken impression of law that the new rules governed even the present leases. Thus any compensation fixed under the new rules would have no legal force and would not legally bind the vendor of the petitioner. Since however, the compensation assessed was not done in accordance with para 21 of the old rules, which rules alone would apply to the lessees in the instant case the legal position would be that such a compensation would be destitute of any legal effect.

18. It would again appear from a perusal of the said Government file that although the Chief Engineer rejected the appeal of the lessees regarding the compensation assessed by the Div. Engineer yet no action was taken by the concerned authorities to pay the amount of compensation to the lessees. A letter from the Dy. Commr. to the Chief Engineer R. and B. dated 10-3-64 reminds the Chief Engineer that the amount of compensation assessed may be arranged so that payment may be made and possession of the premises taken by the Dy. Commr. in order to be handed over to the P. W. Department.

19. While the correspondence between the Dy Commr. and the other department was still continuing for payment of compensation, composite notice under Sections 4 and 5 of the Jammu and Kashmir Public Premises (Eviction of Unauthorized Occupants) Act, 1959, (herein to be referred to as the old Act) were served on the tenants on 19-6-1963. According to the petitioners these notices were not served on the lessees but were merely served on the tenants who filed objections thereto before the estate offi-

cer. Thereafter the matter was completely dropped and no steps either to pay compensation to the lessees or to acquire the lands or to follow the proceedings under the old Act to their logical conclusion took place. No reasonable explanation has been given by the Addl. Advocate General for this silence for a long time on the part of the Government or its officers. The only reasonable inference that can be drawn from such a long and unexplained silence is that the Government on second thought did not want to pursue the matter.

20. After a silence of about five years we find the respondents rising from their deep slumber one fine morning on 5-1-1968 when an order of eviction under the old Act was actually passed. The order is annexure 'E' and runs as follows:—

"Whereas there are sufficient reasons to believe that a portion of Government land comprising Khasra No. 885 min situate in Estate Narsingarh Srinagar is under the unauthorized occupation of Shri H. Abdul Salam S/o Ismail Shah Shargari, and

Whereas under the provision of S. 6 of the Land Grants Act, 1960 the J. and K. Public Premises Eviction of Unauthorized Occupants Act, 1959, is applicable and a notice under Section 4 of the said Act was served on the unlawful occupants in the manner prescribed and

Whereas the unauthorized occupant has failed to produce any genuine cause or any proof of evidence in justification of the occupation of the aforesaid premises in response to the notice lawfully issued to him; and :

Now in exercise of the powers conferred upon me under S. 5 of the Public Premises Eviction of Unauthorized Occupants Act of 1959, I L. S. Tatud. IAS. Dy. Commr. Estates Officer being satisfied that the public premises indicated above are in unauthorized occupation hereby order eviction of the aforementioned unauthorized occupants from the said premises.

A copy of this order be affixed on the outer door or at some other conspicuous part of the public premises unauthorisedly occupied".

21. The order, according to the petitioners, was pasted on the electric pole outside the premises. According to the allegations made by the petitioners this notice was actually dated 8-1-1968 but it was ante dated to 5-1-1968 in order to show that some time was given to the petitioner to vacate the land. It is also common ground that on 5-1-1968 a devastating fire broke out in the Municipal buildings which are adjacent to these buildings, as a result of which a huge portion of the Municipal buildings was burnt down to ashes. The peti-

tioners allege that since the land has been resumed by the Government for purposes of building flats for the Municipality, the Municipality thought it a fit occasion to grab the lands, since its own buildings were gutted, and acting in collusion with the first respondent Estate Officer the Administrator of the Municipality got a notice issued to the petitioner under Ss. 4 and 5 of the old Act, while the Administrator Municipality himself issued a notice on 9-1-1968 under Section 129 of the Municipal Act directing the petitioners to remove the buildings as they were in a dangerous condition. Under the notices the petitioners were given only 24 hours time to demolish the buildings and as they failed to comply with the said notices the Administrator and the Dy. Commr. employed 500 people and got a major portion of the buildings demolished on 11-1-1968. The petitioners moved this Court in vacation and obtained a stay order as a result of which a portion of the buildings could not be demolished and the nefarious object of the first two respondents could not be achieved.

22. The petitioners further contend that after issuing orders under Ss. 4 and 5 of the old Act and after having demolished a major portion of the buildings of the petitioners, a formal order dated 16-2-1968 was passed by the Dy. Commissioner transferring the premises to the Municipality. On the basis of these facts a large number of contentions have been raised before us by the learned counsel for the petitioners.

23. In the first place Mr. Ashok Sen appearing for the petitioner submitted that even if the old Act was a valid piece of legislation, the petitioners were not unauthorized occupants as defined in Sec. 2 (a) of the Act. We have referred to the Jammu and Kashmir (Public Premises Eviction of Unauthorised Occupants) Act, 1959, as the old Act. For purposes of brevity, we shall refer to the Jammu and Kashmir Public Premises Eviction of (Unauthorized Occupants) Ordinance as the ordinance and the J. and K. Public Premises (Eviction of Unauthorized Occupants) amended Act as the amended Act.

24. Section 2 (a) of the old Act runs as follows:—

'Unauthorized occupation' in relation to any public premises means the occupation by any person of the public premises without authority for such occupation and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined by any reason whatsoever."

25. It was contended by the counsel for the petitioners that as the vendors of the petitioners had legal right to continue in possession until they were paid compensation for the land sought to be resumed by the Government, their possession could not be said to be unlawful so as to come within the mischief of unauthorized occupants as defined in the old Act. In our opinion the contention is well founded and must prevail. It would appear from Rule 21 quoted in an earlier part of this judgment as also from para 7 of the rules framed under the Land Grants Act of 1960 that possession from a lessee can be taken only after he is paid compensation and not before that. In these circumstances, therefore so long as the lessee is not paid the compensation, his possession continues to be perfectly lawful and he cannot be evicted under the Act.

26. The Addl. Advocate General drew our attention to the last portion of the words "has been determined for any reason whatsoever". This, in our opinion, would not help the respondents because the rule requires that resumption of land would be a completed act only when compensation is paid to the lessee and possession is taken over. In the instant case it cannot be said that the lease had been completely determined as contemplated by Section 2 (e) of the Act unless the lessees were paid actual compensation. It is somewhat curious to find in the instant case that the very authority which has later issued notices under Sections 4 and 5 of the old Act had on previous occasions stressed the fact that possession from the lessees could not be taken over unless compensation was paid. The said authority namely the Dy. Commr was also aware, as would appear from the correspondence detailed above, that the compensation of Rs. 1,39,260 though assessed and upheld by the Chief Engineer was not yet paid to the petitioners and not even the funds for payment of this amount were made available despite repeated requests. In spite of having knowledge of all these facts, the same authority chose to issue notices under Section 4 of the Act in the year 1963 and then followed it up by issuing orders under Section 5 directing eviction of the lessees knowing full well that compensation had not been paid. In this view of the matter the act of the Estate Officer (Dy Commissioner) in proceeding against the petitioners or their vendors under the provisions of the old Act cannot be held to be bona fide. At any rate in view of the legal position mentioned above namely that the petitioners' vendors not being unauthorized occupants, the Act had no application and therefore, any notice issued under Section 4 or any order passed under Section 5 of the Old Act was completely without jurisdiction.

27. It was next contended that since no action was taken for more than 4 years and a half after the issue of notice dated 19-6-1963, the notice must in law be deemed to have spent itself since no proceedings were taken within a reasonable time of the giving of the notice. In support of this argument reliance was placed on Craies on Statute Law wherein the learned author relying on (1884) 9 App Cas 480, 489 observes as follows:—

"Powers conferred by Act of Parliament must, as a general rule, be exercised within a reasonable time after notice has been given to the persons whose property will be affected by their exercise otherwise the notice will be liable to be treated as being no longer effective. Where powers are given to take lands compulsorily for the execution of works the exercise of powers must be bona fide commenced within the time limited for the completion of the works."

In the instant case it would appear that the Government right from the year 1957 was very anxious that the land should be resumed for various purposes and that compensation should be paid to the lessees. Somehow or the other no action was taken in the matter till January 1968 from which the only inference that one can draw would be that the Government never intended to treat the notices issued under its direction to be effective any longer. On this ground therefore the first notice issued under Ss 4 & 5 must be held to have spent its force and if proceedings were to be taken against the petitioners under the old Act, then a fresh notice under S 4 should have been issued before passing an eviction order under S. 5 of the Act. As this was not done, the order of eviction purported to have been passed on 5-1-68 is clearly void. Furthermore, even the order under S. 5 does not disclose any reason why eviction is being ordered nor does it show that the Estate officer had applied his mind to the objections raised by the tenants of the petitioners. The order of eviction merely quotes the language of S. 4 and does not show in what way and how the Estate Officer was satisfied that the petitioners were unlawful occupants so as to be ejected. The Addl. Advocate General repelled this argument on the ground that if the order under S 5 was erroneous then the petitioners should have filed an appeal before the District Judge under S 9 of the old Act instead of coming in writ before this court.

28. This argument, therefore brings us to a consideration of the next important question raised by Mr. Sen namely that

Section 5 of the old Act is itself ultra vires as being violative of Art. 14 of the Constitution of India. In this connection reliance was placed on the decision of the Supreme Court in AIR 1967 SC 1581 which has been discussed threadbare by us in civil reference No. 4 of 1967 (FB) (J and K) Yashpal v. Dy. Commr. Estate Officer. At the time when the Full Bench pronounced its judgment in that case, the old Act had already been amended by the Ordinance and this Court was called upon to decide the constitutional validity of the old Act as amended by the Ordinance. Reading the Full Bench judgment it seems to us that there can be no doubt that the Court upheld the old Act only because by virtue of the amendment the old Act had undergone revolutionary changes and all the constitutional infirmities from which the old Act suffered were removed by the Ordinance. In this connection the Full Bench in the case of Yashpal Civil Ref. No. 4 of 1967 (FB) (J. and K.) (Supra) observed as under:

"It would thus be seen that the ordinance has substantially amended the existing provisions of the principal Act, apart from introducing many new provisions. Reading the amended Act, we find that the entire ambit, scope and complexion of the principal Act has been changed. To begin with Section 5 which previously was couched in a directory form has now been recast in a mandatory form".

Referring to the decision of the Supreme Court, we observed in the Full Bench case (Supra) as follows:—

"Reading the decision for ourselves, it seems to us that the main ground on which Section 5 of the Punjab Act was struck down by the Supreme Court was that the provisions of Section 5 of that Act gave a discretion to the Collector to pass an order of eviction in one case and not to do so in another. In other words the use of the word 'may' in Section 5 implied that it was open to the Collector to pass an order of eviction in case of one unlawful occupant of Government premises and refuse to evict another at his sweet will. Moreover, the power to evict under Section 5 was purely discretionary, it was open to the Government to proceed against one unlawful occupant under the coercive and drastic machinery provided under the Punjab Act and to proceed against another unlawful occupant under the general law in a Civil Court. Thus, Section 5 permitted hostile discrimination between two persons similarly situate in that there being no ground for justifying such a discrimination and hence it was held that Section 5 was violative of Art. 14 of the Constitution of India.

It is true that Section 10 of the Punjab Act had ensured finality to the orders passed under the Act, but their Lordships

of the Supreme Court held that the said section did not oust the remedy of the Government to move the Civil Court for ejectment of (those in occupation of?) Government premises. There can be no doubt that in the principal Act before amendment, the language of Section 5 was identical with that of S. 5 of the Punjab Act and therefore, S. 5 of the principal Act was open to the same criticism as Section 3 of the Punjab Act. In the meanwhile however, the ordinance intervened and altered the language of Section 5. Section 5 after the amendment is couched in a mandatory form and the Estate Officer has now no choice in the matter but has a duty to evict the unlawful occupants on being satisfied that a case for eviction has been made out——"

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 "In these circumstances, therefore, it is reasonable to presume that the legislature was fully aware of the Supreme Court judgment by which S. 5 of the Punjab Act had been struck down. Whenever the legislature passes a law soon after a judicial pronouncement, the intention ordinarily is either to amend the said pronouncement or to remove any infirmity pointed out in judgments of the Courts. Thus the Supreme Court had held that Section 5 of the Punjab Act was ultra vires mainly because the section was couched in a directory form, the Government thought it fit to remove this infirmity by substituting the word "shall" and accordingly recast the section to remove all possible doubts and infirmities so that the legislature may be saved from the mischief of Art. 14 of the Constitution of India....."

X X X X X X
 "It was next contended that like the Punjab Act the amended Act does not oust the jurisdiction of the Civil Courts for the purpose of ejecting an unlawful occupant of public premises. The result is that even though Section 10 gives some sort of finality to orders passed under the amended Act, it does not deprive the Government from seeking an alternative remedy in the Civil Courts, as held by their Lordships of the Supreme Court in the above noted case while interpreting identical provisions of the Punjab Act. It was thus argued that as the amended Act merely provides an additional remedy, the position is that the Government has got two remedies to eject an unlawful occupant of Government premises, one through the amended Act which is more drastic and coercive and the other through the Civil Court which is liberal and lenient, and that the possibility of hostile discrimination by the Government with respect to one unlawful occupant and another cannot be ruled out".

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There is yet another ground which furnishes a complete answer to the contention raised by the appellant. Section 9 of the amended Act read with Section 9-A leaves no room for doubt that the amended Act clearly intended that the only remedy for eviction of an unlawful occupant of public premises should be under the summary procedure prescribed by the amended Act and through no other means. The amended Act now contains a completely self-contained machinery for evicting unlawful occupants of public premises and the provisions of this Act are exhaustive on the subject. Furthermore, by providing for a reference to the Civil Court under Section 5-A where a *prima facie* question of title regarding the premises is involved, and making the order of the Civil Court subject to appeal as being final, the jurisdiction of the Civil Court is completely ousted."

Thus, summarizing the Full Bench judgment of this Court the position that emerges is as follows—

(1) That Section 5 of the old Act suffered from the same infirmities and was subject to the same criticism as Sec. 5 of the Punjab Act which was also couched in the same language as Section 5 of the old Act.

(2) These infirmities were two-fold. In the first place Section 5 being couched in a directory form, it invested a discretion in the Estate Officer to evict one unlawful occupant and refuse to evict another at his own sweet will. Secondly the jurisdiction of the Civil Court not being ousted the Government reserved two remedies for itself: one through the drastic machinery provided under the Act and the other the remedy of the Civil Court. The Government could in its own discretion choose to proceed against one person under the Act and against another in the Civil Court. Such a power was clearly discriminatory and violative of Art. 14 of the Constitution of India as held by the Supreme Court (*Supra*).

29. There can be no doubt that S. 5 of the old Act also suffered from these infirmities and was, therefore, clearly *ultra vires*, but since these infirmities were removed by the Ordinance and later by the amended Act, the old Act as amended was not struck down by this Court. The observations of the Full Bench quoted above unmistakably point to the conclusion that this Court would have held Section 5 of the old Act as *ultra vires*, as being violative of Art. 14 of the Constitution of India had it not been for the ordinance which came to its rescue. It was, therefore, rightly contended by Mr Sen that since the old Act was *ultra vires* any proceedings taken under the said Act were completely without jurisdiction and must be quashed.

30. In order to repel this argument, the Addl. Advocate General made an interesting submission. He submitted that by virtue of S 15 (a) of the Ordinance and later of the amended Act all the proceedings taken under the old Act had been retrospectively validated, and therefore, even if the Act was *ultra vires* at the time when it was passed or at the time when the order under S. 5 was passed, it will be deemed to be valid when the matter is being considered by us. In other words the Addl. Advocate General took shelter under what is known as the Doctrine of Eclipse. He drew our attention to Seervai's Constitutional Law wherein the learned author at page 167 para 817 observes as follows—

"A law which is unconstitutional for lack of legislative competence is void ab initio, a law which is unconstitutional for violation of constitutional limitations is unenforceable as long as it continues to violate constitutional limitations. Such a law whether pre-Constitution or post-Constitution, is not wholly void if it violates fundamental rights, it is merely eclipsed by the fundamental rights and remains as it were in a moribund condition as long as the shadow of fundamental rights falls upon it. When that shadow is removed the law begins to operate *proprio vigore* from the date of such removal unless it is retrospective."

The observations of the learned author are based on Sundararamier's case, AIR, 1958 SC 468. In our opinion, however, the decision of Supreme Court in the above noted case is clearly distinguishable and does not apply to the facts of the present case. Mr. Seervai has tried to draw a distinction between a law which is unconstitutional for lack of legislative competence and one which is unconstitutional because it violates some constitutional limitations or restrictions. The learned author has included the chapter of fundamental rights also as being in the nature of Constitutional limitations. With great respect to the learned author, we do not agree with him on this part of the classification. In AIR 1958 SC 468 (*Supra*) their Lordships were not at all dealing with fundamental rights but with the right of inter-State sale and were construing the provisions of Art. 286 of the Constitution of India. Article 286, CL (2) clearly imposed restrictions on the State to impose any tax on sale or purchase of goods either outside the State or in the course of import of the goods into or export out of the territory of India. The power to impose such restrictions was given to Parliament under CL (2) of Article 286. Thus it would appear that under the Constitutional provisions there was a clear bar to the State legislature in imposing certain restrictions. The Supreme

Public Service Commission as Chairman and an official nominee of the Education Department of the State; and by the Director of Public Instruction, Kerala.

5. The petitioner says that the two training schools were established by the Diocese primarily for the training of teachers to be appointed in the various schools run by the Diocese, and that the restrictions imposed by the rules in the matter of admission of students of their choice violate the fundamental right guaranteed to the minority under Art. 30 of the Constitution.

6. In *Sidhrajibhai v. State of Gujarat*, AIR 1963 SC 540 the Supreme Court said:

"The right established by Article 30 (1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Article 19 it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justiciable because it is in the public or national interest, though not in its interest as an educational institution the right guaranteed by Article 30 (1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test — the test of reasonableness and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

7. In O. P. No. 927 of 1966, a learned Single Judge has held that these rules would contravene Article 30 and granted relief to the petitioner there, on that basis. But the learned Judge did not strike down the rules as he was of opinion that the rules can be enforced against 'minority schools' in certain circumstances.

8. I am in complete agreement with my learned brother in thinking that the rules are bad for the reason that they impose unreasonable restrictions upon the fundamental right guaranteed by Art. 30

of the Constitution. But, when the rules are couched in language wide enough to recover restrictions upon a fundamental right both permissible and impermissible, the rule must be adjudged void to the extent they contravene the fundamental right.

9. In *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 at p. 129, the Supreme Court said:

"Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action effecting such right it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an enactment, which is capable of being applied to cases, where no such danger could arise, cannot be held to be constitutional and valid to any extent."

10. Article 13 (2) of the Constitution reads:

"The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

11. The question as to what exactly is the meaning of the word 'void' in Article 13 (2) so far as post-Constitution laws or rules repugnant to the provisions in Part III of the Constitution are concerned and whether there is a distinction between a law which conflicts with the limitations on the power of Legislature and a law which conflicts with the fundamental rights has been the subject-matter of decision in several Supreme Court cases. In *Behram Khurshid v. State of Bombay*, AIR 1955 SC 123, Venkatarama Aiyar, J., drew a distinction between invalidity of a law arising out of lack of legislative competence and that arising by reason of a check imposed upon the Legislature by the provisions contained in the Chapter on Fundamental Rights. He was of the view that the word 'void' in Article 13 (1) should be construed as meaning, in the language of American Jurists, 'relatively void'. On the second hearing of the case, Mahajan, C. J., rejected the distinction between a law void for lack of legislative power and a law void for violating constitutional fetter on the legislative power and said all such laws should be taken as obli-

terated from the statute book for all intents and purposes.

12. In *Saghir Ahmad v. State of U. P.*, AIR 1954 SC 728, Mukherjea, J., said that a statute void for unconstitutionality is dead and cannot be vitalized by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted. He further said that the Act there under consideration violated Article 31 (2) of the Constitution, and thus was invalid, and that the doctrine of eclipse cannot be applied to post-Constitution laws.

13. In *Bhikaji Narain v. State of M. P.*, AIR 1955 SC 781, Das, C. J., after referring to the case of *Keshavan Madhava Menon v. State of Bombay*, AIR 1951 SC 128, said that there is a distinction between a pre-Constitution law and a post-Constitution law, that a post-Constitution law will be void by the express provisions of Article 13 (2) of the Constitution to the extent of such inconsistency.

14. The question was again considered by Venkatarama Aiyar, J., in *M. P. V. Sundaramier & Co v. State of Andhra Pradesh*, AIR 1958 SC 468 and he said,

"Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigore when the Constitutional bar is removed, and there is no need for a fresh legislation."

15. In *Deepchand v. State of U. P.*, AIR 1959 SC 648, Subba Rao, J., (as he then was) who delivered the majority judgment adverted to the distinction between these two categories of laws and said that there is really no distinction between the two, and that although both will be void, a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III, whereas no post-Constitution law can be made contravening the provisions of Part III, and therefore, the law to that extent, though made, is a nullity from its inception.

16. In *Mahendra Lal v. State of U. P.*, AIR 1963 SC 1019 Wanchoo J (as he then was) said on behalf of the Court that the doctrine of eclipse must be confined to pre-Constitution laws, and that a post-Constitution law void for violating the provisions in the Chapter on Fundamental Rights was void from its inception, and is not revived by an amendment of the Constitution removing the ground which brought about the voidness.

17. I think, in the light of these later decisions of the Supreme Court it must

be held that these rules are void to the extent of their contravention of the fundamental right under Art. 30. There is, therefore, no question of their being enforced as against educational institutions established and administered by a minority based on religion or language under any circumstance. When I say that those rules are void, to the extent they contravene Art. 30, I must not be understood as saying that they have no effect at all. For, long ago, Chief Justice Hughes of U. S. Supreme Court said in *Chicot County Drainage Dist. v. Baxter State Bank*, (1939) 308 US 371 (374) = 84 L Ed 329 (332-333):

"The Courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law, that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree..... It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality, must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of Courts, State and Federal, and it is manifest from numerous decisions that an all inclusive statement of a principle of absolute retroactive invalidity cannot be justified".

This is the real basis of the doctrine of prospective overruling (see the decision in *Linkletter v. Walker*, (1965) 381 US 618 = 14 L Ed 2d 601 as also the ruling in *Golak Nath v. State of Punjab*, AIR 1967 SC 1643. The anomaly inherent in the compromise between the Blackstonian theory of Courts as only discoverers of the law and theory of J. C. Groy and other of Courts as its makers could have been avoided, if we had adopted the more realistic approach, namely, that declaration of nullity is constitutive act, with retrospective effect in appropriate cases, and not a declaratory function.

"The decision made by the competent authority that something that presents itself as a norm is null ab initio because it

fulfils the conditions of nullity determined by the legal order, is a constitutive act, it has a definite legal effect; without and prior to this act the phenomenon in question cannot be considered to be 'null'. Hence the decision is not "declaratory", that is to say, it is not, as it presents itself, a declaration of nullity; it is a true annulment, an annulment with retroactive force. There must be something legally existing to which this decision refers. Hence, the phenomenon in question cannot be something null *ab initio*, that is to say, legally nothing. It has to be considered as a norm annulled with retroactive force by the decision declaring it null *ab initio*. Just as everything King Midas touched turned into gold, everything to which the law refers becomes law, i.e., something legally existing. The case of absolute nullity lies beyond the law". (See 'General Theory of Law and State' by Hans Kelsen page 161).

18. I do not think that it is part of the function of a Court to strike down and expunge a law from the statute book, especially in a case like this, where the rules will apply to other educational institutions not run by the minorities visualised in Art. 30.

19. The respondent contended that the fundamental right has been waived by its non-assertion by the minority in that they submitted to the enforcement of the rules in the past without protest. In support of this contention, counsel for the respondent has referred me to the ruling of the Supreme Court in *Basheswar Nath v. I. T. Commissioner, Delhi and Rajasthan*, AIR 1959 SC 149. Diverse views have been expressed by the learned Judges who participated in the decision of that case. The majority view is that the right conferred by Art. 14 of the Constitution cannot be waived by a person as the Article is said to be an admonition to the State and enacted as a matter of public policy although the ultimate beneficiaries are persons. The view of S. K. Das, J. and Subba Rao J. is that no fundamental right can be waived. Mr. H. M. Seervai in his 'Constitutional Law of India' has elaborately dealt with the question (see page 173) and he summarises his view as follows:

"It is submitted that the correct line of enquiry as regards the waiver of fundamental rights is to ask: (1) is any person under an obligation to assert his fundamental rights against their violation by the State? (2) if not, is any authority appointed by the Constitution to vindicate those rights on his behalf against his will? (3) if not, should he not be free to make the best arrangement for himself in face of such violation? It is obvious that there is no obligation laid on a per-

son to assert his fundamental rights against their violation by the State, and equally obvious that no authority has been appointed to vindicate those rights on his behalf. If so, it is submitted, adapting the language of the U. S. Supreme Court, that public policy is not so inconsistent as to leave it open to a person not to assert his fundamental rights at all and yet prevent him from securing such mitigation of the violation as he considers satisfactory. Again, if the law can interpose public policy between a person and the waiver by him of his fundamental rights, it must have effective power to do so if he decides not to assert them at all. But we know that there is not such interposition in the last-mentioned case; therefore, there should be no such interposition in the case of waiver". (See page 183 of 'Constitutional Law of India' by H. M. Seervai).

I am not sure whether any generalisation upon a matter like this would be wise. Take for instance, the fundamental right guaranteed under Art. 23 of the Constitution of India. It is a paradox that a freeman is not allowed to be a slave. *Ex hypothesi* freedom implies the freedom to barter it away. Although that is logical, no free society proceeds on that basis. A contract by a freeman to become a slave is against public policy and will not be enforced. And what is waiver, except an agreement to abandon a right to be implied from conduct and attendant circumstances? If an agreement cannot be valid, as it will be against public policy, how can there be a waiver? Can involuntary servitude resulting from an agreement be defended by the master for the reason that the slave has waived his right to be a free man by an agreement, which though invalid in law, is operative as waiver? I do not pause to consider whether waiver requires consideration in all cases as it is not relevant to the present argument. Chief Justice Hughes said for the Court in *A. Bailey v. State of Alabama*, (1910) 219 US 219 = 55 Law Ed 191 at p. 202 that involuntary servitude can stem from a contract.

"Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however, created, is compulsory service, involuntary servitude". (See also the decision in *Kadar v. Muthukoya*, AIR 1962 Kerala 138).

The fundamental right under Art. 30 is that of a plurality of persons as a unit, or if I may say so, of a community of

persons necessarily fluctuating and waiver means the voluntary relinquishment of a known right. It may be difficult to infer a waiver from the conduct of the members of a fluctuating body. Can the present members of a minority community barter away the right under Art. 30 so as to bind the future members of it as a unit? In other words, can the conduct of the present generation affect the fundamental right of the minority community in the future? The fundamental right is of the living generation. The dead cannot waive the right of the living generation unless there be a succession. I doubt whether the future members of a minority community as a unit, derive the fundamental right under Art. 30 from its dead members by succession or by inheritance. However, I need not venture a final opinion on this point. Suffice it for the purpose of this case to say that there is no allegation or proof that the petitioner or the minority community which he represents was aware that these rules are violative of its fundamental right under Art. 30. In order that a plea of waiver may succeed, it must be proved that the person or persons was or were aware of the right waived and then deliberately abandoned it. It is not sufficient to show that he or they failed to exercise the right. The Supreme Court in *Re Kerala Education Bill, 1957*, 1958 Ker LT 465 at p 501 = (AIR 1958 SC 956 at p 985) said that "there can be no question of the loss of a fundamental right merely by the non-exercise of it". The petitioner has said in the affidavit that the minority was not aware of the right to resist the enforcement of these rules and that has not been controverted in the counter. I cannot infer a waiver of the fundamental right from the facts and circumstances of the case.

20. I hold that Rules 6, 7 and 8 of Chapter XXV of the Kerala Education Rules are void to the extent they contravene the fundamental right of the minority to establish and administer educational institutions of their choice and restrain the respondent from enforcing these rules as against the schools in question.

21. The writ petition is allowed, but in the circumstances without any order as to costs.

DVT/D.V.C.

Petition allowed.

AIR 1969 KERALA 196 (V 56 C 46)

K. K. MATHEW J

(on difference of opinion between

T. C. RAGHAVAN AND M. U. ISAAC, JJ.)

Commissioner of Income-tax, Kerala, Ernakulam, Applicant v. Travancore Sugars and Chemicals Ltd. Puhkeezh, Tiruvalla, Respondent.

(On remand in C. A. No. 324 of 1965, D/-20-9-1966, of Supreme Court reported in AIR 1967 SC 477), Income-tax Referred Case No. 16 of 1962, D/-5-4-1968

Income-tax Act (1922), S. 10 (2) (xv) — Allowable deduction — Formation of assessee company by taking over State concerns — By agreement, State to be given 10 P. C. of net profits every year — Net profits to mean amounts for which assessee's audited profits in any year are assessed to income-tax — Amount paid to State held allowable deduction.

The assessee was a limited company incorporated under the Travancore Companies Regulation and was carrying on the business of manufacturing sugar. It also ran a distillery and a tincture factory. The assessee-company was floated with a view to take over the business assets of a company called Travancore Sugar Mills Ltd., which was being wound up and in which the State Government held the largest number of shares, the Government Distillery at Nagercoil and the business assets of the Government Tincture Factory at Trivandrum. An agreement was entered into between the Government of Travancore and the promoters of the assessee-company under which the assets of all the three concerns were agreed to be sold by the Government of Travancore to the assessee-company. Apart from the cash consideration for the transfer of the assets, Cl. 7 of the agreement provided that "The Government shall be entitled to ten per centum of the net profits of the company in every year. For the purpose of this clause net profits means the amount for which the company's audited profits in any year are assessed to income-tax in the State of Travancore". For the assessment year 1958-59 the amount payable to Government under the aforesaid clause came to Rs. 42,480. It was ultimately held by the Supreme Court on special leave against the answer by the High Court upon reference that the amount was not capital expenditure but revenue payment and sent back the case to the High Court for decision of certain questions, namely, whether the payment of the commission was tantamount to diversion of profits by a paramount title, whether the transaction should be treat-

ed as a joint venture with an agreement to share profits between the assessee and the Government, and whether the requirements of S. 10 (2) (xv) had been satisfied in this case. When the case came before the Division Bench the second question was not pressed by the Revenue. Raghavan J. answered the other two questions in the affirmative and in favour of the assessee, whereas Isaac J. answered them in the negative and in favour of the Revenue. Upon reference to the third Judge (Mathew J.) under Section 66-A (1):

Held (agreeing with Raghavan J.) that in computing the real profits of the assessee here, the payment made to the Government had to be deducted. The fact that in Cl. 7, it was said that out of the net profits of the company, the Government would be entitled to 10% would not make it a payment out of the real profits of the company. There was distinction between apparent profit and real profit. What was taxed under the Income-tax Act was only the profits of the company calculated on commercial principles. When a trader makes a payment which is computed in relation to profits, the question that arises is: Does the payment represent a mere division of profits with another party, or is it an item of expenditure the amount of which is ascertained by reference to profits. The payment would be allowable in the second case, but not in the first. (Para 14)

Section 10 (2) (xv) requires that the expenditure should be wholly and exclusively laid out for the purpose of the business, but not that it should be necessarily laid out for such purpose. Therefore, expenses wholly and exclusively laid out for the purpose of trade should, subject to the fulfilment of the other conditions, be allowed under this clause even though the outlay is unnecessary or unnecessarily large, unless the case falls under Section 10 (4A). The further test of necessity is, by contrast, imposed under Section 4 (3) (vi) and Section 7 (2) (iii). In the absence of fraud, the questions whether a transaction had the effect of diminishing the assessee's taxable income, whether it was a prudent or wise transaction, and whether it was necessary for the assessee to enter into that transaction, are irrelevant in determining whether expenditure relating to that transaction should be allowed under Section 12 (2); and the same consideration would apply under this clause. The payment in question was an expenditure laid out wholly and exclusively for the purpose of the business and ascertained with reference to profits and the amount was an allowable deduction. Case law discussed.

(Paras 18, 19)

| Cases Referred: | Chronological | Paras |
|--|---------------|---------|
| (1967) AIR 1967 SC 383 (V 54) = | | |
| 1966-62 ITR 323, Murlidhar Himatsingka v. Commr. of Income-tax, Calcutta | | 7, 9 |
| (1966) AIR 1966 SC 30 (V 53) = | | |
| 1965-57 ITR 521, Poona Electric Supply Co., Ltd. Bombay v. Commr. of Income-tax, Bombay | | 11, 13 |
| (1961) AIR 1961 SC 728 (V 48) = | | |
| 1961-41 ITR 367, Commr. of Income-tax, Bombay v. Sitaldas Tirathdas | | 7, 9 |
| (1956) AIR 1956 Bom 550 (V 43) = | | |
| 1956-30 ITR 654, Commr. of Income-tax v. Jagannath Kisonlal | | 17 |
| (1951) AIR 1951 SC 278 (V 38) = | | |
| (1951) 20 ITR 1, Eastern Investments Ltd. v. Commr. of Income-tax, West Bengal | | 19 |
| (1947) AIR 1947 Bom 302 (V 34) = | | |
| (1946) 14 ITR 822, Vithaldas Thakordas and Co. v. Commr. of Income-tax, Bombay | | 10 |
| (1941) AIR 1941 Rang 145 (V 28) = | | |
| 1941-9 ITR 155, Commr. of Income-tax, Burma v. Bombay Burma Trading Corporation Ltd. | | 16 |
| (1939) 1939-7 ITR 101 = 1938-2 KB 220, British Sugar Manufacturers Ltd. v. Harris (Inspector of Taxes) | | 2, 10 |
| (1937) AIR 1937 PC 139 (V 24) = | | |
| 1937-5 ITR 202, Tata Hydro Electric Agencies Ltd. v. Commr. of Income-tax, Bombay | | 17 |
| (1937) AIR 1937 PC 189 (V 24) = | | |
| (1937) 5 ITR 270, Indian Radio & Cable Communications Co. Ltd. v. Commr. of Income-tax, Bombay | | 13 |
| (1933) AIR 1933 PC 127 (V 20) = | | |
| 1933-1 ITR 135, Bejoy Singh Dudhuria v. Commr. of Income-tax, Bengal | | 7, 8, 9 |
| (1931) AIR 1931 PC 165 (V 18) = | | |
| ILR 54 Mad 691, Pondicherry Railway Co. Ltd. v. Commr. of Income-tax, Madras | | 10, 17 |
| (1931) 16 Tax Cas 293 = 146 LT 172, Union Cold Storage Co., Ltd. v. Adamson | | 10 |
| (1925) 10 Tax Cas 155, Atherton v. British Insulated and Halsby Cables Ltd. | | 16 |

O. T. Peter, for Applicant; C. M. Devan and S. Padmanabhan, for Respondent.

K. K. MATHEW, J.:— The assessee here is a limited company incorporated under the Travancore Companies Regulation and is carrying on the business of manufacturing sugar. It also runs a distillery and a tincture factory. The assessee-company was floated with a view to take over the business assets of a company called Travancore Sugars Ltd., which was being wound up and in which the State Government held the largest number of shares, the Government Dis-

tillery at Nagercoil and the business assets of the Government Tincture Factory at Trivandrum. An agreement was entered into between the Government of Travancore and Sir William Wright on behalf of Parry & Co Ltd., the promoters of the assessee-company. Under the agreement, the assets of all the three concerns were agreed to be sold by the Government of Travancore to the assessee-company. It is not necessary to set out all the clauses in the agreement. Apart from the cash consideration for the transfer of the assets, Cl. 7 of the agreement provided that:

"the Government shall be entitled to twenty per cent. of the net profits earned by the company in every year subject however, to a maximum of Rupees forty-thousand per annum, such net profits for the purposes of this clause to be ascertained by deduction of expenditure from gross income and also after—

(i) provision has been made for depreciation at not less than the rates of allowances provided for in the income-tax law for the time being in force, and

(ii) payment of the Secretaries and Treasurers' remuneration".

On the 28th January, 1947, Cl. 7 was substituted by another clause, which reads, "The Government shall be entitled to ten per centum of the net profits of the company in every year. For the purpose of this clause net profits mean the amount for which the company's audited profits in any year are assessed to income-tax in the State of Travancore."

2. For the assessment year 1958-59, the corresponding previous year being 1st May, 1956 to 30th April 1957, the amount payable to Government under the aforesaid clause came to Rs 42,480. The Appellate Assistant Commissioner disallowed the claim of the assessee for deduction of this amount on the ground that the clause virtually provided for sharing the profits after they came into existence. On appeal by the assessee, the Income-tax Appellate Tribunal held that the case will come within the principle of the decision in *British Sugar Manufacturers, Ltd v Harris (Inspector of Taxes)*, 1939-7 ITR 101 and that the payment was an expenditure made to earn the profits of the business and not an expenditure paid out of the earned profits, and allowed the appeal. At the instance of the Department, the Tribunal referred the following question to the High Court:

"Whether on the facts and in the circumstances of the case, the payment of Rs 42,480 by the assessee to the Travancore Government under the agreements dated 18-6-1937 and 28-1-1947 was allowable under Section 10 of the Income-tax Act?"

3. This Court held that the payment of the aforesaid amount constituted capital

expenditure and was not an allowable deduction under Section 10 (2) (xv) of the Income-tax Act. Against this judgment, an appeal was preferred by special leave to the Supreme Court. The Supreme Court held that the amount is not capital expenditure but revenue payment and sent back the case to this Court for decision of certain questions namely, whether 'the payment of the commission is tantamount to diversion of profits by a paramount title', whether 'the transaction should be treated as a joint venture with an agreement to share profits' between the assessee and the Government, and whether 'the requirements of Section 10 (2) (xv) have been satisfied in this case'.

4. When the case came before the Division Bench the question whether the transaction should be treated as a joint venture with an agreement to share the profits between the assessee and the Government was not pressed by the Revenue. Raghavan J. answered the other two questions in the affirmative and in favour of the assessee, whereas Isaac J. answered them in the negative and in favour of the Revenue.

5. So, the two questions which require consideration are: (1) whether payment of the amount is a diversion of profits before they reached the assessee by an overriding title and (2) whether the amount is an allowable deduction under Section 10 (2) (xv) of the Income-tax Act.

6. The Supreme Court has held that the payment of the amount was not towards purchase price because the unpaid purchase price was neither a fixed sum nor an amount which could be ascertained by any method and so it is not in the nature of capital expenditure.

7. Whether the payment concerned is a diversion of the profits by a paramount title has to be decided keeping in view the principle laid down by the Privy Council in *Bejoy Singh Dudhuria v. Commissioner of Income-tax, Bengal*, 1933-1 ITR 135 = (AIR 1933 PC 127) and by the Supreme Court in *Commissioner of Income-tax Bombay v. Sitaldas Tirathdas*, 1961-41 ITR 367 = (AIR 1961 SC 728) and *Murlidhar Himatsingka v. Commissioner of Income-tax, Calcutta* 1966 62 ITR 323 = (AIR 1967 SC 383).

8. In 1933-1 ITR 135 = (AIR 1933 PC 127) the assessee succeeded to the family ancestral estate on the death of his father. Subsequently his step-mother brought a suit for maintenance against him in which a consent decree was made directing the assessee to make a monthly payment of a fixed sum to his step-mother and declaring that the maintenance was a charge on the ancestral estate in the hands of the assessee. In computing his income, the assessee claim-

ed that the amounts paid by him to the step-mother under the decree should be excluded. It was held by the Judicial Committee that the sums paid by the assessee to his step-mother were not 'income' of the assessee at all and that the decree of the Court by charging the appellant's whole resources with a specific payment to his step-mother had to that extent diverted his income from him and had directed it to his step-mother, and to that extent what he received for her was not his income. At the moment when the estate passed on to him there was a liability on the estate which was not quantified and when it was so done by the decree of the Court the entirety of the estate became, so to speak, charged with it and that portion of the income payable to the step-mother had to be treated as the income of the step-mother and not of the assessee.

9. In 1961-41 ITR 367 = (AIR 1961 SC 728), the assessee had to pay under a consent decree a certain amount every year to his wife and children by way of separate maintenance. He claimed a deduction of the amount from the income and relied on the decision of the Privy Council in 1933-1 ILR 135 = (AIR 1933 PC 127), *Hidayatullah J.*, as he then was, said:—

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow".

The maintenance paid by *Sitaldas Tirathdas* to his wife and children under the consent decree was an obligation he had to discharge from out of his income while the maintenance paid by *Raja Bejoy Singh* to his step-mother was a diversion before it became income in his hands. The difficulty in drawing the line between the two types of cases is illustrated by the decision of the Supreme Court in 1966-62 ITR 323 = (AIR 1967 SC 383). In that case *M. H.* was a partner in firm A and he entered into a sub-partnership with his sons and grandson in firm B, under which his share of the profit and loss in firm A was to belong to firm B. The question arose whether the share of profit of *M. H.* in Firm A had to be assessed in his individual name

or to be included in the assessment of firm B. The Supreme Court held that by an overriding obligation, namely, the formation of the sub-partnership agreement, the profit became the income of firm B, though it passed through the hands of *M. H.*

10. Let us look at the nature of the obligation in this case. The obligation to pay the amount arose out of an agreement, which is part and parcel of the agreement under which the assessee became entitled to the assets of the three concerns. Although the payment of the amount is not part of the consideration for the purchase of the three concerns, it is a payment which the assessee has agreed to make. It might be remembered that in addition to selling the assets of the three concerns, the Government undertook the obligations enumerated in Cls. 4 (b) and (c) and CL 5 (c) of the agreement (See Annexure A). And the Government could have enforced by action the payment in case the assessee refused to pay. It is said that by the clause in question, there is no diversion of the profits of the assessee but only an application of a part of the profits, that the profits are earned by the assessee and then a percentage of it paid over by the assessee to the Government. Reliance was placed on the observations of Lord Macmillan in *Pondicherry Railway Co. Ltd. v. Commissioner of Income-tax, Madras*, AIR 1931 PC 165, to support the contention. In that case, the assessee-company, incorporated in the United Kingdom, obtained a concession for constructing a railway in the territories of Pondicherry. The assessee-company was to pay to the French Government half of its net profits. The French Government on its part gave land on which the Railway was to be built free of charge and also agreed to pay a subsidy. The question for decision was whether the monies paid by the assessee-company to the French Government were allowable deductions under the provision corresponding to Section 10 (2) (xv). Lord Macmillan observed at page 170:—

"A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits."

But these observations have been explained in later cases. In *Union Cold Storage Co. Ltd. v. Adamson*, (1931) 16 Tax Cas 293 the assessee leased lands and premises abroad reserving a rent of £9,60,000. It was provided in that deed

that if at the end of the financial year it was found that after providing for the rent the result of the company's operations was insufficient to pay interest or charges and debentures etc. the rent for the year was to be abated to the extent of the deficiency. In computing its profits the assessee-company claimed deduction of the rent paid in the two respective years. They were held not payable out of the profits or gains and were allowable deductions. Rowlatt J said that the sum which was to be paid by the company was a recompense in respect of possession and use of the premises abroad and the company had entered into some liabilities by way of payment for their premises and that payment was an outgoing of the business which has to be provided for and allowed before profits of the business could be ascertained. In the House of Lords, Lord Macmillan distinguished the Pondicherry Railway Co case, AIR 1931 PC 165 by saying that in that case the ascertainment of profits preceded the coming into operation of the obligation to pay and when profits had been ascertained the obligation was to make over half thereof to the French Government. Dealing with the passage above referred to, Lord Macmillan said at pages 331-332.

".....I was dealing with a case in which the obligation was, first of all to ascertain the profits in a prescribed manner, after providing for all outlays incurred in earning them, and then to divide them. Here the question is whether or not a deduction for rent has to be made in ascertaining the profits, and the question is not one of the distribution of profits at all."

11. The same question was considered in *Vithaldas Thakordas & Co v. Commissioner of Income-tax, Bombay*, 1946-14 ITR 822 = (AIR 1947 Bom 302). There, the facts were: After the death of V, who had during his lifetime carried on in his own name a bullion business, the assessee, a firm of partners, entered into an arrangement with the widow of V for the use of V's name for their bullion business. Under the arrangement, in consideration of the widow having agreed to allow the partners to use the name of V, for the purpose of the partnership business the partners agreed to pay her out of the net profits of the business in the first instance an amount equivalent to two annas in the rupee of the net profits. The partners also agreed that neither she nor the estate of V would be liable for the debts or losses of the partnership and that she would not be deemed a partner in the business. The partnership deed provided that after payment of the aforesaid amount to the widow, the balance of the net profits was

to be divided between the partners in certain proportions. No term was fixed for the duration of the use of the goodwill. In the accounting year the assessee made a net profit of Rs. 40,470 and the widow was paid Rs. 5,059, being her share of the profits.

In considering the question whether the amount was an allowable deduction, the Court said:

"Therefore, in every case the Court has got to consider what are the real profits of the assessee and what are the apparent profits. It is only the real profits that attract the tax; and even though the language used in the material documents may be "net profits", the Court must look to the substance of the transaction and not the form. In this case the two documents I have referred to provide that Bai Tarabai has got to be paid two annas in the rupee of the "net profits". But the two annas in the rupee have to be paid for the use of the goodwill which is essential for the carrying on of the business. Therefore first the apparent profits of the partnership are ascertained and two annas in the rupee are paid out to Bai Tarabai out of those profits, and after those payments are made, the real profits are ascertained which attract the tax; and it is these real profits that are distributed among the partners in the proportion laid down in the partnership agreement, making up what is described as a unit of 14 annas."

The observations of Lord Macmillan in *Pondicherry Railway Co case*, AIR 1931 PC 165 were considered in 1939-7 ITR 101. In that case a company carrying on a manufacturing business agreed with two other companies to pay them a stated percentage of its net profits. "Net profits" were to be ascertained after payment of all expenses of the company and after providing for interest on debentures but before making any provisions for depreciation. The Court of Appeal held that in computing its profits for the purposes of income-tax, the company was entitled to deduct the sums so paid as being "money wholly and exclusively laid out or expended for the purposes of the trade". Lord Greene, the Master of Rolls, pointed out that "net profits" were to be arrived at upon a conventional basis, not the basis upon which the company would ascertain its profits for commercial purposes or the basis upon which it would ascertain its profits for income-tax purposes and the percentage was to be paid out of these conventional profits and not out of the profits which were liable to tax.

Dealing with the *Pondicherry Railway Co case*, AIR 1931 PC 165 the learned Master of the Rolls said:

"It is to be observed that Lord Macmillan in that paragraph was quite clearly using the word, 'profit' in one sense and one sense only; he was using it in the sense of the 'real net profit' to which Lord Maugham referred. That he was doing that is, I think, abundantly clear when the nature of the contract that is in question is considered, which was merely a contract under which a percentage of profits was payable by the railway company to the French Government. There was no question of services or anything of that kind in the case; it was merely a sum payable out of profits. I do not find myself constrained by that expression of opinion, because it must be read, as Lord Macmillan said in a subsequent case, *Union Cold Storage Co., Ltd. v. Adamson*, (1931) 16 Tax Cases 293 at 331-332 in relating to the particular subject-matter with which he was dealing."

The Court finally held that the sum is an allowable deduction holding that it is not an appropriation of the profits of the partnership after they had been ascertained, that the agreement was not in the nature of a joint venture or a quasi partnership, and that the payment was a revenue expenditure wholly and exclusively incurred for the purpose of the business and was an admissible deduction under Section 10 (2) (xii) of the Income-tax Act.

12. In *Poona Electric Supply Co. Ltd. v. Commissioner of Income-tax, Bombay*, 1965-57 ITR 521=(AIR 1966 SC 30) the Company carried on the business of distribution of electricity under a licence issued by the Government. Under the Electricity (Supply) Act, 1948, the company's "clear profits" in any year should not exceed "reasonable return" as defined under the Act; and the excess, if any, the Company had to distribute among its consumers in the form of rebate. The Company claimed deduction of the amounts said to have been credited to the "Consumers' Benefit Reserve Account", and the question before the Supreme Court was whether those amounts were allowable deductions. Subba Rao, J., as he then was, observed that under Section 10 (1) of the Income-tax Act, tax shall be payable by an assessee under the head "profits and gains of business" in respect of profits and gains of any business carried on by him, and that the said profits and gains are not profits regulated by any statute, but profits in a business computed on business-principles, that what is to be ascertained is the business profits and not statutory profits. He further observed that the real profits of a businessman under S. 10 (1) of the Income-tax Act cannot obviously include the amounts returned by him by way of rebate to the consumers under statutory compulsion and that it is as if he received only from the consumers the original amount minus

the amount he returned to them. His Lordship summarised his conclusions at page 530 (of ITR) = (at p. 35 of AIR) thus:

"Income-tax is a tax on the real income, i.e., the profits arrived at on commercial principles subject to the provisions of the Income-tax Act. The real profits can be ascertained only by making the permissible deductions. There is a clear-cut distinction between deductions made for ascertaining the profits and distributions made out of profits. In a given case whether the outgoings fall in one or the other of the heads is a question of fact to be found on the relevant circumstances, having regard to business principles. Another distinction that shall be borne in mind is that between the real and the statutory profits, i.e., between the commercial profits and statutory profits. The latter are statutorily fixed for a specified purpose".

13. In the *Poona Electric Company's* case, 1965-57 ITR 521 = (AIR 1966 SC 30) computation of the profits was regulated by the Electricity (Supply) Act, whereas in the case in hand it is regulated by the contract between the company and the Government. In computing the real profits of the assessee here, I think, the payment made to the Government has to be deducted. The fact that in the substituted Cl. 7, it is said that out of the net profits of the company, the Government will be entitled to 10% would not make it a payment out of the real profits of the company. There is we must remember the distinction between apparent profit and real profit. What is taxed under the Income-tax Act is only the profits of the company calculated on commercial principles.

In the Privy Council case of *Indian Radio and Cable Communications Co. Ltd. v. Commissioner of Income-tax, Bombay* (1937) 5 ITR 270 at pp. 277-78 = (AIR 1937 PC 189 at p. 192) Lord Maugham said:

"It is not universally true to say that a payment the making of which is conditional on profits being earned cannot properly be described as an expenditure incurred for the purpose of earning such profits. The typical exception is that of a payment to a director or a manager of a commission on the profits of a company. It may, however, be worth pointing out that an apparent difficulty here is really caused by using the word 'profits' in more than one sense. If a company having made an apparent net profit of £ 10,000 has then to pay £ 1,000 to directors and managers as the contractual recompense for their service during the year, it is plain that the real net profit is only £ 9,000".

14. When a trader makes a payment which is computed in relation to profits,

the question that arises is: Does the payment represent a mere division of profits with another party, or is it an item of expenditure the amount of which is ascertained by reference to profits. The payment would be allowable in the second case, but not in the first.

15. Now let us see whether the payment is an expenditure wholly and exclusively laid out for the purpose of the business and ascertained with reference to profits.

16. Viscount Cave, L. C. observed in *Atherton v. British Insulated and Helsby Cables Ltd.*, (1925) 10 Tax Cas 155 at p. 191:

"A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of business, may yet be expended wholly and exclusively for the purposes of the trade".

What is money wholly and exclusively laid out for the purposes of business must be determined upon the principles of commercial trading. Thus, remuneration of commission payable to directors, managers, agents or other employees, and ascertained by reference to profits, is deductible as business expense (See the decision in *Commr of Income-tax, Burma v. Bombay Burma Trading Corporation*, 1941-9 ITR 155 = (AIR 1941 Rang 145).

17. Reliance was placed by the Revenue upon the decision in *Tata Hydro-Electric Agencies Ltd. v. Commr. of Income-tax, Bombay*, 1937-5 ITR 202 at p. 209 = (AIR 1937 PC 139 at p. 142), and it was contended that the payment is not an expenditure laid out wholly and exclusively for the purpose of the business. In that case, the Tata Power Company entered into an agency agreement with Tata-sons Ltd. agreeing to pay to Tata-sons Ltd. a commission of 10 per cent. on the annual net profits of Tata Power Co subject to a minimum whether any profits were made or not. Later on two persons D and S advanced funds to Tata Power Company on the condition that in addition to the interest payable to them by Tata Power Company they should each receive from Tata-sons Ltd., 12½ per cent. of the commission earned by Tata-sons Ltd. Tata-sons assigned their entire right to the assessee-company and the Tata Power Company entered into a new agency agreement with the assessee-company and the assessee-company received a commission, and out of that paid ¼ to D and S. Relying on *Pondicherry Railway case*, AIR 1931 PC 165 the Bombay High Court held that that was not an allowable deduction as expenditure incurred solely for earning profits. On appeal the Privy Council held that the *Pondicherry*

Railway case, AIR 1931 PC 165 did not govern the case. The nature of the transaction was held to be this that the obligation to make the payments was undertaken by the assessee-company in consideration of its acquisition of the right to property to earn profits; i.e. of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business. Lord Macmillan observed:

"In the present case their Lordships have reached the conclusion that the payments in question were not expenditure so incurred by the appellants. They are certainly not made in the process of earning their profits; they were not payments to creditors for goods supplied or services rendered to the appellants in their business; they did not arise out of any transactions in the conduct of their business. That they had to make those payments no doubt affected the ultimate yield in money to them from their business but that is not the statutory criterion. They must have taken this liability into account when they agreed to take over the business. In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business."

It might be observed that the decision turned upon the interpretation of the Section 10 (2) (xv) before it was amended in 1939. Before this clause was amended in 1939, allowance was given in respect of any non-capital expenditure "incurred solely for the purpose of earning such profits or gains". Now under the amended law the expenditure should be laid out "wholly and exclusively for the purpose of such business". The two expressions are not synonymous; the latter is wider than the former. Expenditure may be for the purpose of the business although it may not be incurred for the purpose of earning the profits of the business. (See the decision in *Commissioner of Income-tax v. Jagannath Kisonia*, 1956-30 ITR 654 = (AIR 1956 Bom 550).

18. Section 10 (2) (xv) requires that the expenditure should be wholly and exclusively laid out for the purpose of the business, but not that it should be necessarily laid out for such purpose. Therefore, expenses wholly and exclusively laid out for the purpose of trade should, subject to the fulfilment of the other conditions, be allowed under this clause even though the outlay is unnecessary or unnecessarily large, unless the case falls under Section 10 (4A) q v. The further test of necessity is, by contrast, imposed under Section 4 (3) (vi) and Section 7 (2) (iii).

19. The judgment of the Supreme Court in *Eastern Investments Ltd. v. Commissioner of Income-tax, 1951-20 ITR 1*=(AIR 1951 SC 278) establishes that in the absence of fraud, the questions whether a transaction had the effect of diminishing the assessee's taxable income, whether it was a prudent or wise transaction, and whether it was necessary for the assessee to enter into that transaction, are irrelevant in determining whether expenditure relating to that transaction should be allowed under Section 12 (2); and the same considerations would apply under this clause. I think, the payment in question was an expenditure laid out wholly and exclusively for the purpose of the business and ascertained with reference to profits.

I agree with the opinion of Raghavan J. and hold that the amount is an allowable deduction and would answer the question in the affirmative and in favour of the assessee.

20. By Court (Raghavan and Isaac JJ.) after the expression of opinion by the third Judge:— In conformity with the majority opinion, we answer the question referred in the affirmative in favour of the assessee. We also direct both parties to bear their respective costs.

21. A copy of this order will be sent to the Income-tax Appellate Tribunal as required by law.

RGD

Answer accordingly.

AIR 1969 KERALA 203 (V 56 C 47)

K. SADASIVAN, J.

Valia Veettil Komappan, Petitioner v. Elamakandy Kinnattumkara Karthiyayini and others, Respondents.

C. R. P. No. 1302 of 1967, D/-5-7-1968 from order of Munsiff's Court, Quilandy in I. A. No. 830 of 1964.

Court-fees and Suits Valuations—Court Fees Act (1870), S. 13 — Return of plaint on ground of under-valuation of claim — Appeal — Plaintiff directed to delete prayer for recovery of building for purpose of bringing suit within jurisdiction of Munsiff Court — Presentation of plaint after deletion of prayer — Plaintiff entitled in the interest of justice to Court-fee already paid — Civil P. C. (1908), O. 7, R. 10, S. 151.

Where the plaint was returned on the ground that the plaint claim was under-valued with a view to bring it within jurisdiction of the Munsiff Court and the appellate Court while dismissing the appeal against such order of return of plaint, pointed out that the plaint could be represented after deleting the prayer for recovery of the building thereby

bringing it within the jurisdiction of the Munsiff Court, the plaintiff while re-presenting the same plaint, after the deletion of the prayer, in the Munsiff's Court was entitled in the interest of justice to get the credit for the Court-fee already paid on the former occasion. The refund of Court-fee is provided in the Court-fees Act only in cases of compromise or remand of the suit for fresh disposal. AIR 1951 Bom 130 & (1911) ILR 35 Mad 567 (FB) & AIR 1926 Cal 355 & AIR 1950 Mad 57 & AIR 1959 Punj 629, Rel. on.

(Para 3)

This however applied only to cases in which substantially the same plaint is re-presented. The plaint re-presented did not contain any change much less substantial, either in the allegations part or in the causes of action part. From the deletion of prayer it could not be argued that the re-presented plaint was a fresh one in all respects.

(Para 3)

Cases Referred: Chronological Paras

(1959) AIR 1959 Punj 629 (V 46) =

ILR (1959) Punj 1770, Bhuramal

Dan Dayal v. Imperial Flour

Mills Ltd. 4

(1951) AIR 1951 Bom 130 (V 38) =

ILR (1951) Bom 648, Anglo

French Drug Co. (Eastern) Ltd.

v. State of Bombay 3

(1950) AIR 1950 Mad 57 (V 37) =

1949-2 Mad LJ 159, Sarabhamma

v. Veeranna 3

(1926) AIR 1926 Cal 355 (V 13) =

30 Cal WN 90, Bimala Prosad

Mukerji v. Lalmoni Devi 2

(1911) ILR 35 Mad 567 = 21 Mad

LJ 533 (FB), Visveswara Sarma

v. T. M. Nair 1

A. P. Chandrasekharan, for Petitioner; M/s. A. Achuthan Nambiar and T. K. Kelu Nambiar, for Respondents 1 & 2.

ORDER:— The question arising in this revision is whether the court-fee paid on a plaint presented in the wrong Court could be given credit to when the plaint is re-presented in the proper Court. The suit was originally filed in the Munsiff's Court of Quilandy. It was found on a preliminary enquiry that the plaint claim was undervalued with a view to bring it within the jurisdiction of the Munsiff's Court. The plaint was accordingly returned. From that order the plaintiff appealed to the District Judge and the learned District Judge in dismissing the appeal pointed out that the plaint could be re-presented after deleting the prayer for recovery, thereby bringing it within the jurisdiction of the Munsiff Court. From that order a revision was preferred to this Court in C. R. P. 16/64 and in dismissing that petition this Court observed:—

"The learned Judge has pointed out that the plaintiff can re-present the plaint

with the prayer for recovery of the buildings deleted. In view of this, no interference is necessary. Dismissed".

After this the prayer for recovery of the building was deleted and the plaintiff was re-presented in the self-same Munsiff's Court. There the question arose whether the plaintiff could get the court-fee paid on the first occasion credited, so that he may pay only the balance, if any on the plaintiff as presented on the second occasion. According to the learned Munsiff the plaintiff cannot get credit for the court-fee already paid, the reason being that he has made changes in the plaintiff in such a way as to make it appear to be a fresh plaintiff, and such plaintiff can be entertained only on payment of court-fee afresh. The position is well covered by authorities. One of the earliest decisions cited before me is the Full Bench decision of the Madras High Court in *Visweswara Sarma v. T. K. Nair*, (1911) ILR 35 Mad 567 (FB). There, the Court after receiving the plaintiff and cancelling the stamp returned it for presentation to the proper Court under O. 7, R. 10, Civil P. C. The Court in which the plaintiff was re-presented was directed to give credit to the fee already levied by the former Court. In giving the direction the Full Bench observed—

"This is the existing practice in this Presidency and there is nothing in the new Code of Civil Procedure or in the Presidency Small Cause Courts Act or in the City Civil Courts Act to indicate that the legislature intended to interfere with such practice".

2. In *Bimala Prosad Mukerji v. Lal Moni Devi*, AIR 1926 Cal 355 a Division Bench of the Calcutta High Court is seen to have taken the same view. There, in the interval between the return of the plaintiff and its presentation to the proper Court, the Court-fees Act was amended. The learned Judges held—

"When the plaintiff which has been returned is presented in a Court of competent jurisdiction the suit, even for purposes of court-fee, must be taken to be instituted on the date of such re-presentation and therefore, on such plaintiff the court-fee should be leviable under the law which was in force at the time when the plaintiff was re-presented. If the Act is amended in the meantime increasing the amount of fee payable thereunder the plaintiff should be credited with fee originally paid".

3. The same view was taken by the Madras High Court in a later decision in *Sarabhamma v. Veeranna*, AIR 1950 Mad 57. There the learned Judge held:—

"Whether a court after receiving a plaintiff and cancelling the stamp affixed thereto returns the plaintiff for presentation to the proper Court under O. 7, R. 10 the latter

Court to which the plaintiff is presented is bound to give credit for the fee already levied by the former Court". In that case the learned Judge further observed.—

"But this applies only to cases in which the same plaintiff is presented to the Court. Where the plaintiff as presented to the proper Court is not substantially, if not "verbatim et literatim", the same and there are substantial changes made in the allegations part, as well as in the causes of action part, no credit can be given for the court-fee paid on the original plaintiff which had been filed in the wrong Court".

This restriction, however, cannot be availed of in the present case since the plaintiff re-presented does not contain any change much less substantial, either in the allegations part or in the causes of action part. All that the plaintiff has done on the second occasion was that the prayer for recovery of the building was deleted. From this it cannot be argued with justification that the re-presented plaintiff is a fresh one in all respects. There is no provision in the Court-fees Act for refunding the court-fee paid on a plaintiff presented in a wrong court. Refund is provided only in cases of compromise or remand of the suit for fresh disposal. In a case of this nature the only order that the Court can pass in the ends of justice is to give credit to the fee paid on the former occasion. But according to the Bombay High Court, even a refund of court-fee can be ordered in the case of return of the plaintiff invoking the inherent jurisdiction of the Court. Chagla, C. J., for instance, has held in *Anglo French Drug Co., (Eastern) Ltd. v. State of Bombay*, AIR 1951 Bom 130.—

"In the interest of justice an order for refund of court-fees should be made by the Court which returns the plaintiff under O. 7, R. 10. Hence the Bombay City Civil Court has jurisdiction under Section 151 to make an order for refund of court-fees when it returns a plaintiff under O. 7, R. 10".

4. *Bhura Mal Dan Dayal v. Imperial Flour Mills Ltd.*, AIR 1959 Punj 629 is another decision falling in the same category. There it was held:—

"When a court after receiving a plaintiff and cancelling the stamp affixed thereto returns the plaintiff for presentation to the proper Court under O. 7, R. 10 of the Civil P. C. the latter Court to which the plaintiff is re-presented is bound to give credit for the fee already levied by the former Court".

There the re-presentation was in a Court situated in a different State. Even then it was ordered that credit should be given to the fee paid on the first occasion. The suit (in that case) was originally instituted in the Civil Court at Delhi; but it

was held that Delhi Court has no jurisdiction, with the result that the plaint was returned for being presented to the proper Court. The plaintiff thereupon re-presented the plaint in the Court at Ambala. The court-fee stamp affixed on the plaint originally instituted bore the words 'Delhi State' having been purchased at Delhi. The trial Court thought that administration of justice, except where it relates to the Supreme Court and the High Court, is a State subject and therefore, the court-fee stamps purchased in Delhi could not be used in the Court in the State of Delhi. On this view the plaintiff was ordered to make up the deficiency in court-fee. The learned Judge of the Punjab High Court held:—

"That the Court at Ambala was bound to give credit for the fee already paid. The scheme of the Act, shows that a litigant is, normally speaking, not made liable to pay court-fee twice over for the same adjudication by the same Court or by its successor Court or on account of the mistakes of Courts".

5. It is thus obvious that the plaintiff is entitled to get credit for the court-fee already paid by him. In the interests of justice it has to be held that he should not be made to pay twice on the same matter. The order of the learned Munsiff is wrong and it is hereby set aside. The plaintiff will get credit for the court-fee paid by him on the first occasion.

CWM/D.V.C. Revision allowed.

AIR 1969 KERALA 205 (V 56 C 48)
M U. ISAAC AND P. NARAYANA
PILLAI, JJ.

Deputy Commissioner of Agricultural Income-tax and Sales-tax South Zone, Quilon, Petitioner v. M/s. Aluminium Industries Ltd., Kundara, Respondents.

Tax Revn. Cases Nos. 10 and 11 of 1967, D/-23-7-1968 from Sales Tax Appellate Tribunal Trivandrum in T. A. Nos. 408 and 409 of 1966.

Sales Tax — Central Sales Tax Act (1956), S. 2 (i) and (4) — Determination of turnover under — All deductions allowed under State Law to be made from the gross turnover in determining the net turnover shall be liable to deduction in determining the taxable turnover under the Central Sales Tax Act 1956 — Kerala General Sales Tax Rules (1950), R. 7 (1) (a). AIR 1965 SC 1510; AIR 1966 Ker 60; AIR 1969 SC 147; (1966) 17 STC 396 (Mad), Diss. from. (Para 6)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 147 (V 56) =
C. A. No. 763 of 1967, D/-18-4-1968, State of Madras v. N. K. Natraja Mudaliar 6

(1968) AIR 1968 SC 843 (V 55) =
(1968) 21 STC 383, Swastik Oil Mills Ltd. v. H. B. Munshi 5
(1968) 1968 Ker LR 726 = O. P. No. 3988 of 1966, Vazhakkla Rubbers v. Sales Tax Officer 5
(1966) AIR 1966 Ker 60 (V 53) = (1965) 16 STC 794, Laxmi Starch Factory Ltd. v. State of Kerala 6
(1966) (1966) 17 STC 396 = ILR (1967) 1 Mad 709, Khader and Co. v. State of Madras 6
(1965) AIR 1965 SC 1510 (V 52) = (1965) 16 STC 231, State of Mysore v. Lekshminarasimhiah Shetty and Sons 6
(1965) 1965 Ker LT 254 = ILR (1965) Ker 111, Ramaswamy v. Sales Tax Officer 4
(1965) 1965 Ker LT 304 = 1965 Ker LJ 438, Sarvothama Srinivasa Shenoi v. Deputy Commr. of Agricultural I. T. and Sales Tax Kozhikode 4
(1965) 1965 Ker LT 1167=1965 Ker LJ 819, Ninan v. State of Kerala 4
Govt. Pleader, for Petitioner; P. K. Kurien, V. Desikan, K. A. Nayar and K. Sukumaran, for Respondent (in both the Appeals).

ISAAC, J.:— These two petitions have been filed by the Deputy Commissioner of Agricultural Income-tax and Sales Tax, Quilon under Section 41 (1) of the Kerala General Sales Tax Act, 1963 to revise the orders of the Sales Tax Appellate Tribunal in T. A. Nos. 408 and 409 of 1966. The Aluminium Industries Ltd. is the respondent in both the cases. In the first case, the respondent was finally assessed for the year 1960-61 under the Central Sales Tax Act, 1956 by the Sales Tax Officer by his order dated 18-10-1962. In the second case, it was finally assessed for the year 1961-62 under the same Act by the same officer by his order dated 29-10-1962. In both these assessments, the respondent made a claim for deduction of the trade discount paid to its customers from its gross turnover in determining the taxable turnover. This claim was allowed by the Sales Tax Officer. The petitioner took the view that this claim was not admissible under law. Accordingly, he took action under Section 15 (1) of the General Sales Tax Act, 1125 (hereinafter referred to as the 1125 Act), and revised the orders of the Sales Tax Officer, by disallowing the above claim. The orders of the petitioner were passed on 23-6-1966.

2. The period fixed under Section 15 (3) of the 1125 Act for exercising the power of revision is four years from the date on which the order sought to be revised was communicated to the assessee. The revised orders in these cases have been passed within the above period. Rule 33 (1) of the General Sales

Tax Rules 1950 (hereinafter referred to as the Rules) confers the power on an assessing authority to assess escaped turnover. The same power is also conferred by Rule 33 (5) on the appellate authority and the revisional authority. But the period prescribed for exercising the said powers is three years from the end of the year to which the assessment relates. So the order passed by the petitioner is beyond the said period in both cases.

3. The respondent filed appeals before the Appellate Tribunal from the orders of the petitioner; and it raised two contentions. One was that the petitioner was not entitled to take action under Section 15 (1) of the 1125 Act, as these were cases of assessment of escaped turnover, which was barred under sub-rules (1) and (5) of Rule 33 of the Rules. The second contention was that it was entitled to deduction of trade discount from the gross turnover.

4. There are three decisions of this Court, which apparently support the respondent's first contention. They are *Ramaswamy v Sales Tax Officer*, 1965 Ker LT 234, *Sarvothama Srinivasa Shenoy v. Deputy Commissioner of Agricultural Income-tax & Sales-tax, Konkode*, 1965 Ker LT 304 and *Ninan v State of Kerala*, 1965 Ker LT 1167. Presumably on the basis of these decisions, the Appellate Tribunal accepted the first contention and allowed the appeals on the ground of limitation. In this view of the matter, the second contention was not considered. The petitioner has, therefore, filed these revision petitions challenging the decision of the Tribunal.

5. The question whether the Deputy Commissioner is entitled to exercise his revisional power in a matter which squarely falls under Section 15 (1) of the 1125 Act, even though it may involve assessment of escaped turnover arose for decision before one of us in *O. P. No 3988 of 1966* (reported in 1968 Ker LR 726) *Vazhakkala Rubbers v. Sales Tax Officer*. It was held in that case that the aforesaid three decisions of this Court may not be good law in the light of the recent decision of the Supreme Court in *Swastik Oil Mills Ltd. v. H. B. Munshi*, (1968) 21 STC 383 = (AIR 1968 SC 843) and that the power of revision conferred by the Statute on the Deputy Commissioner cannot be taken away or controlled by any rule made thereunder. The learned Government Pleader contended that the decision of the Appellate Tribunal was not correct in the light of the above decision of this Court. On the other hand, the respondent's learned counsel submitted that the said decision was not correct; that it was sought to be appealed from; and that the present cases are governed by the earlier decisions of this Court. As

the correctness of the decision in *O. P. No 3988 of 1966* (reported in 1968 Ker LR 726) is likely to be canvassed in appeal before another Bench, and as we can dispose of these cases on the second contention raised by the respondent before the Appellate Tribunal, we do not propose to decide the question regarding the scope of the Deputy Commissioner's revisional power.

6. The petitioner held that the respondent was not entitled to deduct trade discount from the gross turnover on the ground that, under the Central Sales Tax Act, 1956, this was not a deductible item. The reasoning for the above finding is as follows:—Section 2 (i) of the Act defines turnover as the aggregate of the sale prices received and receivable by a dealer in respect of sales of any goods in the course of inter-State trade. Section 2 (h) of the Act defines sale price as the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally followed in the trade. "Cash discount" and "trade discount" are entirely different and distinct things, and hence under the Central Sales Tax Act, cash discount alone is deductible in determining the turnover, and not the trade discount. But the learned counsel for the respondent submitted that the discount for which the respondent claimed deduction would fall under Rule 7 (1) (a) of the Rules; and that, by virtue of Section 9 (3) of the Central Sales Tax Act, 1956, the respondent was entitled to get all allowances provided in Rule 7 of the Rules in determining the turnover under the said Act. Rule 7 (1) (a) reads as follows:—

"7. (1) The tax or taxes under Section 3 or 5 or the notifications under Section 6 shall be levied on the net turnover of a dealer. In determining the net turnover, the amounts specified in Cls. (a) to (k) shall, subject to the conditions specified therein, be deducted from the gross turnover of a dealer:—

(a) all amounts allowed as discount, provided that such discount is allowed in accordance with the regular practice of the dealer or is in accordance with the terms of a contract or agreement entered into in a particular case and provided also that the accounts show that the purchaser had paid only the sum originally charged less the discount."

There is no dispute that the trade discount paid by the respondent would not fall under the above rule. In *State of Mysore v. Lekshminarasimhaiah Setty and Sons*, (1965) 16 STC 231 = (AIR 1965 SC 1510) the Supreme Court held that, under the Central Sales Tax Act, tax can be assessed and collected only in the same

manner as the tax on the sale or purchase of goods under the General Sales Tax law of the State, which meant that all exemptions, deductions etc. provided under the State law would apply to the assessment of tax under the Central Act. This Court has also taken the same view in *Laxmi Starch Factory Ltd. v. State of Kerala*, (1965) 16 STC 794 = (AIR 1966 Ker 60). Section 15 of the Central Sales Tax Act was amended by the Central Sales Tax (Second Amendment) Act, 1958; and the said section as amended was brought into force with effect from 1-10-1958. In *Khader and Co. v. State of Madras*, (1966) 17 STC 396 (Mad) the Madras High Court held that the law laid down in the above decision of the Supreme Court would apply only to assessments in respect of periods prior to the coming into force of the above amendment; that the position would be different in the light of the said amendment and that, in respect of subsequent periods, the tax under the Central Act can be levied, in spite of any exemption provided under the State law. With the greatest respect, we are unable to see the distinction pointed out by the Madras High Court. In our view, the amendment of Section 15 does not affect the meaning of Section 9 of the Central Act as interpreted by the Supreme Court. It is unnecessary to consider this matter in detail, as it is clear from a very recent decision of the Supreme Court dated 18th April 1968 in *C. A. No. 763 of 1967*: (AIR 1969 SC 147) *State of Madras v. N. K. Nataraja Mudaliar* that the reasoning of the Madras High Court in its above decision cannot be sustained. We, therefore, hold that all deductions allowed under the State law to be made from the gross turnover in determining the net turnover shall be liable to deduction in determining the taxable turnover under the Central Sales Tax Act, 1956.

7. In the result, these revision petitions are dismissed. There will be no order as to costs.

DGB/D.V.C. Petitions dismissed.

AIR 1969 KERALA 207 (V 56 C 49)
V. BALAKRISHNA ERADI, J.
E. Enasu, Appellant v. Edakkulathur Kunjuwareed Antony and others, Respondents.
Second Appeal No. 848 of 1964, D/-9-2-1968, from order of Addl. Sub. Court, Trichur in A. S. No. 18 of 1963.
(A) Succession Act (1925), S. 74 — Will — Construction — General principles — Testator bequeathing his entire properties to wife and after her death to

his children by making allotments — Will held created only life-estate in favour of wife — (Will — Construction).

In interpreting a will the primary task before the Court is to find out the intention of the testator. For this purpose, the overriding duty of a Court of construction is to construe the language which the testator has employed in the various clauses of the instrument, reading the instrument as a whole, giving due weight to all the words and rejecting nothing to which a meaning can reasonably be assigned. A construction which renders some of the clauses in the will totally ineffective and gives effect only to some others, should as far as possible be avoided and attempt should be made to interpret the provisions in such a manner so that effect could be given to every testamentary intention contained in the will. (Para 7)

A testator by his will bequeathed his entire properties to his wife and also made elaborate provisions effecting an allotment of the various items separately amongst the children. In the next paragraph it was stated that in case his wife survived him it was open to her to hand over possession of the properties to the respective allottees excepting certain items which had been set apart for meeting the expenses of the funeral ceremonies of the testator and his wife and for some specified charities. It was further provided that if the properties were so handed over by her to the children the latter would have no powers of alienation in respect of them during the mother's lifetime.

Held on a construction of the will read as whole that the interest created in favour of the wife was merely a life-interest and the remainder in absolute was conferred on his children. The provision for acceleration of the handing over the estate to the children by voluntary surrender on the part of his wife without any power of alienation during her lifetime was clearly indicative of the limited character of the estate conferred on the wife. AIR 1937 Mad 476 and AIR 1964 SC 1323, Rel. on. (Paras 8, 9)

(B) Succession Act (1925), Ss. 131 and 132 — Condition subsequent in defeasance of vested interest — To be construed strictly — Breach of condition — Clear and very strong evidence of its breach essential to operate as forfeiture of vested interest — (T. P. Act (1882), Ss. 28, 29).

Clause 5 of the will stated that if any of the persons who have been enjoined to meet the expenses of the funeral ceremonies of the testator and his wife and to disburse the amounts specified for charities in Clause 2, commits default in the matter of meeting such expenditure, then such person shall not have any right to the properties earmarked for such ex-

penses and only the persons who actually expended the amounts shall be entitled to these items.

Held that the condition imposed by Clause 5 of the will could be regarded, if at all, as a condition subsequent and not as condition precedent for vesting of the estate. Conditions subsequent which are, intended to defeat a vested estate or interest, are always construed strictly, and must, therefore, be so expressed as not to leave any doubt of the precise contingency intended to be provided for. Therefore, unless there was very strong and clear evidence of the breach of condition a Court would not proceed to hold that a vested interest has been thereby forfeited. (Para 13)

Cases Referred Chronological Paras

- (1964) AIR 1964 SC 1323 (V 51) =
 (1964) 2 SCR 722, Ramchandrar
 Shenoy v Mrs Milda Brite 5
 (1937) AIR 1937 Mad 476 (V 24) =
 (1937) 1 Mad LJ 258, Pavan
 Subbamma v. Anumala Rama-
 naidu 8

S Easwara Iyer, L. G. Pottl, C. S. Rajan, P Sankarakutty Nair and E. Subramoniam, for Appellant; T S Venkateswara Iyer and R. C. Plappilly, for Respondent No 1, C. S. Ananthakrishna Iyer, for Respondent No 2.

JUDGMENT:— The 6th defendant in O S No 14 of 1958 on the file of the Munsiff's Court, Chowghat is the appellant.

2. The 1st respondent herein filed the aforesaid suit for partition and separate possession of a half share in plaintiff schedule items 1 to 5 inclusive of the house situated in item No. 1 and for recovery of possession of plaintiff items 14 to 16 as belonging to him exclusively. The 6th defendant resisted the suit in so far as it relates to plaintiff item No 1 and the building situated therein on the ground that the property had been validly assigned to him under a sale deed, Ext. B-2 executed in his favour by the plaintiff's mother Annamma acting for herself and as guardian of the plaintiff who was then a minor, and by the plaintiff's brother the 2nd defendant who was a major. The Courts below negatived the contentions of the 6th defendant and granted the plaintiff a decree as prayed for. Hence this appeal by the 6th defendant.

3. The plaintiff and defendants 1 to 5 are the children of one Kunhu Vareed by his wife Annamma. The plaintiff schedule properties admittedly belonged to Kunhu Vareed. He died on 19-3-1943 leaving a registered will evidenced by Ext. B-1 dated 9-4-1942. The main controversy between the parties is in regard to the interpretation of the provisions contained in this will. It is provided under the will that should Annamma survive the testa-

tor she should keep possession of all the properties and enjoy them with full rights and that after her death the properties should go to the testator's children in absolute rights in accordance with the allotment of properties made in the will whereby specific items have been separately earmarked for each of the children. The will contains three schedules of which the A schedule consists of 19 items of immovable properties owned by the testator, the B schedule of 3 items of outstandings which the testator had to realise from others and the C schedule mentions one item of debt due by the testator which stood charged on item No 10 in the A schedule. It is not necessary for the purpose of this second appeal to go into the details of the allotment of immovable properties made under the will as amongst the testator's children.

4. After the death of Kunhu Vareed his widow Annamma and the three sons, viz., the plaintiff and defendants 1 and 2, entered into a partition with respect to items 1 to 16 in the A schedule mentioned in the will. This was apparently done on the basis that Annamma having survived the testator, she obtained absolute rights in all the properties under the will and that the provisions of the will regarding the division of the properties amongst the children would be operative only in the event of Annamma predeceasing the testator. The plaintiff was a minor at the time of this partition and the document was executed on his behalf by Annamma acting as his guardian. It is subsequent to the aforesaid partition and on the strength of the allotment made thereunder that plaintiff item No 1 was assigned to the 6th defendant by the 2nd defendant and Annamma, the latter acting as guardian of the plaintiff. The plaintiff's contention is that under the will Annamma got only a life-estate and there was a gift over of all the properties in favour of the children, specific items being set apart separately to each of them. The partition as well as the assignment Ext. B-2 entered into during the plaintiff's minority were, therefore, contended to be invalid as against the plaintiff. The 6th defendant, on the other hand, contended that an absolute estate was created in favour of Annamma in respect of all the properties in the event of her surviving her husband and that no vested interest was created in favour of the children under the will excepting on the happening of the contingency of Annamma predeceasing her husband. The Courts below have upheld the plaintiff's contention and rejected the defendant's plea that Annamma got an absolute estate.

5. The learned counsel for the appellant contends that the Courts below have gone wrong in holding that under the provisions of the will (Ext. B-1) only

a life-estate was created in favour of Annamma. It is argued that the testator has, in clear and unambiguous terms, bequeathed the properties absolutely in favour of his wife in the event of her being alive at the time of his death. The appellant's contention is that the bequest in favour of the testator's children was intended to take effect and be operative only in the event of Annamma predeceasing her husband and that such a contingency not having happened, no rights became vested in the children on the death of the testator. According to the appellant's counsel, if the provisions contained in the latter part of the will are to be interpreted as creating any vested rights in the testator's children, they are clearly repugnant to the earlier provision whereby an absolute estate had been granted in favour of the wife in very unambiguous terms and to the extent of such inconsistency the later provision has to be ignored. On the other hand, the respondents' counsel urged that on a proper interpretation of the will it has to be held that there is a gift over of all the properties in favour of the children to take effect on the death of the widow and that in view of this the interest created in favour of Annamma has necessarily to be regarded as only a life-estate.

6. I shall now proceed to discuss the relevant recitals contained in the will. In support of his contention that the widow was granted an absolute estate over all the properties, the appellant's counsel relied mainly on the following recital contained in para 1 of Ext. B-1:—

(Original in Malayalam omitted.—Ed.) Particular emphasis was placed by counsel on the words that I have underlined (here omitted). The remaining portion of the same sentence is, however, in these terms:—

(Original in Malayalam omitted.—Ed.) In the next succeeding paragraph (para 2) of the will the testator has made elaborate provisions effecting an allotment of the various items separately amongst the children, viz., the plaintiff and defendants 1 to 5. In paragraph 3 he then proceeds to state that in case his wife is alive at the time of his death it would be open to her, if she is so inclined, to hand over possession of the properties even during her lifetime, to the respective persons to whom they are allotted under paragraph 2 excepting certain items which have been set apart for meeting the expenses of the funeral ceremonies of the testator and his wife and for some specified charities. It is further provided that if the properties are so handed over by her to the children the latter would have no powers of alienation in respect of them during the mother's lifetime. The next paragraph in the will provides that the properties allotted to such of the

children who are minors, should be prudently managed on their behalf by either the 2nd defendant or the 3rd defendant in case occasion should arise for the management of the properties before their attaining majority. Then follow the three schedules A to C giving particulars of the properties, outstandings and the mortgage liability. After mentioning the three schedules there is a further clause (para 5) to the effect that in respect of the properties set apart for funeral expenses etc., if any of the concerned parties who have been directed to expend the amounts commits a default in the matter of meeting such expenditure, such defaulting person or persons shall not have any rights to those properties and those items shall vest only in those who meet the expenses.

7. In interpreting a will the primary task before the Court is to find out the intention of the testator. For this purpose, the overriding duty of a Court of construction is to construe the language which the testator has employed in the various clauses of the instrument, reading the instrument as a whole, giving due weight to all the words and rejecting nothing to which a meaning can reasonably be assigned. A construction which renders some of the clauses in the will totally ineffective and gives effect only to some others, should as far as possible be avoided and attempt should be made to interpret the provisions in such a manner so that effect could be given to every testamentary intention contained in the will.

8. It is clear from the provisions of Ext. B-1, read as whole, that the intention of the testator was to confer on his children an absolute interest in respect of the items separately allotted to each of them with an intermediate estate carved out in favour of his wife. The provision contained in paragraph 3 of the will that even during the lifetime of Annamma it is open to her to hand over to the children possession of the items respectively allotted to them and that in such event the children shall not have powers of alienation during the lifetime of the widow, clearly indicates that the intention of the testator was that Annamma was to have only a life-estate. If it was the testator's intention to create an absolute estate in favour of his widow, Cl. 3 would be rendered meaningless. Further, from the dispositive words employed by the testator in the concluding portion of paragraph 1 whereby it is provided that the properties respectively allotted to the various children are to be taken by them with absolute rights after the lifetime of Annamma, it is clear that his intention was to make a gift over of the properties in favour of the children. The testator has taken care to indicate that the properties

without any diminution should go to each of his children after his wife's lifetime. It is, no doubt, true that the words of disposition in favour of the wife are also apparently in terms absolute. But they are immediately followed by the subsequent provision which in clear and unambiguous language creates a gift over of the entirety of the properties in favour of the testator's children. If the bequest in favour of the widow is to be held to be an absolute estate, the bequest of the gift over in favour of the children will have to fail. As observed by Varadachariar, J in *Pavani Subbamma v. Anumala Ramanaidu*, AIR 1937 Mad 476 at p 477, to avoid such a possibility the proper rule of construction is to take the will as a whole and "the presence of a gift over, which is not a mere gift by way of defeasance, has generally been held to be an indication that the prior gift was only of a limited interest".

9. It is unnecessary for me to refer to the various decisions cited at the bar because the matter is placed beyond all doubt by the pronouncement of the Supreme Court in *Ramachandra Shenoy v. Mrs. Hilda Brite*, AIR 1964 SC 1323, where the legal position has been stated thus at pages 1328 and 1329:—

"It is one of the cardinal principles of construction of wills that to the extent that it is legally possible, effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. It is for this reason that where there is a bequest to A even though it be in terms apparently absolute followed by a gift of the same, to B absolutely "on" or "after" or "at" A's death, A is *prima facie* held to take a life-interest and B an interest in remainder, the apparently absolute interest of A being cut down to accommodate the interest created in favour of B".

In the present case, it does not admit of doubt that the testator did intend to confer an absolute interest on his children and the question is whether or not effect can be given to it. If the interest of Annamma were held to be absolute, there is no doubt that effect cannot be given to the aforesaid intention of the testator. But, if there are words in the will which on a reasonable construction would denote that the interest of Annamma was not intended to be absolute but was limited to her life only, it would be proper for the Court to adopt such a construction,

for that would give effect to every testamentary disposition contained in the will. It is in that context that the words

(Original in Malayalam omitted.—Ed.) occurring in the last portion of paragraph 1 assume crucial importance. These words indicate that the persons designated in the last portion of para 1 and to whom separate allotments are made in the succeeding paragraph were to take an interest after Annamma, that is in succession and not jointly with her. Again, the provision contained in paragraph 3 of the will for acceleration of the handing over the estate to the children by voluntary surrender on the part of Annamma, is also clearly indicative of the limited character of Annamma's estate. In these circumstances the only reasonable construction to be placed on the will would be to hold that the interest created in favour of Annamma was merely a life-interest and that the remainder in absolute was conferred on the testator's children. This is the interpretation which the Courts below have adopted and I have no hesitation to hold that the view taken by them is correct.

10. It would then follow that the partition effected by Annamma on the basis that the property belonged to her absolutely cannot bind the plaintiff and the findings of the Courts below to that effect have also to be sustained.

11. It only remains to consider whether in respect of the building situated on plaint item No. 1 the 6th defendant cannot claim to have obtained the interests of the 2nd defendant. The ground on which this claim of the 6th defendant has been negatived by the lower Courts is that the 2nd defendant had forfeited all his rights in respect of the building in item No 1 because of the fact that he had not expended any amounts for the funeral ceremonies and the other charities mentioned in Cl. 2 of the will. Reliance is placed on the provisions contained in Cl. 5 of the will which states that if any of the persons who have been enjoined to meet the expenses of the funeral ceremonies of the testator and his wife and to disburse the amounts specified for charities in Cl. 2, commits default in the matter of meeting such expenditure, then such person shall not have any right to the properties earmarked for such expenses and only the persons who actually expended the amounts shall be entitled to these items. The building in item No. 1 is one of the items earmarked for such expenses.

12. Apart from a vague averment contained in the plaint that the amounts for the funeral expenses etc. were spent only by the plaintiff and the 1st defendant, no details are furnished as to when and what amounts were spent and by whom. The evidence adduced on the point is also

absolutely meagre and unsatisfactory. The plaintiff has no personal knowledge whatever about the matter, because the amounts are stated to have been spent during his minority. There is nothing to show that any demand was made on the 2nd defendant who was living in a far off place or that even an opportunity was given to him to contribute towards such expenses. Reliance is placed by the Courts below on an averment contained in the written statement of the 1st defendant to the effect that himself and the plaintiff alone spent the amounts and, strangely enough, this averment is referred to as an "admission" and used as such against the 2nd defendant.

13. Counsel appearing for the respondents found it difficult to contend that the stipulation regarding the incurring of the expenditure mentioned in Cls. 2 and 5 of the will is a condition precedent for the vesting of the legacies. In the very nature of things it could not be, for the simple reason, that there was no knowing as to how long the widow might survive and when the expenses of her funeral were to be incurred and the vesting of the properties could not be indefinitely postponed till then. The condition imposed by Cl. 5 of the will can, therefore, be regarded, if at all, as a condition subsequent. As observed in *German on Wills*, 8th edition, page 1464:

"Conditions subsequent which are intended to defeat a vested estate or interest, are always construed strictly, and must, therefore, be so expressed as not to leave any doubt of the precise contingency intended to be provided for". It is only in a case where there is very strong and clear evidence of the breach of condition that a Court would proceed to hold that a vested interest had been thereby forfeited. In the present case such evidence is totally lacking. It has, therefore, to be held that the Courts below were not justified in holding that the 2nd defendant had forfeited all rights in respect of the building situated on item No. 1. The rights of the 2nd defendant having passed to the 6th defendant by virtue of the sale evidenced by Ext. B-2, the 6th defendant is entitled to a 1/3rd share in the building in plaintiff item No. 1 and the plaintiff and 1st defendant would be entitled only to a 1/3rd share each.

14. The preliminary decree passed by the Courts below is, therefore, modified by holding that the 6th defendant is entitled to a 1/3rd share in the building in plaintiff item No. 1 and that the plaintiff and the 1st defendant are entitled only to a 1/3rd share each and not to a 1/2 share as decreed by the Courts below. In other respects the decrees of the Courts below will stand confirmed.

15. The Second Appeal is allowed to

the extent indicated above and dismissed in other respects. The parties will bear their respective costs in this Court.

KSB

Appeal partly allowed.

AIR 1969 KERALA 211 (V 56 C 50)

K. K. MATHEW, J.

Kumaran and others, Appellants v. Cheriyanbadaid Ayidru and others, Respondents.

Second Appeal No. 140 of 1964, D/- 24-1-1968, appeal from Dist. Court, Kozhikode in A. S. No. 94 of 1963.

(A) Provincial Insolvency Act (1920), Section 37 — "Act done by Court or Receiver" — Official Receiver fixing amount due from debtor to insolvent's estate — Order passed is "act done by Receiver".

Where a debtor of the insolvent filed a petition before the Official Receiver stating that if an account is taken, amounts will be due to him from the estate of the insolvent and the Official Receiver considered the petition and passed an order fixing the amount due from the debtor to the estate of the insolvent and subsequently the order of adjudication was annulled, the order was an "act" of the Official Receiver, and it would remain valid even after the annulment of the order of adjudication. Case law reviewed.

(Pars. 9, 10)

(B) Provincial Insolvency Act (1920), Section 37 — Assignment of rights in bond executed by debtor in favour of insolvent — Amount of bond reduced by Official Receiver — Suit by assignee — Assignee is entitled to recover only amount as found by Official Receiver — Assignment being subject to equities which could have been claimed against assignor, equitable set off is permissible.

(Para 11)

Cases Referred: Chronological Paras (1953) AIR 1953 Mad 620 (V 40) =

(1952) 2 Mad LJ 823, Md. Hussain v. Md. Rowther 8

(1938) AIR 1938 Rang 335 (V 25) = 1938 RLR 276, Daw Hnit v. Anamalai Chettiar 8

(1935) AIR 1935 Rangoon 328 (V 22) = ILR 14 Raj 63, Official Receiver v. Succaram 8, 10

(1935) AIR 1935 Rang 498 (V 22) = 160 Ind Cas 861, Bank of Chittinad v. Saw Yu Byan 8, 9

(1891) 1891-1 QB 538 = 39 WR 372, Brandon v. McHenry 6

P. C. Balakrishna Menon, for Appellants; T. S. Venkiteswara Iyer and R. C. Plappilly, for Respondent No. 1.

JUDGMENT:— Defendants 1 and 2 are the appellants. The suit was to enforce a bond executed by the 1st defendant, with 2nd defendant as surety, to the 3rd defendant.

IL/L/D953/68

2. The 3rd defendant conducted a kuri. The 1st defendant was a subscriber for one ticket in the Kuri. He bid half-a-ticket and executed Ext. A-1, bond. The 1st defendant committed default in the payment of future instalments on 9-8-1953. Thereafter the Kuri broke down on account of the default of the 3rd defendant. The 1st defendant had subscribed for 43 instalments and it was from the 44th instalment that he defaulted. According to 3rd defendant, an amount of Rs 742-8-0 (Rs 742-50) was due to him from the 1st defendant. The plaintiff was also a subscriber in the Kuri conducted by 3rd defendant and for money due to him from the 3rd defendant he filed a suit against the 3rd defendant and obtained a decree and in execution of the decree he brought the right under the bond executed by defendants 1 and 2 and other moveables of the 3rd defendant to sale and purchased them. The 3rd defendant was declared insolvent in 1 P. No 1/54 and the Official Receiver was appointed to administer the estate. Before the Receiver, the 1st defendant filed a petition stating that if an account is taken, amounts will be due to him from the estate of the insolvent. The Official Receiver considered the petition and passed Ext. B-1 order fixing the amount due from the 1st defendant to the estate of the insolvent, at Rs 57. Subsequently, the order adjudicating the 3rd defendant as insolvent was annulled.

3. In the suit filed by the plaintiff to realise the amount due under Ext. A-1 bond, the 1st defendant contended that the suit is barred by limitation and that not more than Rs. 57 as found by the Official Receiver in Ext. B-1 order can be recovered from him. Both the Courts below found that the plaintiff was entitled to recover Rs. 742-50 with interest and decreed the suit.

4. It was argued that under Section 37 (1) of the Provincial Insolvency Act, 1920, Ext B-1 order was binding on the plaintiff even though the order of adjudication has been annulled and that he can recover only Rs. 57 as found by the Receiver in Ext. B-1. Section 37 of the Provincial Insolvency Act is as follows:—

"Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore, done, by the Court or receiver, shall be valid, but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such condition (if any) as the Court may, by order in writing, declare"

It is clear from Section 33 that all the creditors have to tender proofs of their

claims to the Receiver and he has to admit or reject the proofs. Under Section 46, what can be recovered by the estate of the insolvent is what is due after setting off the claims due from the insolvent. Section 80 of the Act reads as follows:

"(1) The High Court, with the like sanction, may from time to time direct that, in any matters in respect of which jurisdiction is given to the Court by this Act, the Official Receiver shall, subject to the directions of the Court, have all or any of the following powers, namely—

(b) to frame schedules and to admit or reject proofs of creditors;

x x x x x
(2) Subject to the appeal to the Court provided for by Section 68, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the Court".

5. The short question for consideration is whether Ext. B-1 order is an 'act' within the meaning of Section 37 of the Act.

6. In *Brandon v. McHenry*, 1891-1QB 538 it was held construing the corresponding section of the English Bankruptcy Act, 1869 that when a proof in bankruptcy is rejected by the trustee, and the bankruptcy is subsequently annulled, the rejection of the proof remains valid and that the amount sought to be proved cannot be recovered. Lord Esher M. R. said:

"It seems to me that the rejection of a claim by the trustee is an act done by him within the meaning of the section, and therefore, such rejection holds good after the annulment of the bankruptcy"

7. In "the Law of Insolvency in India", by D. F. Mulla, 2nd Edition, at page 335, it is observed:

"At the same time if a proof was rejected by the Official Assignee or Official Receiver, the creditor cannot, after annulment, enforce the claim, the rejection of the proof being an "act" done by the Official Assignee which is not nullified by the annulment".

8. Mr. Venkiteswara Iyer appearing for the respondent submitted on the strength of the rulings in *Bank of Chettinad v. Saw Yu Bhan*, AIR 1935 Rang 498, *Official Receiver v. Succaram*, AIR 1935 Rang 328; *Md. Hussain v. Md. Rowther*, AIR 1953 Mad 620 and *Daw Hnit v. Anamalai Chettiar*, AIR 1938 Rang 335 that an order passed by the Court settling a list of the creditors is not an 'act' done by Receiver or Court within the meaning of Section 37 of the Provincial Insolvency Act. I do not think that these rulings go to the extent of deciding the question that rejection or admission of proof by the Official Receiver is not an 'act' done by him

within the meaning of Section 37 of the Act.

9. In AIR 1935 Rang 498 it was observed:—

"Any order setting aside a transfer under either of these sections presupposes an existing insolvency, and as a matter of fact, at the present moment, there is no existing insolvency upon which an order in favour of the receiver or the scheduled creditors as such can be based. The receiver has ceased to exist. The schedule of creditors is waste paper and all the creditors of the insolvents have reverted to their original position as plain creditors and are no longer scheduled creditors in the insolvency. The annulment of the insolvency dates back to the date on which the order of adjudication was passed. The whole insolvency had become null and void. The question of subsequent *res judicata* is not one with which we are primarily concerned."

10. In AIR 1935 Rang 328 it was held:—

"Therefore, the words 'all acts theretofore done' mean all acts done with a view to making sales and dispositions of property, including the setting aside of transfers made by the insolvent with a view ultimately of making sales of the property so recovered for the benefit of the estate in his hands and therefore, ultimately for the benefit of the creditors even though the actual final disposal of the property has not been made on the date of the annulment of the adjudication and therefore, the date on which the receiver in insolvency *qua* receiver ceases to exist".

I think, an order passed by the Insolvency Court or the Official Receiver would be an "act" within the meaning of Section 37 of the Provincial Insolvency Act. I, therefore, hold that Ext. B-1 order was an "act" of the Official Receiver, and therefore, the order would remain valid even after the annulment of the order of adjudication. If that be so, no other question will arise in this case. Under that order, the plaintiff can recover only the amount as found by the Receiver.

11. Even otherwise, the plaintiff is entitled to recover only the balance of the amount after setting off the amount due to the 1st defendant from the 3rd defendant in the same chitty. The plaintiff is an assignee of the bond and the assignment is subject to the equities which could have been claimed against the assignor. I think, an equitable set off is permissible in this case. But, it is not necessary for me to decide that question.

12. I think, the Courts below were wrong in decreeing the suit. The plaintiff is entitled only to a decree for the amount admitted by the defendants. I pass a decree for the same with interest

at 6 per cent. from the date of Ext. B-1 order upto the date of the decree and thereafter, with proportionate costs here and the Courts below. The appellants will get proportionate costs here and in the lower appellate Court.

13. The appeal is allowed to the above extent.

HGP/D.V.C.

Appeal partly allowed.

AIR 1969 KERALA 213 (V 56 C 51)

T. S. KRISHNAMOORTHY IYER, J.

Karthyayani, Appellant v. Raman and others, Respondents.

Second Appeal No. 1187 of 1964, D/- 5-4-1968, appeal from Addl. Dist. Court Trichur in A. S. No. 45 of 1964.

Evidence Act (1872), Section 108 — Presumption of death in respect of a person not heard of for seven years — There is no presumption of date of death — Onus to prove that death took place within seven years lies on person who claims a right to the establishment of which the fact is essential. (1870) LR 5 Ch 139 and AIR 1926 PC 9, Rel. on.

(Para 2)

Cases Referred: Chronological Paras

(1926) AIR 1926 PC 9 (V 13) = 53

Ind. App. 24 Lalchand Marwari v.

Mahant Ramrup Gir

2

(1899) ILR 23 Bom 296, Rango Balaji

v. Mudiappa

2

(1870) LR 5 Ch 139=18 WR 303, In

re Phene's Trusts

2

K. Chandrasekharan, T. Chandrasekhara Menon; C. Sankara Menon and P. Kesavan Nair, for Appellant; T. S. Venkiteswara Iyer and R. C. Plappilly, for Respondents Nos. 1 and 2.

JUDGMENT :— The question raised in the second appeal is whether the decree in O. S. 91 of 1953 filed by the second defendant against Sankaran and the first defendant is valid and binding on the plaintiff items which belonged to Sankaran. O. S. 91 of 1953 is a suit to enforce a mortgage executed by Sankaran. The plaintiff is the daughter of Sankaran. The mortgage was executed by Sankaran in 1122 to the second defendant, and immediately thereafter he left for Ceylon and according to the plaintiff he was not heard of thereafter and there is therefore, a presumption under Section 108 of the Evidence Act that he is dead. Though the learned Munsiff accepted the plea of the plaintiff the learned Judge overruled the same. The suit in O. S. 91 of 1953 was filed on 11-2-1953 and the decree therein is dated 19-5-1953. In execution of the decree the property was sold and purchased by the second defendant who subsequently

transferred the same to defendants 3 and 4 for the benefit of the first defendant.

The sale certificate is Ext. P-10 dated 4-11-1954 and the delivery receipt is Ext. P-11 dated 24-11-1954. The learned Judge took the view that though under S 108 of the Evidence Act there is a presumption that Sankaran is dead there is no presumption regarding the date of his death and the burden is upon the plaintiff to prove that Sankaran was dead on the date of the suit or on the date of the Court sale and that plaintiff has not discharged the burden. The view taken by the Court below is unexceptionable. In Sarkar on Evidence (Eleventh edition), page 932, it is observed.

"If a person is not heard of for seven years there is a presumption of the fact of death at the expiration of seven years but the exact time of death is not a matter of presumption but of evidence and the onus of proving that death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption that death took place at the close of seven years".

2. In Lalchand Marwari v. Mahant Ramrup Gir, 53 Ind. App 24 = (AIR 1926 PC 9) the Privy Council observed thus:

"Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England, (Rango Balaji v. Mudiappa, (1899) ILR 23 Bom 296 and searching for an explanation of this very persistent heresy, their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trusts* (1870) LR 5 Ch 139) run as follows:—

"If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

Following these words, it is constantly assumed—not perhaps unnaturally—that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This, of course, is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more

accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one 'of not less than seven years'".

3. It is seen from Ext. P-2 that Sankaran was alive in 1949. The filing of the suit and the Court sale were all before the expiry of 7 years from the date of Ext. P-2. In these circumstances, the view taken by the Court below is correct. The Second Appeal is dismissed but without costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 KERALA 214 (V 56 C 52)

M. U. ISAAC, J.

Narayani Amma, Appellant v. Bhaskaran Pillai and others, Respondents.

Second Appeals Nos. 1569 of 1964 and 161 of 1965, D/-23-5-1968, appeal from Dist Court, Kottayam in A. S. No. 450 of 1963

(A) Civil P. C. (1908), O. 32, R. 4 (1) — Suit by next friend — Person who has no interest in the benefit of minors cannot maintain.

A person who has no interest at all in the benefit of the minors and who has been put forward by another person for achieving his own objects is not entitled to act as a next friend of the minors and maintain a suit in the name of the minors. AIR 1961 Mad 345, Foll.

(Para 13)

No person has a right to act as a next friend of a minor, and institute a suit for the minor, by reason of the mere fact that he is not of unsound mind, he is a major, and he has no adverse interest to the minor. Rule 4 (1) contains only an enabling provision. Unsound mind, non-attaining of majority and adverse interest are disqualifications, which prevent a person from acting as next friend of a minor. Absence of these disqualifications does not give him the right to act; but it only qualifies him to act. Whether a person can be permitted to act as next friend of a minor is a matter to be decided by the Court; and the decision must depend upon the sole question whether it is a bona fide action instituted for the benefit of the minor. Thus if the competency of a next friend is questioned, it is the duty of the Court to enquire whether the action has been instituted by him bona fide and for the benefit of the minor. If the Court finds that it is not so, the action must be dismissed on that sole ground. If the suit instituted by a next friend is against the minor's own parents, very strong grounds should be made out for permitting him to maintain

the suit. Case law discussed.

(B) Transfer of Property Act (1882), Section 5 — Family settlement — What constitutes. (Paras 13, 15)

A family settlement is only an agreement by the members of the family to divide and hold the family properties separately in accordance with the agreement; and if the agreement is supported by consideration, and is not invalidated by any vitiating circumstance, it would be a valid settlement. The inclusion of properties which do not belong to the family or junction of persons who are not members of the family does not by itself invalidate the settlement. Case law discussed. (Para 9)

(C) Contract Act (1872), Section 138 — Possession of care-taker — It is possession of principal.

A care-taker is only an agent. An agent holds the principal's property only on behalf of the principal. The agent has no possession of his own. What is called a care-taker's possession is the possession of the principal. (Para 6)

(D) Transfer of Property Act (1882), Section 8—Transaction contained in more than one document between the same parties — Documents must be read and interpreted together. 1912-1 Ch 735 and AIR 1965 SC 1856 Rel. on. (Para 8)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1856 (V 52) = 1965) 3 SCR 318, Chattanatha Karayalar v. Central Bank of India 8

(1961) AIR 1961 Mad 345 (V 48) = 74 Mad LW 41, Velayudhan Pillai v. P. P. Narayana Pillai 113

(1960) AIR 1960 Madh Pra 73 (V 47) = 1960 Jab LJ 348, Tulsiram v. Shyamalal 114

(1957) AIR 1957 Pat 260 (V 44), Ramchandrar Singh v. Gopi Krishna 114

(1955) AIR 1955 SC 481 (V 42) = (1955) 2 SCR 22, Sahu Madho Das v. Mukand Ram 9

(1950) AIR 1950 Bom 307 (V 37) = 52 Bom LR 394, Santosh Kumari v. Chimanlal 115

(1943) AIR 1943 All 101 (V 30) = ILR 1943 All 411 (FB), Dasodia v. Gaya Prasad 9

(1940) AIR 1940 Bom 58 (V 27) = ILR (1940) Bom 135, Ratanchand v. Jasraj 114

(1934) AIR 1934 Mad 73 (V 21) = 65 Mad LJ 841, Chikkanna Chetty v. Dhanakoti N. Chettiar 114

(1912) 1912-1 Ch 735 = 81 LJ Ch 457, Manks v. Whiteley 8

S. A. No. 1569 of 1964: V. G. Sankaranarayana Pillai and C. N. Raghavan Nair, for Appellant; K. N. Narayanan Nair, G. P. Panicker, N. Sudha-

karan, for Respondents Nos. 1 to 7, T. R. Achutha Warriar, A. N. Sreedharan Pillai for Respondents Nos. 8 to 16 and 19; P. K. Kesavan Nair, K. N. Narayana Pillai and N. Govindan Nair, for Respondent No 17.

S. A. No. 161 of 1965:

N. Govindan Nair, P. K. Kesavan Nair and K. N. Narayana Pillai, for Appellant; V. G. Sankaranarayana Pillai, for Respondent No. 18.

JUDGMENT:— These appeals arise out of O. S. No. 294 of 1960 on the file of the Munsif's Court, Kanjirapally. S. A. No. 1569 of 1964 is by the 12th defendants and the other appeal is by the 10th defendant. The plaintiffs are eight minors; and the suit was instituted by one Madhavan Pillai, who is an uncle of the 1st plaintiff, as next friend of the minors. Defendants 2 to 8 and the 1st plaintiff are the children of the 1st defendant. The next friend, Madhavan Pillai, and the 10th defendant are brothers of the 1st defendant. Plaintiffs 2 to 4 are the children of the 5th defendant; and plaintiffs 5 to 8 are the children of the 3rd defendant. They belong to the Nayar community, and are governed by the Travancore Nayar Act 2 of 1100. The main relief claimed in the suit is a declaration of the title and possession of the plaintiffs' tarwad for the two items of immovable properties described in the plaint schedule. Item No. 1 is a garden land in Sy. No. 404/1, 2 and 4 in Cheruvally Village, Kanjirapally Taluk, having an area of 1.40 acres. Item No. 2 is a one-third share in a residential building situate in the adjoining land bearing Sy. No. 404/3 in the same village.

2. The allegations in the plaint, in so far as they are relevant for the decision of these appeals, are the following. The plaint properties belonged to the 1st defendant's tarwad. There was partition in the tarwad in 1102 as per Ext. P-1. In that partition, the 1st defendant's tavazhi got these properties; and accordingly, they belonged to the tarwad consisting of defendants 1 to 9 and the plaintiffs. As the 1st defendant and her children were residing far away from the properties, and as her mother, Gouri Amma, had not sufficient means for livelihood, she was allowed to take the income of the first item of the plaint properties. Gouri Amma was also residing in the building mentioned as item No. 2. She was taking the income with the help of the 10th defendant; and after her death in 1132, the 10th defendant has been continuing his possession of item No. 1 as a care-taker. The land in which the building mentioned as item No. 2 is situate along with a one-third share in the said building fell to the share of one Meenakshi Amma under the partition, Ext. P-1.

The 11th defendant, who is the 10th defendant's wife, purchased the said land and the one-third share in the building from Meenakshi Amma. Accordingly, defendants 10 and 11 have been residing in the said building. In 1950, defendants 1 and 2 along with others executed a deed of gift, Ext. D-2, giving the plant properties and other properties to the 3rd defendant and her husband. Ext. D-2 was executed on the assumption that the plant properties belonged to defendants 1 to 3. As per Ext. D-4 dated 5-10-1960, the 3rd defendant and her husband sold the first item to the 12th defendant. Neither the 3rd defendant and her husband nor the 12th defendant have got possession of the properties as per Ext. D-2 or Ext. D-4. These transactions were not for any tarwad necessity, nor supported by consideration. They are, therefore, invalid and not binding on the plaintiff's tarwad. On the above allegations, the plaintiffs prayed for—

(a) declaration of title and possession of the plaintiff's tarwad to the plant properties,

(b) demarcating the boundary of the first item from the land lying on the eastern side,

(c) an injunction against the 12th defendant from reducing to his possession the first item, and against the 10th defendant from permitting any other person to take possession of the said property; and

(d) relieving the 10th defendant of his rights in the first item as care-taker thereof.

The plaint was subsequently amended, by which the plaintiffs prayed for the additional reliefs of setting aside Exts. D-2 and D-4 and recovery of possession of the first item from the 12th defendant with mesne profits at the rate of Rs. 50 per year, in case it was found that he was in possession of the said property.

3. The suit was contested by all the defendants, except the 11th. Defendants 1 to 9 filed a joint written statement and the 3rd defendant also filed a separate written statement. The contentions of defendants 1 to 9 and 12 are common. I shall briefly state their contentions. The 1st plaintiff is residing with and is being looked after by his parents; and his father, who is a Vakil practising at Shertallai, is the guardian of the 1st plaintiff. Similarly plaintiffs 2 to 4 and 5 to 8 are residing with and are being looked after by their respective parents; and their fathers are their guardians. The 3rd defendant and her husband along with their children plaintiffs 5 to 8, are residing far away from the plant properties, and it was not possible to manage them. Hence they wanted to sell the said properties; but the 10th defendant, taking undue advantage of the above

situation and the fact that he was living in the house mentioned in item No. 2, planned to purchase the said properties for a very cheap price. The 3rd defendant and her husband sold the first item alone to the 12th defendant for a much higher price.

The 10th defendant got offended and infuriated, and he attempted to trespass and forcibly take away the income from the said property. Thereupon, the 12th defendant complained to the police; and the police started proceedings against the 10th defendant and his companions under Section 107, Criminal Procedure Code, for security for keeping the peace. Madhavan Pillai, who has instituted this suit as next friend, is a brother of the 10th defendant. The friend is a pauper, and a person hired by the 10th defendant for instituting this suit to save him from the above proceedings. The next friend has no concern with the minors; and the suit is detrimental to their interest. He is not, therefore, entitled to institute this action for the minors. Regarding the tarwad partition, Ext. P-1, they contended that defendants 1 to 3 got the plant properties to their individual shares, and that they did not form a tavazhi under the said partition. Hence the tarwad consisting of defendants 1 to 9 and the plaintiffs had no right in the said properties, and defendants 1 to 3 are the absolute owners thereof.

Regarding the deed of gift, Ext. D-2, they contended that it was executed as part of a family settlement, along with Ext. D-1, a deed of settlement, and that it was valid, even if the plant properties belonged to the tarwad. It was also contended by them that under the partition deed, Ext. P-1, Meenakshi Amma had only a one-sixth right in the building mentioned in the second item of the plant schedule, that the 11th defendant has got only the said right, and that the remaining five-sixth share in the building was owned by the 3rd defendant and her husband as per Ext. D-2. They further contended that the 10th defendant was not a care-taker of the first item at any time, that he had no manner of a right in the said property, and it was in the possession of the 12th defendant pursuant to the sale deed, Ext. D-4.

4. The 10th defendant supported the plaintiffs' case that the plant properties belonged to the tarwad consisting of defendants 1 to 9 and the plaintiffs, and that Exts. D-2 and D-4 were invalid. But he claimed that the first item was given to him by the 1st defendant and others on oral lease in 1113, that he has been holding it thereafter as a lessee, that he had effected valuable improvements therein, and that he was not liable to be evicted therefrom.

5. Several issues were framed by the trial Court; but it is not necessary to refer to them. The main points which arose for decision were—

1. Whether Madhavan Pillai was competent to institute the suit as next friend of the minor plaintiffs.

2. Whether, under the partition deed, Ext. P-1, the plaint properties were given to the shares of defendants 1 to 3 individually, or to the share of the 1st defendant's tavazhi.

3. Assuming that the plaint properties belonged to the tavazhi of the 1st defendant, whether Ext. D-2 is valid as part of a family settlement; and

4. Whether the 10th defendant has got any right in the plaint properties.

In the course of the suit, the 1st plaintiff attained majority; and on 7-9-1962 he filed an affidavit supporting the contentions of defendants 1 to 9, and stating that the suit was detrimental to the interest of the minors, that it was filed at the instance of the 10th defendant, and that the suit should be dismissed. Notice was given to all parties on the affidavit; but no action was taken by the trial Court in that matter. The trial Court decided all the above points in favour of defendants 1 to 9 and 12, and dismissed the suit with costs. Madhavan Pillai, acting as next friend of plaintiffs 2 to 8, filed an appeal in the District Court, Kottayam; and the 10th defendant filed a cross-objection. The learned Additional District Judge did not consider the first point; and he reversed the findings of the trial Court on the second and third points. Regarding the 10th defendant's claim, he concurred with the trial Court in holding that the lease set up by the 10th defendant was untrue; but he held that the 12th defendant did not get possession of the first item of the plaint properties pursuant to Ext. D-4, and that the 10th defendant was in possession of the same as a care-taker. In the light of the above findings, he allowed the appeal with costs, granting plaintiffs 2 to 8 all the reliefs sought for in the plaint, except recovery of possession of the first item with mesne profits from the 12th defendant. The cross-objection of the 10th defendant was also dismissed.

6. The appeal filed by the 10th defendant can be easily disposed of. Both the Courts have concurrently disbelieved his case of lease. The trial Court held that the 12th defendant was in possession of the property, while the lower appellate Court held that the 10th defendant was in possession of the same, as caretaker. Under law it means that he was only an agent. An agent holds the principal's property only on behalf of the principal. The agent has no possession of his own. What is called a caretaker's possession is the pos-

session of the principal. I should therefore, clarify the position, and hold that the 10th defendant had no possession of the property at any time. Admittedly, a receiver was appointed for the first item of the plaint schedule properties by the Executive First Class Magistrate, Devikulamp and he is in possession of the said property. He should restore possession of the property to the rightful owner.

7. I shall now consider the question whether the plaint properties were allotted to the tavazhi of the 1st defendant or to defendants 1 to 3 individually under the partition of 1102. The properties partitioned as per Ext. P-1 were the properties which belonged to the tavazhi of Gouri Amma, the mother of the 1st defendant. At that time, defendants 2 and 3 were the only children of the 1st defendant; and they were minors. There were also other minor members in the tavazhi. Ext. P-1 clearly states that the plaint properties were allotted to the share of the 1st defendant and her children, the 2nd and 3rd defendants. In the scheme of the partition, the 1st defendant and these two minor children formed a tavazhi. Nothing was given to them separately or individually as it was done in the case of some of the other persons, who are parties to Ext. P-1. The learned Additional District Judge has fully considered this question. The learned counsel for the appellant also did not seriously challenge the correctness of the finding of the lower appellate Court on this point. I hold that the plaint properties vested in the tavazhi of the 1st defendant under Ext. P-1.

8. The next question for consideration is whether Ext. D-2 is valid as part of a family settlement. Ext. D-1 is a deed of settlement executed by the 1st defendant and her husband, Padmanabha Pillai, settling the properties mentioned therein in favour of defendants 2 and 4 to 9 and the 1st plaintiff. These properties consist of 29 items of immovable properties, which were given to the 1st defendant by Padmanabha Pillai as gift and were accordingly in the possession and enjoyment of the 1st defendant and her children, 7 items of immovable properties belonging to Padmanabha Pillai, and all the movables belonging to the 1st defendant and Padmanabha Pillai. Ext. D-2 was executed on the same day by defendants 1 and 2 and Padmanabha Pillai in favour of the 3rd defendant and her husband. The 3rd defendant was at that time living with her husband, at a place far away from the house, wherein defendants 1 and 2 and 4 to 9 and the 1st plaintiff were residing.

The properties given to the 3rd defendant and her husband under Ext. D-2 consist of the plaint properties, a garden land having an extent of 3.15 acres and

belonging to Padmanabha Pillai, and another garden land having an extent of 70 cents and belonging to the 1st defendant, and also the rights under a decree obtained by Padmanabha Pillai, Ext. D-1 refers to Ext. D-2; and Ext. D-2 refers to Ext. D-1. It is clear from the terms of these documents that they evidence an arrangement agreed to by all the persons who are parties thereto, and that they were executed to give effect to that arrangement. The principle is well established that if a transaction is contained in more than one document between the same parties, they must be read and interpreted together. In *Manks v. Whitely* 1912-1 Ch 735 Moulton L. J. stated:

"Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole". The above passage was quoted with approval by the Supreme Court in *Chattapath Karayalar v. Central Bank of India Ltd.*, AIR 1965 SC 1856. Exts. D-1 and D-2 have, therefore, to be read and interpreted together.

9. I shall now consider whether Exts. D-1 and D-2 constitute a valid family settlement. In *Sahu Madho Das v. Mukandram*, AIR 1955 SC 481 the Supreme Court referred to family settlement as

"an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (Provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present".

The above statement was not intended as an exhaustive definition of a family settlement. A Full Bench of the Allahabad High Court in *Dasodia v. Gaya Prasad*, AIR 1943 All 101 (FB) said:

"A doubtful claim based on the allegation of an antecedent title is not essential for the validity of a family arrangement; such arrangement may bind the parties to it if it is for the benefit of the family or for the maintenance of peace and harmony and the avoidance of future discord or for the preservation of the property. But there must be some kind of consideration before an agreement in respect to the division of family property

can be held to be a valid family arrangement".

Exts. D-1 and D-2 related to properties which belonged to the tavazhi of the 1st defendant and properties belonging to the 1st defendant and Padmanabha Pillai. Thus properties which did not belong to the tavazhi and persons who were not members of the tavazhi have come into the transaction. It was contended that a family settlement is a settlement of the family or tarwad properties among its own members, and that a settlement which takes in other properties and brings in other persons is not a family settlement. I have not been referred to any authority in support of the above contention. I do not also think that it can be sustained on any principle. A family settlement is only an agreement by the members of the family to divide and hold the family properties separately in accordance with the agreement, and if the agreement is supported by consideration, and is not invalidated by any vitiating circumstance, it would be a valid settlement. I do not find any reason why the inclusion of properties which do not belong to the family or junction of persons who are not members of the family should by itself invalidate the settlement.

In the instant case, Padmanabha Pillai and the 1st defendant have not taken any benefits under Ext. D-1 or D-2. They have brought in large extent of valuable properties of their own, and made them available by way of gift for settlement among the members of the tavazhi. The 1st defendant also surrendered all her rights in the tavazhi properties. Hence, there is no scope for any complaint on this account. Ext. D-2 is styled as a gift deed, and it is in favour of the 3rd defendant and her husband. Ext. D-1, though it is styled as a deed of settlement, is drawn up in the form of a gift deed. I have already held that these two documents were executed to give effect to a family arrangement, and that they have to be read and construed together. Thus construed, neither of them is a deed of gift. Under Ext. D-1, defendants 2 to 9 and the 1st plaintiff got absolutely to themselves 2 items of immovable properties, which belonged to the tavazhi of the 1st defendant, by getting them released of the rights of the 1st and 3rd defendant therein.

They also got other 7 items of immovable properties which belonged to Padmanabha Pillai, and all movable belonging to him and the 1st defendant. It was in consideration of this conveyance that they surrendered their rights in the plaint schedule properties, which are given to the 3rd defendant and her husband as per Ext. D-2. Under Ext. D-2, the 3rd defendant and her husband got

In addition to the plaint schedule properties, two other valuable items of immovable properties, and also the rights under a Court decree. In consideration of this conveyance, the 3rd defendant surrendered her rights in the 29 items of immovable properties, which belonged to the 1st defendant's tavazhi and included in Ext. D-1. Exts. D-1 and D-2 are thus mutually supported by consideration. These documents, therefore, constitute a valid family settlement.

10. It is also evident from what I have stated above that the consideration for Ext. D-1 proceeded from defendants 2 to 9 and the 1st plaintiff, while the consideration for Ext. D-2 proceeded from the 3rd defendant. It can also be said that the large extent of properties which were given as gift by the 1st defendant and Padmanabha Pillai as per Exts. D-1 and D-2 also formed part of the consideration for the settlement evidenced by these documents. The point to be noted is that no consideration has proceeded from the husband of the 3rd defendant. He is not a member of the tavazhi; and he cannot derive any rights in the tavazhi properties under the family settlement. He is not a party to this suit and hence the question whether he would derive any rights in the plaint properties under Ext. D-2 cannot be decided in this action. There is no case, and it was not contended, that Ext. D-2 is bad, because the conveyance thereunder is also in favour of the 3rd defendant's husband. The transaction was not attacked on this ground.

11. The fact that Exts. D-1 and D-2 constitute a valid settlement only means that it is binding on the parties to the settlement. The question whether it is binding on the tarwad and whether it can be set aside by the minor members of the tarwad depends on entirely different considerations. All the major members of the tarwad are parties to or have accepted the settlement. All the minor members who subsequently attained majority have also accepted the transaction. Under these circumstances, there would be a presumption that the transaction was beneficial to all the members of the tarwad; and it cannot be set aside unless it is established that it was detrimental to the interest of the minors. There is no such case for the plaintiffs 2 to 8. Apparently it was a very beneficial arrangement for all the members of the tarwad. The whole attack against Ext. D-2 was on the assumption that it was an outright gift of the whole tarwad properties by two members of the tarwad in favour of another member and her husband.

This, as I have held, is not the true character of the transaction. Ext. D-2 was only part of a family settlement; and hence the objection raised by plaintiffs 2

to 8 to the validity of Ext. D-2 falls to the ground. There are also other difficulties for plaintiffs 2 to 8 to succeed in this action. In the first place, as Exts. D-1 and D-2 constitute a family settlement, it is not possible to set aside Ext. D-2 without Ext. D-1 also being set aside. Both of them would stand or fall together.

Secondly, the conveyance under Ext. D-2 is in favour of the 3rd defendant and her husband; and it relates to the plaint properties and other properties. The 3rd defendant's husband is not a party to the suit; and the validity of Ext. D-2 cannot be adjudicated behind his back. Thirdly, under the family settlement effected by Exts. D-1 and D-2, defendants 3 and 5 have conflicting interests. There is no case that plaintiffs 5 to 8 do not get the plaint properties as children of the 3rd defendant. So the interest of the 3rd defendant and plaintiffs 5 to 8 is to uphold Ext. D-2, under which they got the whole of the plaint properties. It is only plaintiffs 2 to 4, the children of the 5th defendant, who can be interested in questioning the validity of Ext. D-2. Thus the plaintiffs 2 to 8, who have joined in this action, have conflicting interests in the relief asked for in respect of Ext. D-2.

12. Ext. D-4, the sale deed in favour of the 12th defendant relating to the first item of the plaint properties, has been sought to be set aside on the ground that Ext. D-2 was void, and that the 3rd defendant and her husband had no right therein. Therefore, if plaintiffs 2 to 8 do not succeed in setting aside Ext. D-2, they must fail in setting aside Ext. D-4 also. It may be open for plaintiffs 5 to 8 to assail Ext. D-4 on the ground that Ext. D-4 is not supported by tarwad necessity. They have no such case in the plaint. On the other hand, the 3rd defendant has pleaded that Ext. D-4 was executed for proper consideration and tarwad necessity. She has also let in evidence in support of that plea. This question was not considered by the Courts below, as Ext. D-4 was not attacked on such a ground. The plaintiffs cannot, therefore, succeed in getting Ext. D-4 set aside.

13. There is an important question raised in this case; and it relates to the competency of the next friend to maintain this action on behalf of plaintiffs 2 to 8. It was submitted on his behalf that, in the absence of a guardian appointed or declared by a competent authority, any person who is of sound mind and has attained majority is entitled to act as next friend of a minor, provided that his interest is not adverse to that of the minor. Reliance was made on sub-rr. (1) and (2) of Rule 4 in Order 32 of the Civil P. C. They read as follows:—

"4. Who may act as next friend or be appointed guardian for the suit.—(1) Any

person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the Interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

The learned counsel also relied on the following observation of Rajamannar C J in *Parameswaran Pillai Velayudhan Pillai v Parameswaran Pillai Narayana Pillai*, AIR 1961 Mad 345.

"Undoubtedly any person who is of sound mind and has attained majority may act as next friend of a minor or lunatic for the suit, provided that the interest of that person is not adverse to that of the minor or the lunatic".

I respectfully agree with the above observation, which is only a statement of the provision contained in O 32, R. 4 (1) of the Civil Procedure Code. But the question for decision in the instant case is whether a person, who has no interest at all in the benefit of the minors and who has been put forward by another person for achieving his own objects, is entitled to act as a next friend of the minors, and maintain a suit in the name of the minors. It appears to me that no person has a right to act as a next friend of a minor, and institute a suit for the minor, by reason of the mere fact that he is not of unsound mind, he is a major, and he has no adverse interest to the minor. Rule 4 (1) contains only an enabling provision. Unsound mind, non-attaining of majority and adverse interest are disqualifications, which prevent a person from acting as next friend of a minor. Absence of these disqualifications does not give him the right to act, but it only qualifies him to act. Whether a person can be permitted to act as next friend of a minor is a matter to be decided by the Court; and the decision must depend upon the sole question whether it is a bona fide action instituted for the benefit of the minor.

14. Order 32 of the Civil Procedure Code has been enacted for the protection of the interest of minors. (Vide the decision of the High Court of Patna in *Ramchandrar Singh v. Gopi Krishna*, AIR 1957 Pat 260 and of the High Court of Madhya Pradesh in *Tulsiram v. Shyam Lal*, AIR 1960 Madh Pra 73) It would be an abuse of the statutory protection, if a person

who has no interest in the minor and who is not concerned with his benefit, is permitted to institute suits in the name of the minor for achieving that person's own object, or serving the interest of others. The law allows two occasions for a minor to institute an action. One is during the period of his minority; and the other after he has attained majority. In the first case, the action has to be instituted by a next friend. The obvious advantage in allowing a minor to institute a suit during his minority is that much of the evidence, which would be available if the action were instituted soon after the cause of action arose, would be lost if he were to wait to institute it, after attaining majority. Failure to institute the action during the minority does not bar the remedy. He can institute the action after attaining majority within the period allowed by the law of limitation.

At the same time, the institution of a suit by a next friend involves the minor in serious consequences. After he attains majority, he has to elect whether the suit is to be continued or not. If he elects to abandon the suit, he has to pay all the costs incurred by the next friend, as well as the costs of the opposite party, unless he satisfies the Court that the institution of the suit by the next friend was unreasonable or improper. (Vide the decisions of the High Court of Madras in *Chikkanna Chetty v. Dhanakoti Narayana Chettiar*, AIR 1934 Mad 73 and of the High Court of Bombay in *Ratanchand v. Jasraj*, AIR 1940 Bom 58) If the suit happens to be decided against him during his minority, the decree is binding on him, irrespective of the question of negligence or inaction on the part of the next friend in prosecuting it. The minor can have the decree set aside only by another suit, in which he has to prove gross negligence of the next friend in the conduct of the earlier suit.

15. A minor has no volition of his own. He can act only through the next friend. A minor who is a party to a suit is considered to be under the protection of the Court; and it is consequently the duty of the Court to watch his interests vigilantly, and to see that he is represented by a fit and proper person. If a person, not subject to any of the disqualifications mentioned in O. 32 of the Civil P. C., has got the unfettered right to institute an action in the name of any minor as his next friend, an unscrupulous person may institute a suit as next friend of a minor against the minors own parents, though the minor may be living with the parents and the parents may be acting in all possible respects for the benefit of the minor. Similarly joint families and tarwads may also be dragged into litigations in the name of minors by strangers, who have no interest in the

minors and whose sole interest may be the ruination of the family or the tarwad, or the wreaking of vengeance against anyone of its members. This would be a calamitous situation. It would not only defeat the statutory protection given to a minor under O. 32 of the Civil P. C., but it would also enable an unscrupulous person to drag many happy families into frivolous and vexatious litigations in the name of innocent minors and create discord and disruption.

I have no doubt that this is not the correct legal position. In my view, if the competency of a next friend is questioned, it is the duty of the Court to enquire whether the action has been instituted by him bona fide and for the benefit of the minor. If the Court finds that it is not so, the action must be dismissed on that sole ground. If the suit instituted by a next friend is against the minor's own parents, very strong grounds should be made out for permitting him to maintain the suit. Normally, nobody can have better interests in the children than their own parents. The following observations contained in the judgment of Bhagwati J. in Santosh Kumari v. Chimanlal AIR 1950 Bom 307 support my view. The learned Judge said:

"If it was the case of the respondent that the minor's name was being bandied about or used with some ulterior motives or objects of the next friend himself and the proceedings taken by the next friend ostensibly in the name of the minor but really for some purposes of his own, it would have been open to the respondent to take out proceedings to have the next friend removed and on demonstrating before the Court in that behalf to have the proceedings brought to a standstill".

16. I shall now examine the position of the next friend in this litigation, and the nature of the suit. As I have already held Exts. D-1 and D-2 constitute a family settlement. Apparently it was beneficial to all the members of the tarwad. Nothing has been made out to show the contrary. All the major members of the tarwad were parties to the settlement. It was a transaction of 1950. Defendants 6, 7, 8 and 9 were minors at that time. Defendants 6, 7 and 8 became majors long before the institution of this suit. They did not question the settlement. On the other hand, they have supported it in the suit. The 1st plaintiff, who was a minor, repudiated the suit as soon as he became a major, stating that it was a mala fide action, and prayed that it may be dismissed. It is said that some of the other minor plaintiffs have also attained majority by this time. But none of them has elected to proceed with the action instituted by the next friend. The minor plaintiffs are the children of

defendants 1, 3 and 5 and their fathers are alive. The suit is vehemently contested by these defendants. The evidence shows that all the plaintiffs are residing with their parents; and that their interests are looked after as best as possible by their parents.

It is also in evidence that the 10th defendant, taking advantage of the position, that he is residing adjacent to the first item of the plaint properties and the fact that the 3rd defendant and her husband are residing far away, attempted to purchase the said property for a cheap price, but it was sold by them to the 12th defendant for a proper price, and that, thereafter, he began to commit trespass on the property, which necessitated taking security proceedings against him by the police. It is only at this juncture that the present suit has been filed; and in this suit the 10th defendant has set up a false case that he is a lessee of the said property. The next friend is the 10th defendant's own brother. He is a person who is not possessed of any means and a dependant of the 10th defendant.

His evidence shows that he is not concerned with the interest of the minors, and that he knows very little about them. It is abundantly clear that this is a litigation, which has been instituted by the next friend at the instance of the 10th defendant and really prosecuted by him, in total disregard of the interest of the minors and with the sole object of wreaking his vengeance against the members of the plaintiffs' tarwad and the 12th defendant, who purchased the property, and if possible to establish his false claim of lease to the said property. It would be an abuse of the process of Court, if the next friend and the 10th defendant are allowed to maintain this action in the name of the minor plaintiffs. I hold that the suit has been instituted mala fide, that it is not for the benefit of the minors, and that it is liable to be dismissed on that sole ground.

17. In the result, I allow S. A. No. 1569 of 1964, set aside the decree of the lower appellate Court, and restore the decree of the trial Court. Madhavan Pillai, the next friend of the minor plaintiffs, and the 10th defendant will pay the costs of the 12th defendant and of defendants 1 to 9 and the 1st plaintiff in this Court and in the lower appellate Court. Defendants 1 to 9 and the 1st plaintiff will be entitled to only one set of costs. S. A. No. 161 of 1965 is dismissed. The 10th defendant will pay the costs of this appeal to the 12th defendant. The Executive First Class Magistrate, Devikulam, will restore possession of the first item of the plaint properties to the 12th defendant with all the income collected through the receiver. MVJ/D.V.C.

Order accordingly.

AIR 1969 KERALA 222 (V 56 C 53)
T. C. RAGHAVAN AND
M. U. ISAAC, JJ.

Velliyottummel Soppai and others, Appellants v. Nadukandy Moossa and others, Respondents.

Second Appeal No. 276 of 1963, D/- 20-5-1968

(A) Limitation Act (1963), Arts. 64 and 65 — Co-owners — Adverse possession — Ouster — Inference of ouster or exclusion.

When one co-owner takes possession and continues in possession for a long time enjoying the income of the property without sharing it with the other co-owners, it is a strong circumstance indicative of, or from which an inference can be drawn, that there was ouster of the co-owners not in possession, and if other circumstances also exist in support of this, Courts will be justified in inferring ouster or exclusion. Case law discussed. AIR 1957 SC 314, Explained. (Para 13)

Ouster is a positive matter; and the hostile animus necessary to constitute ouster must also be a positive matter. It is a matter involving action. It cannot be mere inaction. If the co-owner in possession did not give a share of the income to the co-owner out of possession merely because the latter did not ask for it, then, such animus may be only a negative animus. On the other hand, if the evidence shows that even if the co-owner out of possession demanded his share the co-owner in possession would not have given him a share, then, the animus is positive, in the sense that it is indicative of an animus to exclude. For entertaining a hostile animus to oust the real owner, the person in possession need not know who the real owner is, if he has the animus to hold the property as his against the whole world including the real owner, whoever he be, known or unknown, the animus is sufficiently hostile to exclude the real owner also. (Para 14)

(B) Civil P. C. (1908), Ss. 100-101 — Question of adverse possession — It is a mixed question of fact and law — High Court can interfere if the decision of the lower Courts on this question is erroneous. (Para 14)

Cases Referred: Chronological Paras

- (1958) AIR 1958 Andh Pra 48 (V 45) = ILR (1957) Andh Pra 686, Peeran Sahib v. Pedda Jamaluddin Sahib 7, 10
(1958) AIR 1958 Ker 58 (V 45) = 1957 Ker LT 1246, E. C. Kesavan v. E. C. Mayankutty 15
(1958) AIR 1958 Madh Pra 209 (V 45) = 1958 Jab LJ 424, Ishak Ali v. Mst. Unasbi Porthahin 7, 10, 11

(1957) AIR 1957 SC 314 (V 44) = 1957 SCR 195, P. Lakshmi Reddy v. L. Lakshmi Reddy

(1956) AIR 1956 Bom 204 (V 43), Dhanji Gurja Bhallume v. Dharma Kanhu 7, 10, 11

(1953) 1953-2 Mad LJ 241 = 1953 Mad WN 473, M. Krishnayya v. M. Udayalakshammamma 7, 10

(1934) AIR 1934 PC 23 (V 21) = 61 Ind App 78 Secretary for State of India v. Debendralal Khan

(1931) AIR 1931 PC 48 (V 18) = 27 Nag LR 131, Govindrao v. Rajabai 9, 20

(1919) AIR 1919 PC 44 (V 6) = ILR 43 Mad 244, N. Varada Pillai v. Jeevarathanammal 9, 11

(1912) 1912 AC 230 = 81 LJPC 151, Corea v. Appuswamy

(1905) ILR 29 Bom 300 = 7 Bom LR 252, Gangadhar v. Parashram Bhalchandra 7, 10

(1900) 27 Ind App 136 = ILR 27 Cal 943 (PC), Radhamoni Debi v. Collector of Khulsa

(1840) 1840-3 P and D 539 = 52 RR 566, Culley v. Deod Taylorson 9, 10, 11

(1774) 1 Cowp 217 = 98 ER 1052, Fisher and Taylor v. Prosser 10, 11

V. R. Krishna Iyer and K. Raghavan Nair, for Appellants; A. Achuthan Nambiar and T. P. Kelu Nambiar, for Respondents Nos. 1 to 5, M/s. P. K. Shamsuddin and E. Ebrahimkutty, for Respondents Nos 15 to 19

RAGHAVAN, J.— The second appeal has been placed before a Division Bench by Madhavan Nair J. as our learned brother felt that the case involved a question of adverse possession fresh for this Court and as such, the expression of opinion by a Division Bench on the question was essential.

2. We shall state the essential facts to bring out the question. The nine items of properties involved in this litigation belonged to a Mahomedan by name Pakkrammar. He died in 1916 leaving his widow and children (defendants 1 to 4—the appellants being defendants 2 to 4, the children) and his father Soppai and mother Kunhoma. The parents together were entitled to a third of his estate and his wife and children were entitled to the rest. But, the wife and children took possession of all the properties Kunhoma died, and Soppai also died in 1920 leaving two sons, Pokker and Mammad, and four daughters, Avissa, Beeyumma, the fifth defendant and the sixth defendant. The plaintiffs, who sued for partition and separate possession of their 12th share in the suit items as the heirs of Soppai and Kunhoma, are the widow and children of Pokker; defendants 7 to 12 are the widow and children of Mammad; defendants 13,

14, 20 and 21 are the children of Ayissa; defendants 15 to 19 are the children of Beeyumma; and defendants 22 to 25 are the children of the fifth defendant. The 26th defendant is a person claiming a share through Ayissa's husband. Some of the defendants died and their legal representatives have also been impleaded. Barring defendants 15 to 19, all the others supported the plaintiffs; and defendants 15 to 19 supported the contesting defendants, defendants 1 to 4.

3. The contesting defendants claimed that items 7 and 8 did not belong to Pakkrammar and were acquired by them after his death. This contention was found against by both the lower Courts; and the same is reiterated in the second appeal. Defendants 1 to 4 also claimed that the decision in an earlier suit (O. S. No. 152 of 1935) was *res judicata* regarding items 1, 4 and 6, the judgments therein being Ex. B-1 (the judgment of the trial Court) and Ex. B-2 (the judgment of the lower appellate Court). The trial Court rejected this claim, but the lower appellate Court affirmed it. The memorandum of cross-objections is directed against this decision by the lower appellate Court. Defendants 1 to 4 had yet another contention regarding all the items: they contended that they perfected full title by adverse possession by holding the properties adversely for about 36 or 37 years since the death of Pakkrammar to the filing of the suit in 1953. Both the lower Courts rejected this. They have held that all the items excepting items 1, 4 and 6 are partible. The trial Court has further held that items 1, 4 and 6 are also partible, while the lower appellate Court has held that they are not partible since the decision in O. S. No. 152 of 1935 was *res judicata*.

4. We may observe, at the very outset, that some of the findings of the lower Courts cannot be seriously disputed and one of them is that since the death of Pakkrammar in 1916 defendants 1 to 4 had been in possession and enjoyment of the suit items till the filing of the suit in 1953 without sharing the income with any other sharer. The plaintiffs had a case that they received their share of the income till six years prior to the institution of the suit; but Pw. 1, the second plaintiff, admitted that nothing was received in cash and their share of the income was also utilised for the improvement of the properties. The lower Courts, as already stated, have held that nothing was paid to anybody by defendants 1 to 4. In April 1952 the plaintiffs sent Ex. A-3, the suit notice, claiming their share; defendants 1 to 4 sent Ex. 5, their reply, denying the plaintiffs' right to share; and the suit was instituted in 1953.

5. About items 7 and 8 also, though it is urged before us by Mr. Rama-

krishnan, the counsel of the appellants, that the concurrent decision of the lower Courts is erroneous, we are of opinion that these items belonged to Pakkrammar and the subsequent acquisition claimed by the appellants (Ex. B-12) was only a renewal of the earlier one by Pakkrammar with the result that these items also are properties left by Pakkrammar.

6. Then about items 1, 4 and 6. O. S. No. 152 of 1935 was a suit filed by the sixth defendant for partition and separate possession of her share in the assets of her father, Sooppi. Items 5 to 7 in that suit were items 1, 4 and 6 in the present litigation. All the heirs of Sooppi were parties to that suit; and defendants 1 to 4 were also impleaded. The father of the plaintiffs (Pokker) was the first defendant and defendants 1 to 4 were defendants 13 to 16. The trial Court held (vide Ex. B-1) that the items belonged to Sooppi and they were available for partition. Defendants 1 to 4 took up the matter in appeal; and the appellate Court held (vide Ex. B-2) that these items belonged to them in their own right and did not form part of the estate of Sooppi. The contention raised in the memorandum of cross-objections is that the earlier suit was for partition of only the self-acquisitions of Sooppi and not of the properties he obtained by succession from his son, Pakkrammar.

We do not think that there is any force in this contention. Admittedly, Sooppi had a share in these items on the death of his son and later his wife; and when it was held that these items were not the self-acquisition of Sooppi, naturally, the question whether Sooppi had any right in those items might or ought to have been raised in that suit itself. Having failed to do that, the plaintiffs or the other respondents who sail with them cannot now be heard to contend that the earlier decision is not *res judicata*. We are in agreement with the reasoning of the Subordinate Judge on this question and we confirm his decision.

7. Now we come to the main question which necessitated reference to the Division Bench by Madhavan Nair J. It was urged before our learned brother that since defendants 1 to 4 took possession of the properties left by Pakkrammar and enjoyed the same for over 36 or 37 years without paying any portion of the income to any of the other co-sharers, it must be presumed that they prescribed for full title against the others. Madhavan Nair, J. considered the decisions in *Gangadhar v. Parashram Bhalchandra*, (1905) ILR 29 Bom 300; *Maddela Krishnayya v. Maddela Udayalakshamma*, (1953) 2 Mad LJ 241; *Peeran Sahib v. Pedda Jamaluddin Sahib*, AIR 1958 Andh Pra 48; *Dhanji Girja Bhailume v. Dharma Kanhu*, AIR 1956 Bom 204, *Ishak Ali v. Mst. Unasbi*

Porthabin, AIR 1958 Madh Pra 209 and lastly, P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314. Considering the earlier cases Madhavan Nair J. observed:

"This line of decisions shows that the presumption of a co-owner's possession being on behalf of all the co-owners has an exception when the sole enjoyment of the property by a co-owner was for a pretty long time (as about 40 years)". And considering the decision of the Supreme Court in the last case our learned brother observed that since the line of cases indicated above was not noticed by their Lordships of the Supreme Court, the observations of the Supreme Court were to be read "in the context of the case—secundum subjectam materiam " and then the observations of the Supreme Court "cannot imply a disapproval of the dicta in the line of cases" cited above.

8. We have thus to consider whether the line of decisions pointed out by Madhavan Nair, J. and relied upon by Mr Ramakrishnan is an exception to the presumption that a co-owner's possession is possession on behalf of all the co-owners, if there is sole enjoyment of the property by the co-owner in possession for a pretty long time; whether the observations of the Supreme Court are only secundum subjectam materiam; and, if not, what is the legal position, if one co-owner has been in possession and enjoyment for a fairly long time without sharing the income with the other co-owners.

9. We shall at the outset extract one paragraph from the judgment of the Supreme Court already referred to, because that paragraph, in our opinion, furnishes answers for all the questions raised in this case. Paragraph 4 reads:

"Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario (see Secretary of State for India v. Debendra Lal Khan: 61 Ind. App. 78 at p. 82 = AIR 1934 PC 23 at p. 25). The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor (see Radhamoni Debi v. Collector of Khulsa, (1900) 27 Ind. App. 136 at p. 140 (PC)). But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties, it is presumed to be on the basis of joint title. The co-heir in possession cannot

render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title (see *Corea v. Appuswamy*, 1912 AC 230). It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in *N. Varada Pillai v. Jeevarathnammal*, (AIR 1919 PC 44 at p. 47) quotes, apparently with approval, a passage from *Culley v. Deo d Taylorson* (1840 3 P and D 539=52 RR 566) which indicates that such a situation may well lead to an inference of ouster "if other circumstances concur. (See also *Govind-rao v. Rajabai*, AIR 1931 PC 48). It may be further mentioned that it is well settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession".

10. Mr. Ramakrishnan has cited before us the same decisions he cited before Madhavan Nair, J. and a few others. We do not think it is necessary to refer to decisions other than those considered by Madhavan Nair, J. in the order of reference. In ILR 29 Bom 300 the facts were that the properties belonged to a Hindu father and four sons, divided in status; that two sons, Balaji and Lakshman, went abroad in 1857 and the father was in management until his death in 1881; that, thereafter, Ganesh, a grandson through another son, managed till his death in 1893 when his widow succeeded him; that she mortgaged the properties in 1899 to the defendant and she died in 1900; and that the plaintiffs, sons of Balaji and Lakshman, sued for recovery of their share in 1901. The Munsif, the Subordinate Judge and the Bombay High Court (Jenkins C. J. and Batty J.) dismissed the suit holding that the suit was barred by adverse possession.

Their Lordships referred to an earlier decision of the Bombay High Court and to two English decisions, 1840-3 P and D 539 and *Fisher and Taylor v. Prosser*, (1774) 98 ER 1052. This decision has been followed by *Venkatarama Ayyar, J.* in (1953) 2 Mad LJ 241 and by *Subba Rao, C. J.* and *Manohar Pershad J.*, AIR 1958

fulfilled here is that the amount of Rs. 12,000/- which the assessee received was paid to him out of public revenues. The other three conditions have not at all been satisfied.

5. The exemption granted by paragraph 13 (iii) is in respect of "any pension paid out of public revenues". The word "pension" signifies a periodical allowance or a stipend granted not in respect of any right, privilege, perquisite or status but on account of past services or particular merits. 'Pension is a bounty for past services. Now, it is manifest from the order dated 18th November 1943 of the Ruler of the Khairagarh State that the monthly allowance of Rs. 1000/- which was granted to the assessee by virtue of that order was not any amount of pension. As the order itself stated, the increase in the allowance of the assessee made by that order was for giving "him certain privileges, according to the customs and tradition in vogue in the State, consequent on his marriage." The allowance of Rs. 1000/- per month paid to the assessee was, therefore, nothing but a maintenance allowance granted to the assessee consequent on his marriage and in keeping with the customs and tradition of the Khairagarh State. The Income-tax Officer, the Appellate Assistant Commissioner and the Appellate Tribunal all missed the point that the amount of allowance received by the assessee was not a pension amount. They assumed that it was a pension amount.

6. Again, the amount of allowance of Rs. 12,000/- paid to the assessee was not received by him as the subordinate chief of the Ruler of the Khairagarh State. The Appellate Assistant Commissioner and the Tribunal seemed to think that the assessee was not a subordinate chief of the Ruler as he was not "next to the Ruler in point of succession and a son was born to the Ruler some time before 1st August 1949". This construction put on the words "subordinate chief" by the Appellate Assistant Commissioner and the Appellate Tribunal is altogether erroneous. As is evident from paragraph 13 of the Order, it is concerned with the grant of exemption from tax on the privy purse of the Ruler, sums received by the widow or mother of the Ruler as maintenance allowance and any pension paid to a subordinate chief of the Ruler. In construing paragraph 13 the historical circumstances in which the amounts spoken of in para 13 came to be paid to the persons concerned cannot be ignored. If those circumstances are borne in mind, it will be apparent that the words "subordinate chief of the Ruler" as used in paragraph 13 (iii) have no reference whatsoever to the blood relationship of the person claiming the status of a subordinate chief with the Ruler. A person

may not be related in any manner with the Ruler of a merged State, yet he may be a subordinate chief of the Ruler. The expression "subordinate chief of the Ruler" has its origin in the existence of a feudal system known by different names in different large Indian States as, for example, Gwalior, many States of Rajasthan and Hyderabad. Under this system the land revenue of a territory or ilaka was assigned to a Chief differently known in different States to support troop, police and for specified service. These Chiefs exercised considerable revenue, police and judicial powers and their estates were virtually States within the State: Many of these Chiefs received from the paramount State yearly amounts in perpetuity. Thus, in Gwalior State there were as many as 48 feudatory estates. Many of them received annual payments not only from the Scindia but also from the Rulers of Bhopal, Indore and Dewas. A historical account of the chiefs of the Mediatised Estates is to be found in Aitchison's "Treaties, Engagements and Sanads", volumes IV and V, as also in Sir John Malcolm's "Malwa".

7. There is no material whatsoever to show that the assessee was ever the chief of any feudatory State or estate under the suzerainty of the Rulers of the Khairagarh State. The assessee made no attempt to prove this. He relied solely on the order dated 18th November 1943 under which the Ruler of the Khairagarh State made to him the grant of a monthly allowance of Rs. 1000/-. That order on the face of it is not one indicating that the assessee was recognised as the subordinate chief of the Ruler and that the monthly allowance of Rs. 1000/- was by way of pension to him as the subordinate chief of the Ruler. The order itself shows that the monthly allowance was paid to the assessee by the Ruler merely because he happened to be the brother of the Ruler. That the amount was so paid to the assessee was admitted by the assessee himself in his letter dated 28th February 1955 to the Income-tax Officer, Nagpur (Annexure 'H' to the Statement the Case). In that letter the assessee said:

"There is no separate order passed by the State Government after the merger regarding the payment of Rs. 1,000/- per month as Political Pension (for a subordinate chief). However, I have been drawing this pension before the merger of the State out of State Revenue, and the same amount is still being paid out of the State Revenue, as allowance in the nature of Khorposh or a Political Pension, and I come within the definition of subordinate chief, being only blood-brother of the Ruler of Khairagarh, who was an heir-presumptive of the Khairagarh State till the birth of the heir apparent."

This letter plainly shows that the stand of the assessee was that the allowance of Rs 1000/- per month was paid to him because he was the blood-brother of the Ruler and further that as he was the heir-presumptive till the birth of a son to the Ruler, he was a "subordinate chief". The assessee was obviously under a mistaken impression in thinking that his blood relationship with the Ruler gave him the status of a subordinate chief. In our judgment, there is no material whatsoever to show that the amount of Rs 12,000/- which the assessee received was paid to him as the subordinate chief of the Ruler of the Khairagarh State.

8. There is also nothing to show that the amount of Rs. 12,000/- per year was payable to the assessee in the capacity of a "subordinate chief" by the Ruler immediately before 1st August 1949. Before the Appellate Assistant Commissioner the assessee produced an undated "certificate" (Annexure 'E' to the Statement of the Case) given by Shri Birendra Bahadur Singh, the ex-Ruler, saying that he, that is the Ruler, had granted an allowance of Rs. 1000/- per month by an order dated 18th November 1943 to his younger brother, the assessee, and adding that the assessee was Tazeem Sardar of the former Khairagarh State and was his subordinate chief. The certificate proceeded to say that the assessee was exempt from the provisions of the Arms Act and enjoyed other privileges "according to the Sanad granted from time to time". It was also stated in the certificate:

"The allowance was granted to him for the maintenance of his family in the proper status of his position and it was to be paid during my will and pleasure as the then Ruler of the Khairagarh State. The Income-tax Law of British India was applied to Khairagarh State during my regime mutatis mutandis but no income-tax was chargeable on his allowance."

9. Leaving aside the question whether the undated certificate was procured by the assessee from his brother just for the purpose of claiming exemption, that certificate does not advance his case in any way. The statements made therein have no bearing on the question whether the assessee had the status of a subordinate chief of the Ruler. The bare statement of the Ruler in the certificate that the assessee was his subordinate chief without any more cannot give to the assessee the status of a subordinate chief when there is no Sanad or document to support that status. It is worthy of note that the certificate itself shows that the monthly allowance which was granted to the assessee was not granted to him as a subordinate chief of the Ruler but for

"maintenance of his family in the proper status of his position".

10. For all these reasons, our conclusion is that the assessee's claim that the allowance of Rs 12,000/- received by him was exempt from tax is altogether untenable. The question referred to us is, therefore, answered in the affirmative. The assessee shall pay costs of this reference. Counsel's fee is fixed at Rs. 200/-.

Question answered affirmatively.

AIR 1969 MADHYA PRADESH 130
(V 56 C 36)

S. P. BHARGAVA

AND R. J. BHAVE, JJ

Smt. Thakurain Dulaiya, Appellant v. Shivnath Punjabi and others, Respondents.

Second Appeal No. 292 of 1965, D/- 8-1-1968, from appellate decree of Vth Addl. Dist. J., Jabalpur, D/- 25-2-1965.

(A) Houses and Rents—C. P. and Berar Regulation of Letting of Accommodation Act (11 of 1946) Ss. 6, 2 — Orders under S. 2—C. P. and Berar Letting of Houses and Rent Control Order, 1949, Cl. 12A — Validity of — Not ultra vires or unconstitutional — (Government of India Act (1935) S. 107 (2), Entry 21 List II Seventh Schedule). S. A. No. 357 of 1962 D/- 27-11-1962 (MP) and AIR 1959 Bom 93 Overruled.

Clause 12-A of the Rent Control Order 1949 is validly promulgated and is not ultra vires or unconstitutional.

(Para 6)

The Act of 1946 was enacted after obtaining the assent of the Governor General as contemplated under S. 107 (2) of the Government of India Act 1935, and as such, any provision of the Act or any order passed by the State Government in exercise of the powers under S. 2 of the Act is immune from any attack on the ground that they are in conflict with any provisions of the Central Act.

(Para 5)

Moreover the provisions of section 6 clearly indicate that the 1946 Act itself does not contravene any provision of the Transfer of Property Act, or any other Central Act. It is clearly contemplated that the orders issued under section 2 of the Act might contain such provision. It is therefore futile to say that section 2 of the Act does not authorise promulgation of any order so as to abrogate any provisions of the Central Act.

(Para 6)

Furthermore, as Cl. 12-A of the Rent Control Order in pith and substance being directed to control the regulation be-

tween landlord and tenant which is within the powers conferred on the Provincial legislature under item 21 list II seventh Schedule of the Act of 1935, the mere fact that it incidentally trenches upon other field including transfer of property, cannot render it ultra vires. The Central Act, since, incidentally trenching upon cannot change the colour or the substance of the legislation. S. A. No. 357 of 1962 D/- 27-11-1962 (MP) and AIR 1959 Bom 98 Overruled; AIR 1955 Nag 246 (FB) Foll. AIR 1947 P. C. 60 and AIR 1947 P. C. 72 Rel. on.

(Para 7)

(B) Houses and Rents — M. P. Accommodation Control Act (23 of 1955), S. 4 Cl. (e) Proviso — Protection of subletting of accommodation under—Not available to unlawful subletting.

The proviso under cl. (e) of S. 4 protects only those subtenancies which were validly created and which were with the permission of the landlord, direct or indirect. It does not, in any way, touch a subtenancy which was, in the inception, unlawful and unenforceable in law. In any case, the proviso had not the effect of making an unlawful tenancy a lawful tenancy, though under the 1955 Act no ground would have been furnished to the landlord to terminate the tenancy on the ground of unlawful subletting.

(Para 9)

(C) Evidence Act (1872), S. 115 — C. P. and Berar Regulation of Accommodation Act (23 of 1946) S. 2 — C. P. and Berar Letting of Houses and Rent Control Order 1949, Cl. 12-A—Prohibition under, to sublet accommodation except by written permission of landlord — Tenant subletting accommodation only with oral permission — Subletting is unlawful — Oral permission by landlord cannot operate as waiver of benefit of prohibition — He is not estopped from pleading that subletting is unlawful. AIR 1959 SC 689 Rel. on. (Paras 10, 11)

Cases Referred: Chronological Paras (1962) SA No. 357 of 1962 D/- 27-11-1962 (MP), Ramkishan v.

Jamuna Prasad 3, 5, 7 (1959) AIR 1959 SC 689 (V 46)=

(1959) Supp (2) SCR 217, Waman Shrinivas v. R. B. and Co. 11

(1959) AIR 1959 Bom 98 (V 46)= 1958 Nag LJ 392, Tilokchand v. Ganpatdas 4, 5, 7

(1955) AIR 1955 Nag 246 (V. 42) (FB), Balkishan v. Totaldas 4, 6

(1947) AIR 1947 PC 60 (V 34)= 74 Ind App 23, Prafulla Kumar v. Bank of Commerce, Khulna 7

(1947) AIR 1947 PC 72 (V 34)= 74 Ind App 12, Megh Raj v. Allahi Rakhia 7

R. S. Dabir, B. C. Verma, R. P. Sinha and M. R. Pathak, for Appellant; M. Adhikari and K. K. Adhikari, for Res-

pondents; P. R. Noolekar, for Respondent No. 1; S. C. Jain, for Respondent No. 2, A. P. Sen Advocate General and A. R. Choubey Govt. Advocate, for the State.

BHAVE, J.: Smt. Thakurain Dulaiya, the plaintiff-appellant, is the owner of House No. 828, Lordganj, Jabalpur, and the respondent No. 1 (defendant No. 1) is the tenant thereof at the monthly rent of Rs. 120/-. The plaintiff filed the suit, out of which this second appeal arises, for ejectment on various grounds including the ground that the defendant No. 1 had sub-let part of the premises to the defendants 2 and 3 and that the subletting being unlawful, she was entitled to eject the defendants under section 12 (1) (b) of the Madhya Pradesh Accommodation Control Act, 1961. The defendant No. 3 vacated the premises during the pendency of the suit. The defence of the defendants 1 and 2 was that the part of the premises was sublet to the defendant No. 2 at a tripartite contract between the plaintiff, the defendant No. 1 and the defendant No. 2, arrived at between the parties at Mauranipur in April 1955. It was not disputed that the contract was oral; but the submission was that it being a tripartite contract, it was not unlawful.

2. The trial Court negatived other grounds urged by the plaintiff but held that under Clause 12-A of the C. P. and Berar Letting of Houses and Rent Control Order, 1949 (hereinafter referred to as the 'Rent Control Order'), which was in force in 1955, a tenant was prohibited from sub-letting any portion of the accommodation except in pursuance of a condition in the lease-deed executed in favour of the tenant or with the written consent of the landlord; and as no written consent of the landlady was obtained in this particular case, the sub-letting was unlawful and that the plaintiff was entitled to a decree for ejectment.

3. The lower appellate Court, however, felt bound by the decision of Shiv Dayal, J. in Ramkishan v. Jamuna Prasad, SA No. 357 of 1962 D/- 27-11-1962 (MP), wherein it was held that Clause 12-A of the Rent Control Order was ultra vires and unconstitutional. In this view of the matter, it was held that the subtenancy in favour of the defendant No. 2 was not unlawful and that the plaintiff was not entitled to a decree for ejectment. The plaintiff has now come up in second appeal.

4. The decision of Shiv Dayal, J. is based on the decision of Mudholkar, J. (as he then was) in Tilokchand v. Ganpatdas, 1958 Nag LJ 392; (AIR 1959 Bom 98). The Full Bench decision of the Nagpur High Court in Balkishan v. Totaldas, AIR 1955 Nag 246 (FB) was unfortunately not brought to the notice of

Shiv Dayal, J The Full Bench decision takes a contrary view of the matter. Hence, it appears that this appeal was placed before this Division Bench for disposal.

5. Before we proceed further, it may be noted that the Rent Control Order was promulgated by the State Government in exercise of powers conferred under section 2 of the C P and Berar Regulation of Letting of Accommodation Act, 1946 (hereinafter referred to as the 1946 Act). The Act was enacted after obtaining assent of the Governor-General as contemplated under section 107 (2) of the Government of India Act, 1935, and, as such any provisions of the 1946 Act or any orders passed by the State Government in exercise of powers under section 2 of the Act must be held to be immune from any attack that they are in conflict with any provisions of the Central Act. In 1958 Nag LJ 392; (AIR 1959 Bom 98) (supra), Mudholkar, J, however, held that Clause 12-A of the Rent Control Order was repugnant to the provisions of section 108 (j) of the Transfer of Property Act. His Lordship was of the view that the subject "Transfer of Property" falls in the Concurrent List, i.e., List III of Seventh Schedule of the Government of India Act, 1935, the State Legislature, therefore, could not make any law repugnant to the provisions of the Transfer of Property Act, unless the procedure prescribed under section 107 (2) of the Government of India Act, 1935, was followed.

His Lordship observed that though assent of the Governor-General was obtained while enacting the 1946-Act, the assent could not be availed of for upholding the validity of Clause 12-A of the Rent Control Order because, even though section 2 of the 1946 Act did confer a power on the State Government to provide by general or special order for regulating the letting or subletting of any accommodation, it did not mean that the power conferred was intended to be exercised by the State Government in derogation of the provisions of any Central Act. His Lordship held that it must be presumed that when the Legislature enacted section 2 of the 1946 Act, it contemplated making by the Government of such an order as would be in conformity with the provisions of the Transfer of Property Act. It was further observed that the 1946 Act itself did not contain any provision which was repugnant to the Transfer of Property Act, and hence it could not be said that the Act authorized the State Government to promulgate any order so as to abrogate the provisions of the Transfer of Property Act. This very reasoning was followed by Shiv Dayal, J in S. A. No. 357 of 1962 D/- 27-11-1962 (MP)

(supra) In both these cases, the provisions of section 6 of the 1946 Act were not taken note of. Section 6 reads.

"Any order made or deemed to be made under S 2 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

This provision clearly indicates that though the 1946-Act itself did not contain any provision repugnant to the Transfer of Property Act or any other Central Act, it was clearly contemplated that the orders issued under section 2 of the Act might contain such provisions. It is, therefore, futile to say that section 2 of the Act did not authorise promulgation of any order so as to abrogate any provisions of the Central Act.

6. In the case of AIR 1955 Nag 246 (FB) (supra) the provisions of the 1946 Act came for consideration. On the vires of section 2 of the Act, it was held by the Full Bench:

"Section 2 cannot be impugned on the ground that it is very meagre in principle and has left the entire matter of legislation with respect to the topics specified in clauses (a) to (d) to the executive. No question of legislative competence to delegate can arise in England. There are instances of delegation even on matters of principle by the British Parliament by entrusting the executive with the power of giving meaning and content to legislation enacted in the barest outline by making orders, regulations and orders in council and the doctrine that, in legislating upon subjects committed to the care of the Indian Legislature, it could legislate in the same manner as the Parliament at Westminster could do, has now been firmly established." and as to the validity of Clauses 4 to 8, it was held

"Clauses 4 to 8 of the Rent Control Order, in so far as they are inconsistent with S 108, T P. Act, are sustained by reason of S. 6 of the C P, and Berar Act 11 of 1946 and as the Act has received the assent of the Governor-General, no question of repugnancy with the existing law arises under S 107 (1), Government of India Act, 1935, because of sub-section (2) of that section."

On parity of reasoning it must be held that Clause 12-A of the Rent Control Order is also validly promulgated and is not ultra vires or unconstitutional as held by Shiv Dayal, J. in S.A. No 357 of 1962 D/- 27-11-1962 (MP) (supra). We have already observed that the Full Bench decision was not brought to the notice of Shiv Dayal, J. We are bound by the Full Bench decision, and hence

our conclusion is that S. A. 357 of 1962 D/- 27-11-1962 (MP) (supra) does not lay down correct law. We, therefore, hold that the lower appellate Court was in error in holding that Clause 12-A of the Rent Control Order was ultra vires and unconstitutional.

7. Shri Sen, learned Advocate-General, urged that Clause 12-A of the Rent Control Order was not open to challenge for another reason also. Shri Sen urged that the 1946-Act and the Rent Control Order promulgated thereunder were enacted within the powers conferred under Item 21 of the Second List (Provincial List) of the Seventh Schedule of the Government of India Act, 1935. Item 21 deals with land, that is to say, rights in or over land, land-tenures, including relation of landlord and tenant. He urged that, in pith and substance, the above provisions are directed to control the relations between the landlord and the tenant. Incidentally, they may trench upon other fields, including transfer of property. But such incidental trenching upon could not change the colour or substance of the legislation. In support, he relied on the decisions of the Privy Council in *Prafulla Kumar v. Bank of Commerce, Khulna* AIR 1947 PC 60 and *Megh Raj v. Allah Rakhia*, AIR 1947 PC 72. In view of the Full Bench decision, we are not called upon to consider this aspect of the matter; but we may, in passing, observe that Clause 12-A of the Rent Control Order can also be held to be intra vires and constitutional on the abovesaid ground also. Shri Adhikari, learned counsel for the respondents, also very fairly conceded that he could not support the decision of *Mudholkar, J.* in 1958 Nag LJ 392 = (AIR 1959 Bom 98) (supra), as also the decision of *Shiv Dayal, J.* in S. A. No. 357 of 1962 D/- 27-11-1962 (MP) (supra).

8. This brings us to the consideration of the question as to the effect of the sub-tenancy created by the defendant No. 1 in favour of the defendant No. 2 with the consent of the landlady, though without her consent in writing. Shri Dabir, learned counsel for the appellant, urged that inasmuch as creation of such a sub-tenancy was prohibited under Clause 12-A of the Rent Control Order, no lawful sub-tenancy was created in favour of the defendant No. 2, and as such the landlady was entitled to a decree for ejection under clause (b) of sub-section (1) of Section 12 of the M. P. Accommodation Control Act, 1961. Shri Adhikari, on the other hand, urged on behalf of the respondents that the Rent Control Order was repealed by the M. P. Accommodation Control Act, 1955, and any prohibition as to subletting was withdrawn as a result of the 1955-Act. He specifically referred to Section 4 (e) which reads thus:

"4. Restrictions on eviction — No suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds:—,

(e) that the tenant has, without an express permission in the contract, sub-let the whole or any portion of the accommodation; or that he has assigned his tenancy right to another or has removed his possession therefrom.

Provided that if the accommodation had been so sublet before the commencement of this Act with the direct or indirect permission of the landlord, the tenant shall not be liable to eviction."

He urged that proviso under clause (e) made it abundantly clear that if the premises had been sub-let with the direct or indirect permission of the landlord, no ground for eviction was available to the landlord. On the finding of the lower appellate Court, the sub-tenant was inducted with the permission of the landlady, though it was not in writing. Shri Adhikari urged that though under the Rent Control Order such a sub-tenancy was invalid, the effect of Section 4 (e) of the 1955-Act was to remove that bar and to validate the sub-tenancy, which was invalid under the repealed Order. He further urged that inasmuch as under the 1955-Act such a sub-tenancy was validated, it could not be urged that the sub-tenancy could be termed as 'unlawful' under the present Act. He emphasised that the present Act does not define 'unlawful subletting'. Under the Transfer of Property Act, such a right is recognized. The prohibition contained in the Rent Control Order disappeared when that Order was repealed by the 1955-Act. That Act went further and gave protection to the tenants if they had inducted subtenants with the direct or indirect permission of the landlord, thus validating the sub-tenancies which were invalid under the old law. He, therefore, urged that even on the assumption that initially the sub-tenancy was unlawful, its character changed when the 1955-Act was enacted and it no longer remained an unlawful sub-tenancy when the present Act was enacted.

9. We find it difficult to accept the contention of Shri Adhikari. It is plain that no new contract was entered into between the defendant No. 1 and the defendant No. 2. The same contract continued even after the 1955-Act was brought into force. The proviso under Clause (a) of Section 4 protects only those subtenancies, which were validly created and which were with the permission of the landlord, direct or indirect. It does not, in any way, touch a sub-tenancy, which was in the inception unlawful and

unenforceable in law. In any case, the proviso had not the effect of making an unlawful sub-tenancy a lawful sub-tenancy, though under the 1955-Act no ground would have been furnished to the landlord to terminate the tenancy on the ground of unlawful subletting. We are therefore, of the view that the submission of Shri Adhikari is without any force.

10. Shri Adhikari, then, urged that the prohibition under Clause 12-A of the Rent Control Order was as against a tenant creating a sub-tenancy on his own, there was nothing in the said Clause to prohibit a landlord from becoming a party to the subletting, as was done in this case under the tripartite contract. We find it difficult to accept this contention. Even under the so-called tripartite contract the defendant No. 2 did not become a tenant of the landlady. The transfer was effected in his favour by the defendant No. 1, though approval to such a transfer was secured from the landlady. It is thus clear that the tenant created the sub-tenancy interest and the subtenant remained responsible to the tenant. No direct relationship between the landlady and the defendant No. 2 came into existence. The alleged tripartite contract, therefore, means nothing more than that the landlady gave her oral consent to the tenant to sublet the premises to the defendant No. 2. This was prohibited by Clause 12-A of the Rent Control Order, unless the permission was in writing. It must, therefore, be held that the sub-letting was unlawful.

11. It was also suggested that the prohibition contained in Clause 12-A of the Rent Control Order was for the benefit of the landlord and that he could have waived that benefit, and the landlady in giving explicit permission to sub-let had waived that benefit. In *Waman Shrinivas v. R. B. & Co.*, AIR 1959 SC 689 their Lordships of the Supreme Court, while considering the provisions of Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, held that the provision in Section 15 prohibiting sub-letting of premises was in furtherance of public policy. Any contract of sub-letting was, therefore, hit by Sec. 23 of the Contract Act, and in such a case the plea of waiver as against the Landlord was not available to the tenant or the sub-tenant. Their Lordships held:

"Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied. . . But an agreement to waive an illegality is void on grounds of public policy and would be unenforceable."

We must, therefore, hold that the plaintiff is not estopped from urging that the subtenancy was unlawful, though she had given her consent orally for such sub-letting.

12. In this view of the matter, our conclusion is that the lower appellate Court was in error in setting aside the decree of the trial Court. We accordingly allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court. The appellant shall get costs of this court as well as of the lower appellate Court from the defendants 1 and 2. A decree be drawn up accordingly.

13. The defendant No. 3 was also made a party on the allegation that he was also a sub-lessee of the defendant No. 1. He had, however, vacated the premises when the case was pending before the trial Court. He was made a pro forma party in the lower appellate Court as well as here. He was ex parte. We, therefore, make no order regarding costs as against him. The plaintiff's costs are to be borne only by the defendants 1 and 2. Their liability shall be joint and several.

GKC/D.V.C.

Appeal allowed.

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(V 56 C 37)

P. V. DIXIT, C. J. AND

G. P. SINGH, J.

M/s. H. M. Esufali, H. M. Abdulali Siyagunj, Indore, Applicant v. Commissioner of Sales Tax, M. P. Indore, Opp. Party.

Misc Civil Case No. 84 of 1968 D/- 2-12-1968 from order of Member, Board of Revenue, Gwalior D/- 30-3-1968

(A) Sales Tax — M. P. General Sales Tax Act, 1958 (2 of 1959), S. 19 (1) — There can be best judgment assessment under S. 19 (1) — Sales Tax — M. P. General Sales Tax Rules (1959), R. 33 (1) (2) — Evidence Act (1872), S. 3 "Proved".

It is no doubt true that neither Section 19 (1) of the M. P. General Sales Tax Act, 1958 nor Rule 33 (1) and (2) of the M. P. Gen. Sales Tax Rules 1959 provides in so many words that if a dealer does not appear or does not produce any evidence in response to a notice issued to him under rule 33(1), then the assessing authority shall assess the dealer to the best of its judgment, but from this omission it does not follow that if the dealer does not appear and show that no turnover of his escaped assessment, or that if it did, it was not of the alleged magnitude, then the assessing authority cannot make an assessment even on the basis of the escaped turnover determined by itself.

BM/BM/A365/69

Such an absurd result is really not contemplated either by section 19 (1) or by rule 33(1) and (2). If the assessment is made on the basis of the figure of escaped turnover determined by the assessing authority itself, that assessment is clearly one made by the assessing authority to the best of its judgment on the material before it. The quantum of such assessment, though not admitted by the assessee, would be one "proved in the judgment of the assessing authority", within the meaning of the Evidence Act. Thus there can be a best judgment assessment under section 19(1) of the Act. In a best judgment assessment the quantum of escaped turnover would be that which the assessing authority thinks is proved or established. In other assessments the quantum of escaped turnover would be the one which the assessing authority finds proved whether on the admission of the assessee or on the material produced at the enquiry in which the assessee has participated. (1962) 13 S. T. C. 366 (MP) Rel. on. (1965) 16 S. T. C. 54 (AP) Expl. (Paras 5, 6, 8)

(B) Sales Tax — M. P. General Sales Tax Act, 1958 (2 of 1959), S. 19—Escaped turnover for period of 19 days only proved — Authorities cannot estimate taxable turnover for entire period of the relevant year on its basis—Penalty, levy of—Basis of, under Central Act — Sales Tax — Central Sales Tax Act (1956), S. 9.

Whenever the Sales Tax Officer is required to make an estimate of the assessee's turnover, he must pay due regard to the extent of the business carried on by the dealer, the surrounding circumstances and all matters which may be of assistance in arriving at a fair and proper estimate of the taxable turnover of the dealer. The assessing authority cannot make an arbitrary estimate of the turnover without any material to support it. (Para 9A)

The estimate of taxable turnover under the M. P. Act and the Central Act made by the assessing authority for the period from 1st November 1959 to 20th October 1960 calculated on the basis of Rupees 31,171.28 as the proved escaped turnover for a period of 19 days, is altogether illegal and unjustified. In such a case, the escaped turnover proved is only Rs. 31,171.28. The assessee is liable to be assessed under both the Acts only on the taxable turnover comprised in the escaped turnover of Rs. 31,171.28. AIR 1957 Orissa 79 and AIR 1957 SC 810 and (1961) 12 S. T. C. 567 (Ker). Foll.

(Paras 10, 12)

As regards penalty the position is that under section 19 (1) of the M. P. Act the penalty that can be imposed for escaped assessment cannot exceed the amount of tax determined payable on re-

assessment. Consequently in the instant case the penalty cannot exceed the amount of the taxable escaped turnover, which could legally be computed.

(Para 13)

The effect of section 9 (3) of the Central Act is that the procedure of making an assessment, collection of tax and enforcement of payment of any tax including penalty under the Central Act is the very same procedure as laid down in the local Sales-tax Act. Therefore, the provisions contained in section 19 (1) of the M. P. Act including the provisions for the imposition of penalty for escaped assessment would apply for assessment and imposition of penalty for escaped assessment under the Central Act. It is incorrect to say that penalty could be imposed only under R. 12 of the Madhya Pradesh Sales Tax (Central) Rules, 1957, for a breach of any of the provisions of those Rules and that the said Rules did not in any way deal with escaped assessment. Thus penalty for escaped assessment under the Central Act can be imposed under section 19 (1) of the local Act, AIR 1968 Madh Pra 20 Rel. on.

(Para 14)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Madh Pra 20 = (V 55) = (1967) 19 STC 377, Commr. of Sales Tax v. Kantilal Mohanlal & Bros. 14
- (1965) 1965-16 STC 54 = ILR (1966) AP 689, State of A. P. v. Ravuri Narasimloo 7
- (1962) 1962-13 STC 366 = ILR (1960) MP 914, Commr. of Sales Tax v. Kunte Brothers 7
- (1961) 1961-12 STC 567 = ILR (1962) 1 Ker 136, Alikoya & Co. v. State of Kerala 11
- (1959) AIR 1959 Orissa 79 (V 46) = (1958) 9 STC 648, Jami Narasaya Prusty & Bros. v. State of Orissa 11
- (1957) AIR 1957 SC 810 (V 44) = (1957) 8 STC 770, Raghubir Mandal Maihar Mandal v. State of Bihar 9a, 11

M. Adhikari and A. S. Usmani, for Applicant; K. P. Munshi, Govt. Advocate, for Opposite Party.

DIXIT, C. J.: In this consolidated reference under section 44 of the Madhya Pradesh General Sales Tax Act, 1958, the questions which have been stated for our decision at the instance of the assessee are:

"1. Whether on the facts and circumstances of the case the revised assessment enhancing the taxable turnover under the State Law by Rs. 2,50,000/- and the taxable turnover under the Central Law by Rs. 1,00,000/- on the basis of the undisputed escape in the amount of Rupees 31,171.28 by adopting the said amount of escaped turnover as the measure for determining the quantum of enhance-

ment for the whole year was illegal, unjustified or excessive?

2 Whether a best judgment assessment could at all be made under S. 19 (1) of the Act or whether revision of the assessment should be confined to the quantum of proved or admitted escaped turnover?

3 If the answer to the previous question is that the revision in the assessment should be confined only to the quantum of proved or admitted escape in turnover was the penalty of Rs. 2,000/- imposed on the footing of the revision of the assessment for the whole year legal and justified?"

The question which has been referred to us for decision at the instance of the Commissioner of Sales Tax is:

"Whether on the facts and circumstances of the case the imposition of a penalty under S. 19 (1) of the Madhya Pradesh General Sales Tax Act, 1958, read with S. 9 (3) of the Central Sales Tax Act was not legal?"

2. The material facts are that the assessee M/s H. M. Esufali H. M. Abdulali is a registered dealer engaged in the business of sale of iron and steel. For the period from 1st November 1959 to 20th October 1960 the assessee's taxable turnover under the Madhya Pradesh General Sales Tax Act, 1958 (hereinafter referred to as the local Act) was determined at Rs. 1,21,567/- and a tax of Rs. 3743 34 was levied. The assessee's taxable turnover for the same period under the Central Sales Tax Act, 1956 (hereinafter referred to as the Central Act) was determined at Rs. 22,916/- and the assessee was held liable to pay a tax of Rupees 252.04 under the Central Act. The assessee did not prefer any appeals against these orders of assessment. Several months after the assessment orders were made, the Flying Squad of the Sales Tax Department "raided" the business premises of the assessee and found a bill-book for the period from 1st September 1960 to 18th September 1960 showing that during this period the assessee had effected sales of the value of Rs. 31,171 28. These sales had not been entered in the assessee's account books which were produced before the sales tax authorities when assessments under the two Acts were made for the period from 1st November 1959 to 20th October 1960.

3. The Sales Tax Officer, Indore, therefore issued notices to the assessee under S. 19 (1) of the local Act for assessment under the local Act as well as under the Central Act of the escaped turnover for the period from 1st November 1959 to 20th October 1960. The notices mentioned that a turnover of Rs. 2,50,000/- escaped assessment under the local Act and a turnover of Rs. 1,00,000/- escaped assessment under the Central Act. The assessee was also called upon to

show cause why penalty should not be imposed on it for suppressing the escaped turnover. In response to these notices the assessee gave an explanation saying that the bill-book discovered by the Flying Squad did not pertain to its business and the sales entered in the bill-book had not been effected by it. It was also said that the estimates of escaped assessment made by the Department were excessive and arbitrary.

4. After hearing the assessee the Sales Tax Officer determined the escaped turnover of the assessee under the local Act at Rs. 2,50,000/- and imposed a tax of Rs. 6000/- The escaped turnover under the Central Act was determined at Rs. 1,00,000/- and a tax of Rs. 4500/- was assessed under that Act. A penalty of Rs. 2000/- was imposed on the assessee under the State Act and a penalty of Rs. 1500/- was imposed under the Central Act.

The assessee then preferred appeals before the Appellate Assistant Commissioner of Sales Tax, Indore, which were dismissed. Thereupon, the assessee preferred appeals before the Board of Revenue (Sales Tax Tribunal). The Board of Revenue upheld estimates of escaped assessment under the two Acts made by the Sales Tax Officer. It, however, took the view that the imposition of penalty under the Central Act was illegal inasmuch as a penalty under that Act could be imposed only under Rule 12 of the Madhya Pradesh Sales Tax (Central) Rules, 1957, for a breach of any of the rules and the Department had failed to show the breach committed by the assessee. In the appeals which the assessee preferred before the Appellate Assistant Commissioner and the Board of Revenue, the assessee contended that the escaped assessment could at the most be that shown by the bill book which the Flying Squad discovered and that there was no justification whatsoever for estimating the escaped assessment for the entire period from 1st November 1959 to 20th October 1960 adopting Rs. 31,171 28 as extra turnover for a period of 19 days during the period from 1st September 1960 to 19th September 1960 as the measure of escaped assessment.

5. It would be convenient to consider first the second question which the Board of Revenue has referred. The question has to be answered with reference to Section 19 of the local Act and sub-rules (1) and (2) of Rule 33 of the Madhya Pradesh General Sales Tax Rules, 1959. Section 19 (1) is as follows:—

"19 Assessment of turnover escaping assessment. (1) Where an assessment has been made under this Act or any Act repealed by Section 52 and if for any reason any sale or purchase of goods,

chargeable to tax under this Act or any Act repealed by Section 52 during any period has been under-assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made therefrom, the Commissioner may, at any time within five calendar years from the date of order of assessment after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed in such manner, as may be prescribed to re-assess the tax payable by such dealer and the Commissioner may direct that the dealer shall pay, by way of penalty, in addition to the amount of the tax so assessed, a sum, not exceeding that amount:

** ** **

Sub-rules (1) and (2) of Rule 33 in so far as they are material here run thus:—

"33 (1) Where—

** ** **

(f) the sale or purchase of goods by a dealer during any period has been under-assessed or has escaped assessment or has been assessed at a lower rate or any deduction has been wrongly made therefrom within the meaning of sub-section (1) of Section 19, or

(g) a dealer has deliberately concealed his turnover in respect of any goods or has furnished a false return,

then in every such case, the assessing authority shall serve on the dealer a notice in Form XVI specifying the default, escapement or concealment, as the case may be, and calling upon him to show cause by such date, ordinarily not less than 30 days from the date of service of the notice as may be fixed in that behalf, why he should not be assessed or re-assessed to tax and/or penalty should not be imposed upon him and directing him to produce on the said date his books of accounts and other documents which the assessing authority may require and any evidence which he may wish to produce in support of his objection:

Provided that no such notice shall be necessary where the dealer, having appeared before the assessing authority, waives such notice.

(2) on the date fixed in the notice issued under sub-rule (1) or in case the notice is waived on such date which may be fixed in this behalf the assessing authority shall, after considering the objections raised by the dealer and examining such evidence as may be produced by him and after taking such other evidence as may be available, assess or re-assess, the dealer to tax and/or impose a penalty or pass any other suitable order". It will be seen from the aforesaid provisions that the escaped turnover has to be determined after giving a notice to the dealer in Form XVI specifying the escapement or concealment and calling upon him

to show cause why he should not be re-assessed to tax and after making such enquiry as the Sales Tax Officer may think it necessary. Rule 33 (1) also says that the assessee shall be called upon to produce the books of accounts and other documents which the assessing authority may require and any evidence which he may wish to produce in support of his objection.

When such a notice is issued to the dealer, he either appears before the assessing authority on the date fixed in the notice issued under sub-rule (1) to prefer his objections and produce such evidence as he may think it necessary or he does not appear. If he appears, then as provided in sub-rule (2) of rule 33 the assessing authority is required to make the reassessment after considering the objections raised by the dealer and examining such evidence as may be produced by him and after taking such evidence as may be available. It is important to note that in the notice which is issued to the assessee in Form XVI the extent of escaped turnover has to be specified. The estimated escaped turnover in the notice is plainly one made by the assessing authority in its judgment on the basis of such material as is available to it at that stage.

If, therefore, in response to the notice the assessee does not appear and attempt to show that no turnover of his escaped assessment, or that if it did, it was not of the alleged extent, then if the assessment is made on the basis of the figure of escaped turnover determined by the assessing authority itself, that assessment is clearly one made by the assessing authority to the best of its judgment on the material before it. The quantum of such assessment, though not admitted by the assessee, would be one "proved in the judgment of the assessing authority", for after all even according to the Evidence Act a fact is said to be proved when, after considering matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

6. It is no doubt true that neither section 19 (1) nor rule 33 (1) and (2) provides in so many words that if a dealer does not appear or does not produce any evidence in response to a notice issued to him under rule 33 (1), then the assessing authority shall assess the dealer to the best of its judgment; but from this omission it does not follow that if the dealer does not appear and show that no turnover of his escaped assessment, or that if it did, it was not of the alleged magnitude, then the assessing authority cannot make an assessment even on the basis of the escaped turnover determined

by itself. Such an absurd result is really not contemplated either by section 19 (1) or by rule 33 (1) and (2).

7. In Commissioner of Sales Tax v. Kunte Brothers, (1962) 13 STC 366 (MP) a Division Bench of this Court dealt with a similar question arising under S 10 of the Madhya Bharat Sales Tax Act, 1950, and held that under that provision a best-judgment assessment could be made in proceedings for the assessment of any escaped turnover. The provisions of section 10 of the Madhya Bharat Act are analogous to section 19 (1) of the local Act before us. In that case it was observed that—

"Under section 10 the burden of proving that any turnover has escaped assessment or that there has been under assessment is no doubt upon the department, but this only means that in order to justify initiation of proceedings under section 10 it is necessary for the assessing authority to establish at least one transaction the turnover of which was not included in the previous assessment. Once that is done, it is for the assessee to satisfy that no turnover has escaped assessment or that the escaped turnover is of a certain magnitude. If the assessee fails to discharge this burden by failing to appear or failing to produce his account books despite a notice under section 10, then the assessing authority is entitled to form its own opinion about the escaped turnover."

With reference to these observations, Shri Adhikari, learned counsel appearing for the assessee, said that it was impossible for the assessee to prove that no turnover of his escaped assessment, that he could only prove positively his turnover. In order to understand the real import of these observations it is necessary to remember that in the notice which is issued to the assessee to show cause why he should not be assessed in respect of any escaped turnover, the amount of escaped turnover provisionally determined by the assessing authority has to be stated. When this figure is stated in the notice, there should be no difficulty for the assessee to show that the alleged escaped turnover did not really escape in his previous assessment or that it was not of the extent alleged.

Learned counsel for the assessee drew our attention to the decision of the Andhra Pradesh High Court in State of Andhra Pradesh v. Ravuri Narasimloo, (1965) 16 STC 54 (AP) where the decision in (1962) 13 STC 366 (MP) (Supra) was dissented from. The learned Judges of the Andhra Pradesh High Court were inclined to think that when the relevant provision under which escaped turnover was assessed did not itself say in so many words that the assessing authority could make a best-judgment assessment,

there could be no best-judgment assessment. What has been said earlier is sufficient to show that even in the absence of an express provision enabling the assessing authority to make a best-judgment assessment, the assessment made by it when the assessee does not appear in response to a notice issued to him would none the less be a best-judgment assessment. Such an assessment is no doubt on the basis of the quantum of escaped turnover determined by the assessing authority itself, the quantum is one 'proved' in the judgment of the assessing authority though not admitted by the assessee who failed to appear. That being so, the assessment would be one made by the assessing authority to the best of its judgment.

It must be noted that in the case of (1962) 13 STC 366 (MP) (Supra) the assessee failed to appear and to produce his account books in response to a notice issued to him under section 10 of the Madhya Bharat Sales Tax Act. We do not think that the Andhra Pradesh High Court intended to lay down in (1965) 16 STC 54 (AP) (Supra) that if the assessee does not appear in response to a notice or if he appears and does not show any cause against the assessment intended to be made, then no assessment can at all be made inasmuch as the relevant provision does not expressly provide for the making of an assessment to the best of the judgment of the assessing authority in such circumstances.

8. In our judgment, there can be a best-judgment assessment under S 19 (1) of the local Act. In a best-judgment assessment the quantum of escaped turnover would be that which the assessing authority thinks is proved or established. In other assessments the quantum of escaped turnover would be the one which the assessing authority finds proved whether on the admission of the assessee or on the material produced at the enquiry in which the assessee has participated.

9. The real point to be considered in connection with the first question is the correctness of the escaped turnover under the local Act and the Central Act determined by the assessing authority for the period from 1st November 1959 to 20th October 1960 by adopting the measure of Rs. 31,171.28 as the escaped turnover for a period of 19 days. The assessee no doubt first denied that the bill-book which was found by the Flying Squad disclosing an escaped turnover of Rupees 31,171.28 during the period from 1st September 1960 to 19th September 1960, was its bill-book. Later on the Munim of the assessee when examined by the Sales Tax Officer admitted that the bill-book was of the transactions effected by the assessee. The assessee is undoubtedly liable to pay tax under the local Act and

the Central Act on the taxable turnover comprised in the escaped turnover of Rs. 31,171.28. The question is whether there is any justification for computing the escaped turnover for the entire period from 1st November 1959 to 20th October 1960 taking as base Rs. 31,171.28 as the escaped turnover for a period of 19 days even if the assessee's explanation was rejected and it did not produce any material to show that the escaped turnover was not of the magnitude specified in the notices served on him.

9A. Now, it is well settled that whenever the Sales Tax Officer is required to make an estimate of the assessee's turnover, he must pay due regard to the extent of the business carried on by the dealer, the surrounding circumstances and all matters which may be of assistance in arriving at a fair and proper estimate of the taxable turnover of the dealer. The assessing authority cannot make an arbitrary estimate of the turnover without any material to support it. This principle has been laid down by the Supreme Court in *Raghubar Mandal Harihar Mandal v. State of Bihar* (1957) 8 STC 770 : (AIR 1957 SC 810). In that case it has been held with reference to section 10 (2) (b) of the Bihar Sales Tax Act that in making an assessment under that provision the Sales Tax Officer is not fettered by technical rules of evidence and pleadings and he is entitled to act on material which may not be accepted as evidence in a Court of law, but he is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all; there must be something more than bare suspicion to support the assessment; when the returns and the books of account are rejected, the assessing Officer must make an estimate and to that extent he must make a guess, but the estimate must be related to some evidence or material and it must be something more than mere suspicion; and for this purpose he must take into consideration such materials as he has before him, including the assessee's circumstances, knowledge of previous returns and all other matters which he thinks will assist him in arriving at a fair and proper estimate.

10. Applying these principles here it is plain that the estimate of turnover made by the Sales Tax Officer for the entire period in question was a pure guess unrelated to any evidence or material circumstances with regard to the assessee's business. In making an estimate for the entire period taking Rs. 31,171.28 as the escaped turnover for a period of 19 days as the yardstick, the assessing authority assumed that the assessee continued to effect in the entire period of assessment extra transactions, which were suppress-

ed, on the same scale as disclosed by the bill-book found by the Flying Squad. There is no basis for such an assumption. The assessee is a dealer in iron and steel, a commodity for which there is no uniform market day after day. The sales of iron and steel depend on the extent of constructional activity. The sales tax authority made no attempt to find out whether having regard to the constructional activity during the material period the assessee could effect transactions in iron and steel day after day on the same scale.

Again, iron and steel being a controlled commodity, it should have been easy for the Sales Tax Officer to find out the quantity of iron and steel secured by the dealer under permits and the quantity sold from the assessee's stock registers. But nothing of the kind was done; and the Sales Tax Officer made estimates of the sales of iron and steel by the assessee on the basis of escaped turnover of Rs. 31,171.28 for 19 days treating the commodity in which the dealer carried on business as no different from a vegetable for which there is a uniform constant market. In our judgment, the estimate of escaped turnover under the local Act and the Central Act for the entire period from 1st November 1959 to 20th October 1960 made by the sales tax authority was based on mere guess work and was without any proper basis.

11. In this connection it would be pertinent to refer to the decision in *Jami Narasaya Prusty and Brothers v. State of Orissa*, (1958) 9 STC 648 : (AIR 1959 Ori 79). That was a case where the assessee's return did not include the turnover of sale of five watches and the Sales Tax Officer made an addition of Rs. 15,000/- covering the period during which the watches were sold. The Orissa High Court quashed the assessment taking the view that it was based on mere guess-work and there was no proper basis for making it. The decisions in (1957) 8 STC 770 : (AIR 1957 SC 810) (Supra) and (1958) 9 STC 648 : (AIR 1959 Ori 79) (Supra) were followed by the Kerala High Court in *Alikoya and Co. v. State of Kerala* (1961) 12 STC 567 (Ker). In that case also an estimate for the entire relevant period was made on the basis of suppressed turnover in respect of a certain period. The Kerala High Court observed:

"In the case before us the material recovered may justify the conclusions of the sales during the days, being what the recovered evidence covering the days disclose, but such material could hardly be the basis for ascertaining sales during the entire period preceding the recovery; for same quantity of the commodity for sales would not be uniformly available, nor the market rate would be the same."

12. In our view, the estimate of taxable turnover under the local Act and the Central Act made by the assessing authority for the period from 1st November 1959 to 20th October 1960 on the basis of Rs. 31,171 28 as the escaped turnover for a period of 19 days was altogether illegal and unjustified. In the present case, the escaped turnover proved is only Rs 31,171 28 The assessee is liable to be assessed under both the Act only on the taxable turnover comprised in the escaped turnover of Rs. 31,171 28.

13. In regard to the third question the position is that under section 19 (1) of the local Act the penalty that can be imposed for escaped assessment cannot exceed the amount of tax determined payable on reassessment. The amount of Rs 2,000/- as penalty was imposed on the assessee on the footing that the escaped taxable turnover under the local Act was Rs 2,50,000/- and that under the Central Act was Rs 1,00,000/- for the period from 1st November 1959 to 20th October 1960. If, as we have endeavoured to point out, the taxable turnover for the period is only that comprised in the escaped turnover of Rs. 31,171 28, then it follows that the amount of tax payable on reassessment would be proportionately reduced and consequently the amount of penalty would also be reduced. The penalty of Rs 2,000/- imposed on the assessee cannot, therefore, be held to be legal and justified.

14. The answer to the question referred to us by the Tribunal at the instance of the Commissioner of Sales Tax is to be found in section 9 (3) of the Central Act itself. That sub-section reads thus:

"The authorities for the time being empowered to assess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India and subject to any rules made under this Act, assess, collect and enforce payment of any tax, including any penalty, payable by a dealer under this Act in the same manner as the tax on the sale or purchase of goods under the general sales tax law of the State is assessed, paid and collected, and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, appeals, reviews, revisions, references, penalties and compounding of offences, shall apply accordingly:

The effect of section 9 (3) is that the procedure of making an assessment, collection of tax and enforcement of payment of any tax including penalty under the Central Act is the very same procedure.

dure as laid down in the local Sales-tax Act. Therefore, the provisions contained in section 19 (1) of the local Act including the provisions for the imposition of penalty for escaped assessment would apply for assessment and imposition of penalty for escaped assessment under the Central Act. The Board of Revenue was in error in thinking that penalty could be imposed only under rule 12 of the Madhya Pradesh Sales-Tax (Central) Rules, 1957, for a breach of any of the provisions of those Rules and that the said Rules did not in any way deal with escaped assessment.

The decision of this Court in Commissioner of Sales Tax v. Kantilal Mohanlal and Brothers, (1967) 19 STC 377 (AIR 1968 Madh Pra 20) supports the view that penalty for escaped assessment under the Central Act can be imposed under section 19 (1) of the local Act. That was a case in which the question raised was whether when failure to file returns within time was not dealt with by the Madhya Pradesh Sales Tax (Central) Rules, 1957, penalty for late submission of the returns could be imposed under section 17 (3) of the local Act. It was held that penalty for late submission of returns in Form V appended to the Madhya Pradesh Sales Tax (Central) Rules, 1957, could be imposed under Section 17 (3) of the Madhya Pradesh General Sales Tax, Act, 1958. The reasoning given in the case of (1967) 19 STC 377; (AIR 1968 Madh Pra 20) (Supra) applies equally here.

15. For these reasons, our answer to the first question is that the estimate of taxable turnover under the local Act and the Central Act made by the assessing authority for the period from 1st November 1959 to 20th October 1960 on the basis of Rs. 31,171.28 as the escaped turnover for a period of 19 days was illegal and unjustified. The escaped turnover proved in the present case is only Rs 31,171.28 and the assessee is liable to be assessed under both the Acts only on the taxable turnover comprised in the escaped turnover of Rs 31,171.28. Our answer to the second question is that there can be a best-judgment assessment under section 19 (1) of the local Act. In a best-judgment assessment the quantum of escaped turnover would be that which the assessing authority thinks is proved or is established. In other assessments the quantum of escaped turnover would be the one which the assessing authority finds proved whether on the admission of the assessee or on the material produced at the enquiry in which the assessee has participated. The third question is answered by saying that the imposed penalty of Rs. 2,000/- is, in view of our answer to the first question, not legal. Our answer to the fourth question is

that a penalty for escaped assessment under the Central Act can be imposed under section 19 (1) of the local Act.

16. As the assessee has substantially succeeded in the present reference, we direct that the Commissioner of Sales Tax shall pay costs of the reference to the assessee. Counsel's fee is fixed at Rs. 200/-.

RGD Answers accordingly.

AIR 1969 MADHYA PRADESH 141
(V 56 C 38)

P. V. DIXIT C. J.
AND G. P. SINGH, J.

N. H. Ozha and Co. (Pvt.) Ltd. Jamkunda Colliery, Petitioner v. Union of India through the Ministry of Steel, Mines and Heavy Industries (Department of Mines and Metals) New Delhi and others, Respondents.

Misc. Petn. No. 310 of 1966, D/- 19-7-1968.

Mineral Concession Rules (1960), R. 27 (5)—Non-compliance with notices under, requiring lessee to make payment of rent and royalty — Subsequent notice demanding rent and royalty becoming payable thereafter — Right to forfeit or determine lease on ground of non-compliance with previous notices waived — Cancellation of lease on that ground is unauthorised — T. P. Act (1882), S. 112.

If the Government, after a notice under Rule 27 (5) requiring the lessee to make payment or remedy the breach is not complied with, does any act which shows an intention to continue the lease, it would amount to an implied waiver of the right to forfeit or determine the lease on the ground of non-compliance with the notice. The use of the word 'may' in the context of the determination of the lease and use of word 'shall' in the earlier portion of Rule 27 (5) in the context of notice is clearly indicative that the Government is not bound to determine the lease even if the notice be not complied with in time. It is thus open to the Government either to elect to determine the lease or to elect not to determine it. The choice of action emerging from the enabling 'May' clearly brings in the principle of waiver. (Para 3)

Where the Government, instead of exercising the right of forfeiting the lease on footing of previous defaults in paying rent and royalty even after demand notices under rule 27 (5), issued subsequent demand notice demanding rent and royalty which then became payable and the subsequent notice was complied with, it could not, thereafter, cancel the lease on the basis of previous defaults which were waived by issue of

subsequent demand notice. Demand of rent accruing due after the lapse, which would have given rise to forfeiture, if the demand be unqualified, amounts to waiver. Consequently an order so cancelling the lease would be in exercise of the power conferred by rule 27 (5). (1921) 1 A. C. 271 and (1887) ILR 14 Cal 176 at p. 184 Rel. on. (Paras 3, 4)

Cases Referred: Chronological Paras (1921) 1921-1 AC 271 = 90 LJ PC 1,

Rex v. Paulson 3
(1887) ILR 14 Cal 176, Kristo Nath

v. T. F. Brown 3

Y. S. Dharmadhikari, for Petitioner;
K. K. Dubey Govt. Advocate, for Respondents.

G. P. SINGH, J.: This petition is by a company which held a coal mining lease of certain lands in tahsil and district Chhindwara. The company made defaults in payment of royalty and dead rent and the Director of Geology and Mining issued notices calling upon the company to pay the dues within sixty days from the receipt of the notices and intimating that if the dues were not paid within that period the lease would be terminated. In all six such notices were issued. As regards the first five notices, last of which was issued on 19th October 1964, the company in each case paid the dues beyond sixty days from the receipt of the notice. As regards the sixth notice, which was issued on 21st May 1965, the company fully complied with its terms and deposited all the dues on 16th July 1965 within sixty days. In the meantime by an order passed on 29th June 1965, the Government acting under Rule 27 (5) of the Mineral Concession Rules 1960 cancelled the petitioner's lease and forfeited the security deposit on the ground that the earlier notices were not complied with in time. Against this order the petitioner went up in revision to the Central Government which was dismissed on 8th June 1966. The petitioner then filed this petition under Articles 226 and 227 of the Constitution calling in question the order of the State Government cancelling the lease and the order of the Central Government dismissing the revision.

2. The only point urged before us by the learned counsel for the petitioner is that after the sixth notice was issued on 21st May 1965 calling upon the petitioner to pay up the dues of royalty and dead rent in terms of the lease within a period of sixty days and intimating that the lease will be cancelled in case the payment is not made within that time, the previous defaults under first five notices must be taken to have been waived and it was not open to the Government to cancel the lease on the basis of the earlier defaults.

3. Under the Law of landlord and tenant it is well settled that if the lessor

wants to take advantage of any breach of any term or condition so as to enforce his right to forfeit the lease he must not do anything after the breach which amounts to an acknowledgment of the continuance of the lease. Any act on the part of the lessor showing an intention to treat the lease as subsisting, as section 112 of the Transfer of Property Act puts it, amounts to waiver of forfeiture or more appropriately waiver of the breach which, had the lessor so elected, would have enabled him to forfeit the lease. The general law of waiver of forfeiture has been applied to mining leases (*Rex v Paulson*, 1921-1 AC 271). The question then is whether Rule 27 (5) of the Mineral Concession Rules 1960, under which the petitioner's lease was cancelled, contains this principle of waiver or is inconsistent with it. Rule 27 (5) reads as follows

"27 (5) If the lessee makes any default in payment of royalty as required by Section 9 or commits a breach of any of the conditions other than those referred to in sub-rule (4), the State Government shall give notice to the lessee requiring him to pay the royalty or remedy the breach, as the case may be, within 60 days from the date of the receipt of the notice and if the royalty is not paid or the breach is not remedied within such period, the State Government may, without prejudice to any proceeding that may be taken against him, determine the lease and forfeit the whole or part of the security deposit."

It is pertinent to note that the first limb of the sub-rule which enjoins the Government to give notice requiring the lessee to pay the royalty or remedy the breach uses the language—'shall give notice', whereas the second limb of the sub-rule which empowers the Government to determine the lease in case the notice is not complied with uses the language—'may...determine the lease'. The use of the word 'may' in the context of the determination of the lease and use of the word 'shall' in the earlier portion of the rule in the context of notice is clearly indicative that the Government is not bound to determine the lease even if the notice is not complied with in time. It is thus open to the Government either to elect to determine the lease or to elect not to determine it. The choice of action emerging from the enabling 'may' clearly brings in the principle of waiver. In our opinion if the Government, after a notice requiring the lessee to make payment or remedy the breach is not complied with, does any act which shows an intention to continue the lease it would amount to an implied waiver of the right to forfeit or determine the lease on the ground of non-compliance of the notice. It is also clear that demand of rent accruing due

after the lapse, which would have given rise to forfeiture, if the demand be unqualified, amounts to waiver. [*Woodfall*, 26th Edition Vol 1 P. 914, *Kristo Nath v. T F Brown*, (1887) ILR 14 Cal 176 at p. 184.]

4. We may now revert to the facts of the instant case. The last notice in respect of which default was committed was issued, as stated earlier, on 19th October 1964. According to the statement of account exhibited as Annexure RI by the respondent State, this notice related to the dead rent and royalty falling due on 15th July 1964. The default was committed after expiry of sixty days from this notice i.e. nearabout 19th December 1964. This was the last default as other defaults were in respect of notices issued earlier to this notice. Instead of exercising the right of forfeiting the lease on footing of the default committed on or about 18th December 1964, another notice was issued on 21st May 1965 demanding dead rent and royalty which became payable on 15th March 1965. This demand can only be explained on the footing that the lease continued till 15th March 1965 and the default committed on 19th December 1964 or other earlier default were not given effect to by exercising the right of forfeiture and the Government elected to forgo the defaults and to continue the lease. It was then not open to the Government to cancel the lease on 29th June 1965 on the basis of these earlier defaults which were waived by issue of demand notice of 21st May 1965. This last notice was complied with and there was no question of default or forfeiture thereafter. In our opinion by demanding rent and royalty for a period subsequent to the earlier defaults which could have resulted in forfeiture, the Government waived the defaults which could not thereafter be made basis of cancellation of the lease. The order issued on 29th June 1965 cancelling the lease was therefore in excess of the power conferred by rule 27 (5).

5. The petition succeeds and is allowed. The order of the State Government cancelling the lease and the order of the Central Government dismissing the revision are quashed. The petitioner will be entitled to recover the costs of this petition from the State Government. Counsel's fee Rs. 150/- if certified. The security amount will be refunded to the petitioner.

YPB/D.V.C.

Petition allowed.

AIR 1969 MADHYA PRADESH 143
(V 56 C 39)

P. K. TARE
AND K. L. PANDEY, JJ.

J. K. Pal, Petitioner v. State of Madhya Pradesh and another, Respondents.

Misc. Petn. No. 27 of 1965, D/- 26-8-1968.

(A) States Reorganisation Act (1956), S. 115 (7) — Scales of pay made available to employees of State Government could no longer be revised to their disadvantage : AIR 1965 SC 136, Rel. on.

(Para 6)

(B) States Reorganisation Act (1956), S. 115 (7) — Government of new State by order creating, with retrospective effect, new scales of pay governing permanent employees to their disadvantage — Held, order was not rule framed under Art. 309 of Constitution and therefore not in conformity with S. 115 (7) (Obiter).

According to the rule of construction of statutes expressed in the maxim "Expressio unius est exclusio alterius", an enabling enactment in an Act shuts the door for further implication. Applying this rule to S. 115 (7) of the States Reorganisation Act, 1956, it would appear that, after the passing of the Act, the only method that seems to be available for prescribing the conditions of services of the government servants of the former States is by making rules under Article 309 of the Constitution. Where the Government of the new State of Madhya Pradesh passed an order dated 5 June, 1959, whereby it created, with retrospective effect, new scales of pay governing permanent government servants to their disadvantage, it was not a rule framed under Art. 309 of the Constitution and was, therefore, not in conformity with the aforesaid S. 115 (7) (Obiter).

(Para 7)

(C) Civil Services — Madhya Pradesh Unification of Pay Scales and Fixation of Pay on Absorption Rules (1959), Rr. 4, 6 — Employee is bound by terms of employment given to him or by those that he subsequently accepted, either expressly or by necessary implication — He cannot be prejudiced by any reservation not communicated to him.

(Para 4)

Cases Referred: Chronological Paras (1965) AIR 1965 SC 136 (V 52) = (1964) 7 SCR 549, Raghavendra Rao v. Dy. Commr. South Canara & C. P. Sen, for Petitioner; K. K. Dubey, for Respondents.

PANDEY, J.: This is a petition under Articles 226 and 227 of the Constitution to call up and quash by certiorari—

(i) an order dated 22 March 1961, whereby the petitioner's pay was fixed at Rs. 133/- on a new time scale of pay

introduced retrospectively from 17 November 1954;

(ii) another consequential order dated 2 December 1961 by which directions were given for recovery of Rs. 132.15 from the salary of the petitioner on account of over-payments made to him since 6 June 1959; and

(iii) an order dated 1 December 1964 by which the petitioner was given an opportunity for election exercisable under Rules 4 and 6 of the Madhya Pradesh Unification of Pay Scales and Fixation of Pay on Absorption Rules, 1959.

The petitioner further prayed for a writ of mandamus prohibiting the authorities from giving effect to the aforesaid orders.

2. The facts giving rise to this petition, shortly stated, are these. The petitioner was employed as a clerk in the Public Works Department of the old State of Madhya Pradesh, having entered service in the year 1941. By an order dated 14 February 1955, the Government of that State took a decision to divide the Public Works Department into two branches, (i) Buildings and Roads Branch and (ii) Irrigation Branch. In regard to the establishment of the two branches, it was directed inter alia as follows:

"(iv) Subject to the provisions of clause (iii) above, the existing conditions of service and procedure in the matter of appointment, promotions, scales of pay etc. shall continue to be in force for the Public Works Secretariat and the combined office of the Chief Engineers but persons recruited after the 17th November 1954 in the combined office of the Chief Engineers will however be entitled to the scales of pay that may be sanctioned hereafter."

Following this, the petitioner and several other persons were appointed as Upper Division Clerks (Ordinary Grade) by an order dated 31 March 1955, which reads:

"Order No. 59/A Dated Nagpur 31-3-1955.

The following Head Assistants attached to the Circle noted against each are transferred to this office and appointed temporarily until further orders to officiate as Upper Division Ordinary Grade Clerks on the time scale of pay of Rs. 125-10-175 p.m. with effect from the date they join this office:

(9) Shri J. K. Pal West Raipur Circle
Sd/-H. R. Gupta
Chief Engineer, P. W. D.
(B&R) M. P."

Subsequently, by an order dated 26th October 1956 to be more precise, the petitioner was confirmed on that post (Annexure C). Thereafter, the States were reorganised in pursuance of the provisions of the States Reorganisation Act,

1956. Even in the new State of Madhya Pradesh, the petitioner continued to hold that post. Nay, by an order dated 4 March 1957, he was promoted to officiate as an Upper Division Clerk in the Selection Grade (Annexure D). Later on, the Government of the new State of Madhya Pradesh, relying upon the aforesaid order dated 14 February 1955 of the former State, passed an order dated 5 June 1959 whereby it created, with retrospective effect from 17 November 1954, new scales of pay for the clerks employed in the offices of the two Chief Engineers. This included the following changes:

| | Existing Scale | New Scale |
|--|--------------------------|-----------|
| Upper Division Clerk (Ordinary Grade) | 125-10-175 | 125-8-165 |
| Upper Division Clerk (Selection Grade) | 150-10-200- EB.15-275 | 120-8-200 |

It was in pursuance of this decision that the impugned order dated 22nd March 1961 (Annexure F) was passed and thereby the petitioner's pay was fixed at Rupees 133/- on the new time scale of pay. It was followed by the second impugned order relating to recovery of over-payments which was, as already indicated, consequential to the first order. It was on the basis of the pay thus fixed that the petitioner's pay was refixed under the Unification of Pay Scales and Fixation of Pay on Absorption Rules, 1959. It was again this pay which was taken into account for purposes of equation of posts and integration. Being aggrieved, the petitioner made a representation to the State Government, but it went unheeded in spite of several reminders. He has, therefore, moved this Court for relief.

3. The respondents resisted the petition only on the basis of the order dated 14 February 1955 (Annexure R-1) and claimed that it entitled them to revise the scales of pay at a future date.

4. Having heard the counsel, we have formed the opinion that this petition must be allowed. An employee is bound by the terms of employment given to him or by those that he subsequently accepted, either expressly or by necessary implication. He cannot be prejudiced by any reservation not communicated to him, though it might be noted on the office file or recorded elsewhere. The order of appointment of the petitioner (Annexure A) and the order of his confirmation (Annexure C) do not show that the time scale of pay on which he was appointed was liable to be revised. That being so, the petitioner's contention that the terms of appointment, forming a part of the contract of service, could not be unilaterally revised is well founded.

5. Again, the order dated 14 February 1955 (Annexure R-1) on which reliance is placed shows that, on the date on which that order was passed, the State Government had not decided upon the scales of pay of the members of the staff, and therefore, directed that those scales of pay would be sanctioned thereafter. The operative portion of the order reads:

"Subject to the provisions of clause (iii) above, the existing conditions of service and procedure in the matter of appointment, promotion, scales of pay etc. shall continue to be in force for the Public Works Secretariat and the combined office of the Chief Engineer, but persons recruited after the 17th November 1954 in the combined office of the Chief Engineer will however be entitled to the scales of pay that may be sanctioned hereafter".

As already indicated, it was after that date that the petitioner was appointed as an Upper Division Ordinary Grade Clerk on the time scale of pay of Rupees 125-10-175. This is not all. He was subsequently confirmed unconditionally on that post on 26 October 1956. In our opinion, the State Government had thus sanctioned, as envisaged by the order dated 14 February 1955, the scale of pay of the petitioner and other employees, who were appointed on 31 March 1955, and the power reserved for that purpose was thus exhausted. There could be thereafter no question of revision of their scale of pay.

6. We are further of opinion that, in any event, the scale of pay made available to the petitioner and others could no longer be revised to their disadvantage in view of the provisions of section 115 (7) of the States Reorganisation Act which reads:

"(7) Nothing in this section shall be deemed to affect after the appointed day the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to determination of the conditions of services of persons serving in connection with the affairs of the Union or any State:

Provided that the conditions of service applicable immediately before the appointed day to the case of any person referred to in sub-section (1) or sub-section (2) shall not be varied to his disadvantage except with the previous approval of the Central Government".

In regard to this provision, the Supreme Court in *Raghvendra Rao v. Deputy Commissioner*, AIR 1965 SC 136 observed as follows:

"The effect of this sub-section is, inter alia, to preserve the power of the State to make rules under Art. 309 of the Constitution, but the proviso imposes a limitation on the exercise of this power, and

In *Jugal Kishore v. Union of India*, AIR 1965 Pat 196 it was pointed out by the Bench that when the very same clause in the Letters Patent provides for an appeal from the decision of a Single Judge exercising original jurisdiction as well as exercising appellate jurisdiction it was impossible to imagine that in one case the Bench will have jurisdiction to interfere on facts, but in the other, the Bench having no jurisdiction to interfere on facts, the sole scope of the hearing in appeal being confined to mere questions of law. It was also observed that it is a well-established principle of law that unless the statute otherwise provides, an appellate Court shall have the same powers and jurisdiction of dealing with all questions either of fact or of law arising in the appeal before it as that of the Court whose judgment is the subject-matter of scrutiny in the appeal. It was further emphasised therein that it is only because of the special provision contained in Sec. 100, C. P. C. that in second appeals, there are well defined restrictions and prohibitions with regard to the investigation on facts. The observations to the contrary of Mahapatra, J., in the earlier decision of the Patna High Court, in AIR 1964 Pat 76, were distinguished as in the nature of obiter dicta.

6. We may also refer to another Bench decision of the Patna High Court in *Saligram v. Ayodhya Prasad*, AIR 1966 Pat 61 in which it was held that the Bench in dealing with a Letters Patent appeal has all the powers which could have been exercised by the Single Judge. In view of the plain, unqualified language of Clause 15 and the clear pronouncement of the Supreme Court, it is unnecessary to elaborate the point further.

7. In a Letters Patent Appeal preferred, where leave has been granted by a Single Judge, while disposing of a second appeal, the position will be different, for the obvious reason, that the Bench hearing the appeal will be bound by the same statutory limitations as the Single Judge in a second appeal under Section 100, C. P. C. In a Letters Patent Appeal, the Bench is concerned with the correctness or otherwise, of the conclusion of the learned Single Judge and if the latter was bound by certain limitations, the Bench would be equally bound by the same. For instance, in *Subbarama v. Saraswati*, AIR 1967 Mad 85, when a Single Judge disposing of a second appeal arising under the Hindu Marriage Act of 1955 interfered with questions of fact in violation of Section 100, C. P. C., the Bench reversed that finding. In *Jivubai v. Ninappa*, AIR 1963 Mys 3 again in a second appeal, arising out of proceedings under the Hindu Marriage Act,

it was held that the High Court cannot interfere with questions of fact in view of the provisions of Section 100, C. P. C. These are all cases in which the first proceeding in the High Court itself was governed by Section 100, C. P. C. The appeal before Jagadisan, J., was not under Section 100, C. P. C., but was a first appeal.

8. Though our jurisdiction and powers under Clause 15 are wide and unqualified, the Bench is reluctant and does not lightly interfere with the findings of the learned Single Judge of this Court. It is, for this reason, that, barring appeals from the decisions in the Original suits, other appeals under Clause 15 Letters Patent, like writ appeals or appeals from orders of remand or decisions rendered by a Single Judge in the exercise of his appellate jurisdiction (not being second appellate jurisdiction) are posted for admission for an initial scrutiny by the Bench. The appellant has to make out a clear case for interference under Cl. 15. The oft-quoted note of warning that a Judge sitting on appeal not having had the opportunity of seeing and hearing the witnesses and observing their demeanour should think twice and more than twice before reversing the findings of fact arrived at by the trial court which has had that opportunity, does not apply in the instant case as the learned Single Judge was only drawing his inference from the evidence on record and the probabilities of the case. Where important considerations bearing on the question of credibility have not been taken into account or properly weighed either by the trial Judge or by a Judge of this Court on appeal and where the question of the probability of the story given by the witnesses clearly indicates that the view taken by the trial Court and the Appellate Court is wrong, this Court will have no hesitation in reversing the findings on such questions. We are free to reach our own conclusion, where it is a question of inference on facts, based upon probabilities, circumstances of the case and the assessment of the oral evidence, where the trial Judge has not recorded any distinct opinion about his impression based upon his observations of the demeanour of the witnesses and the way in which evidence was given by them.

It may be useful to extract the following observations of the Supreme Court in *Radha Prasad v. Gajadhar Singh*, AIR 1960 SC 115 at p. 118 where the Supreme Court has specifically dealt with the power of the Appellate Court in the matter of appreciation of evidence and interference with the finding of fact:

"This question of the proper approach of the Court of appeal to decisions on questions of fact arrived at by the trial

Court was considered by this Court in *Sarju Prasad v. Jwaleshwari Pratap Narain Singh*, 1950 SCR 781 at p 784= (AIR 1951 SC 120 at p 121). Mukherjee, J., while delivering the judgment of the Court observed —

'In such cases, the Appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is — and it is nothing more than a rule of practice — that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the Appellate Court should not interfere with the finding of the trial Judge on a question of fact. The position in law, in our opinion, is that when an appeal lies on facts it is the right and the duty of the Appeal Court to consider what its decision on the question of facts should be, but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court. But, this does not mean that merely because an appeal Court has not heard or seen the witness it will in no case reverse the findings of a trial Judge even on the question of credibility, if such question depends on a fair consideration of the matters on record. When it appears to the Appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the Court of Appeal is in as good a position as the trial Judge and is free to reverse the findings if it thinks that the infer-

ence made by trial Judge is not justified'.

9. I shall now consider the truth of the episode of 30th June 1958 (after discussing the facts, his Lordship proceeded) —

10. Learned Counsel for the respondent, Mr. T. K. Rajagopalan, invited our attention to some of the decisions and contended that the party who seeks relief, whether under Section 10 or under Section 13 of the Act must adduce strict, satisfactory proof, that the standard of proof should be as high and vigorous as in a criminal case and that the relief should not be granted on the mere balance of probabilities or on the basis of the benefit of doubt.

As part of this argument, learned Counsel also urged that the fact that the respondent had failed to establish her case as pleaded by her and that the evidence adduced by her, oral or documentary, has been found to be false and did not support her, would not in any manner help the appellant in the matter of discharging the heavy burden upon him to establish his case by clear, positive, satisfactory evidence.

While we agree with a major portion of this submission, we are of the view that there is no warrant in law for this extreme contention. It is sufficient to refer to the decision of the Supreme Court in *Earnest Joho White v. Kathleen Olive White*, AIR 1958 SC 441 as to the perspective of approach while deciding disputes in matrimonial causes. The Supreme Court has observed that Courts in India while deciding matrimonial causes, 'shall act and give relief on principles and rules which in the opinion of the Court are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief'. From this decision, it is clear that while awarding relief under Section 23 of the Act, the Court must be satisfied beyond all reasonable doubt and that what is required is that there should be a strict enquiry into the matter. The word 'strict' is sufficiently apt to describe the measure and high standard of proof. While pointing out that the two jurisdictions, matrimonial and criminal, are distinct jurisdictions, the Supreme Court has extracted with approval, the statement of the law by Lord Macdermott in *Prestone Jones v. Prestone Jones*, 1951 AC 391 at p. 417, to the effect that the expression 'satisfied' in the statute means, 'satisfaction by proof beyond reasonable doubt' and that the standard of proof drawn from the criminal law is not a safe or proper analogy.

11. As regards the precise import of the standard of proof beyond reasonable

doubt, it may be useful to refer to the following observations of Denning, L. J., in *Miller v. Minister of Pensions*, 1947-2 All ER 372—

"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice".

This rule has been applied and followed in a recent Bench decision of this Court in AIR 1967 Mad 85 approving the statement of the law by Venkatadri, J., in *Varadarajulu Naidu v. Baby Ammal*, 1964-2 Mad LJ 187=(AIR 1965 Mad 29).

In *Bipinchandra Shah v. Prabhavati*, AIR 1957 SC 176, the husband sought divorce against the wife on the ground that she had deserted the husband for more than four years prior to the commencement of the proceeding. The question was whether during the entire period of four years, the wife stayed away with the definite continued, unbroken animus of not coming back to the husband or whether she had subsequently changed her mental attitude during that period and was anxious to join the husband. The wife's case that she did not leave or desert her husband voluntarily and of her own free will but the husband actually drove her out of the house was not accepted. Even so, on the facts, the Supreme Court found that after the wife left the husband of her own accord, during the interval of four years, the wife did not stick on to her decision but changed her mind and was prepared to join the husband. The Supreme Court observed at page 188 that

"the fact that the wife pleaded a case of constructive desertion by the husband and failed to establish that case would not necessarily lead to the conclusion that the husband had succeeded in proving his case".

Learned Counsel for the respondent relied upon those observations. It is needless to say that those observations should be understood in the light of the particular facts of that case. As a general rule, there cannot possibly be any dispute that in matrimonial proceedings the Court is vigilant to see that the burden of proof is satisfactorily and properly discharged by the applicant and that the respondent's putting forward a false defence is not regarded as sufficient by itself to establish

the truth of the applicant's case. At the same time, the putting forward of false defence will destroy the respondent's credibility. This does not, however, mean that in all cases, irrespective of the precise setting and the nature of the rival theories, the Court cannot take into account its own findings that the version of the other side is totally false. In numerous cases it will have a bearing upon the inference to be drawn upon the probabilities and the surrounding circumstances of the case and the assessment of the petitioner's case.

Again, when there are only two diametrically opposite rival versions and the case does not admit of any other theory the finding of the Court that the case of one of the parties is totally false may have some bearing and relevance on the assessment of the truth of the other version. Indeed in many cases, the case may not admit of a treatment of the two rival versions, in two separate water-tight compartments. For instance, in this case if the case of the respondent that she left only in August, 1958 is found against, there is no other case that she left on some date other than November 1957, i.e., between November 1957 and August 1958. In this connection, it may be relevant to refer to a significant observation in the decision in AIR 1958 SC 441, already referred to. In that case, the husband asked for the dissolution of his marriage on the ground that the wife had committed adultery by staying for several days in the Central Hotel, Patna, along with one Mr. David. The wife, in contesting the petition, denied the whole episode of her stay in the Central Hotel along with Mr. David. The Supreme Court found that her defence was totally false, but that she stayed in the hotel and in the light thereof, assessed the evidence adduced by the husband and found the wife guilty of adultery. This is what the Supreme Court observed at page 443—

"The wife in the witness box wholly denied the episode of the Central Hotel including her stay there, which has deprived the Courts of her explanation. We are, therefore, unable to get any assistance from her or as a matter of that from respondent 2 as to what happened in the hotel at Patna".

In the instant case, the wife respondent came forward with a false case about the circumstances under which she left the husband and the other events following thereafter. By this dubious conduct, she had deprived the Courts of her true explanation. Even in criminal cases, it is permissible for the prosecution to rely upon the fact that the explanation given by the accused in his statement under Section 342, Cri. P. C., is patently false and opposed to the established facts and circumstances of the

case I am of the view that for a limited purpose depending upon the particular facts of each case and also depending upon the nature of the competing rival theories, it will not be improper for the Court to take into consideration, the fact that the case of one party has been proved to be completely false. At the same time, it has to be borne in mind that that by itself would not amount to holding that the appellant has discharged the burden.

There is no need to refer to the other cases relied upon by learned Counsel for the respondent because we are resting our conclusion not upon mere balance of probabilities or on the theory of benefit of doubt or even on the ground that the respondent's defence is false. We are satisfied that taking the evidence adduced on the side of the appellant, along with the probabilities and surrounding circumstances of the case, the appellant has proved beyond all reasonable doubt that the separation of the couple was in November 1957.

11A. It only now remains to consider the two circumstances strongly used against the appellant by Jagadisan, J., as powerful conduct evidence. The first is the failure to send an immediate reply to the telegram Ex. A.1, containing the news of the birth of the child. The learned Judge himself in the later portion has stated that having regard to the circumstances of the case, the prestige of the family, the conduct of the appellant was a fair and reasonable attitude and anybody in his position would have done the same thing. I may, in this connection, refer to the observations of Lord Denning in *Joyce v Joyce*, 1966-2 WLR 660, that in matrimonial cases, it is better for the Judge to apply the same standard in all his findings. In that case, the trial Judge used some set of circumstances in two contexts mutually inconsistent and this is how Lord Denning put the matter:—

"He very rightly acquitted the wife and the party cited, of the charge of adultery, saying that he was 'not sure' that there was adultery between them. But then he seems to have taken the suspicious circumstances into account in considering whether to exercise discretion in her favour. He said, 'I am left with a feeling of grave suspicion as to whether the party cited has committed adultery with the petitioner and she with him. If I had to decide this case on a balance of probabilities, I would make a finding of adultery'.

So his findings depended on the difference in the standard of proof. On the one hand, in considering whether the charge was proved against her, he had to be 'sure', that is, be satisfied beyond a rea-

sonable doubt, and he acquitted her. On the other hand, in considering discretion, he could look at it on a balance of probabilities and in effect find her guilty. It reminds me of *Hornal v Neuberger Products Ltd*, 1957-1 QB 247=1956-3 M LR 1034=1956-3 All ER 970 where different findings were made by a Judge according to the standard of proof he applied. I think that such a difference is very undesirable. It is better for the Judge to apply the same standard in all his findings. He should ask himself, am I satisfied that adultery has taken place? If yes, he should find her guilty. If no, acquit her. And having acquitted her, he should not take it against her when exercising discretion".

12. I am also of the view that the appellant was well advised in keeping quiet at that moment and it is not right nor fair to expect him to send an immediate protest while his wife had not even been discharged from the Nursing Home. It must be borne in mind that the appellant's father and the respondent's mother are very near relatives, brother and sister. Is it right to expect of the appellant to send an immediate reply to Ex. A. 1, even while the respondent was in the Nursing home, charging her with adultery proclaiming the child as a bastard and threatening the wife with Court proceedings? To expect any such conduct on the part of the husband would mean to expect him to behave not like a human being, but a beast devoid of all culture.

For all these reasons I have no hesitation in holding that far from Ext. B2 lending any support to the case of the respondent, it contains a clear, unambiguous, categorical statement with precision that after November 1957, the couple never met and there was no manner of contact between them.

13. The result is that the judgments of the learned City Civil Judge and Jagadisan, J., are set aside. The question of appropriate relief which would meet the ends of justice on the peculiar facts and circumstances of the case poses a problem. This case is a typical instance of best illustration of the proverbial saying "Justice delayed is justice denied". When the appeal came before the First Bench, my Lord, the Chief Justice and Natesan, J., attempted to compose the differences between the parties. But as the compromise proposals did not take any shape, the Bench directed the posting of the appeal before us. Even at the commencement of the hearing, Counsel on both sides stated that there is no question of any settlement. The final rupture and separation between the parties took place more than ten years back and the appellant is made to suffer for the inevitable

delay of Court proceedings and this Court taking the final decision in his favour, setting aside the erroneous views held up till now. The maxim *actus curiae neminem gravabit* "An act of the Court shall prejudice no man" has been applied in varying context so that no party suffers any prejudice through the instrumentality of the Court and the Court proceedings. Precedents are not wanting in which by the application of this salutary principle of justice underlying this maxim, judgments have been entered retrospectively to meet the justice of the case, the decision taking effect for a period long anterior to the date of the judgment — Vide Broom's Legal Maxims, 10th Edn. page 73, 1939 Edition. If the award of the relief of judicial separation had not been delayed the appellant would have been entitled to the relief of divorce under Section 13, sub-section (1-A), sub-clause (i) read with Section 23, there having been no reunion between the parties for the past over ten years. The question whether in this proceeding itself, there can be a decree for judicial separation dating back to the date of the petition and a decree for divorce under Section 13 sub-section (1-A) sub-clause (i) was debated in the course of the hearing and whether in view of the language in Section 13, the Court will have jurisdiction to award the relief of divorce relying upon the fundamental legal maxim referred to above. In view of the fact that our decision may not be the final say in the matter, we took the view that it would only complicate matters if we were to award the relief of divorce under Section 13. It is unfortunate and a matter for regret that besides sufferings of every kind in his married life, the appellant has to wait for another two years before there can be a final legal severance of his marital ties. In this view, we are not expressing any final opinion as to the jurisdiction of the Court to mould the relief in matrimonial causes by the combined operation of Section 10 and Section 13 read with Section 23 of the Act.

14. The appeal is accordingly allowed. I agree with my learned brother about the order as to costs.

15. RAMAPRASADA RAO, J.:— The appellant (husband) is seeking judicial separation from the respondent (wife) who is his father's sister's daughter. The marital life of the spouses was not rosy and was always impregnated with unhealthy and unhappy pin pricks. The appellant married the respondent according to the Hindu rites in 1943 at Maradagiri in former Bellary Dt., in the composite State of Madras. The appellant was a student there. Excepting for one month, July 1948, the respondent is stated to have been residing with her parents till

1948: This was so even when the appellant left for the United Kingdom for higher studies. On his return in 1953, the respondent joined him; but even then her consortium with him was for a short while. She left again for her parents' house and joined him at the intervention of elders after the appellant shifted to No. 439 Poonamallee High Road, a prominent highway in the city.

The appellant's version is that he was bearing with all the idiosyncrasies of his wife with assiduous patience and in fact was anxious to have a child. The respondent was subject to an operation for conception in or about the year 1956. The wife however was not responsive, and, according to the appellant, she was indifferent and was averse to share the common bed, thus making the life of the appellant most unhappy. The respondent, however, denies that she ever kept herself aloof from the consortium of her husband, and, in fact, she could not win over the affections of her husband because she was not good looking and uneducated. Her complaint is that she was being constantly nagged by her husband because of her backward social qualities.

We are not however concerned in this case with facts attendant and relating to physical or mental cruelty. The primordial fact, which is the primary setting on which the bed rock of the petition under the Hindu Marriage Act 1955 filed by the appellant rests, and as is now contended, is that the respondent is guilty of sexual intercourse with a third party, other than himself, within the meaning of Section 10 (1) (f) of the Act, and hence the appellant is entitled to judicial separation on that ground. It may be noted that though originally the petition was founded on the ground of adultery and a divorce was sought, the appellant pressed his claim at the appellate stage, though not at the trial stage, for judicial separation. That the petitioner can ask for the lesser relief of judicial separation, though in the first instance divorce was sought, is indisputable, and rightly therefore the learned Counsel for the respondent did not demur to the course adopted by the appellant both before Jagadisan, J., who heard the appeal and before us.

16. The primary facts on which this petition is sought to be sustained, after foundering the charge of adultery, may be noted.

As already stated, the spouses, though under the same roof, were not living happily. Complaints and cross-complaints were the order of their living. According to the appellant, the rendition of conjugal rights by the respondent was an anathema to her, in spite of his honest overtures to consummate the marriage. Such domestic bickerings took an abnormal turn that, according to

the appellant, she would not talk to him freely, she would cook for herself in the bed room, she would not permit him to sleep with her on some pretext or other, and her hostility and aversion towards him reached the zenith in 1957. The respondent however denies such a state of affairs and would have it that it was the appellant who was avoiding her and was taking a delight in freely mixing up with other ladies of questionable character. On 17-11-1957, the respondent is reported to have left the abode of the appellant after spitting and cursing the appellant. In such a huff she left along with her brother and sister-in-law that she went in a taxi, though her husband was possessed of a car and was quite opulent at that time. The respondent no doubt admits of the parting, but would say that she ceremoniously left him with her brother quick, with child, in August 1958 and every thing was normal till then. It is not in dispute that the respondent gave birth to a child on 23-12-1958. It is also common ground that the appellant had no access to the respondent after she left her husband's abode.

The crucial question is when she left No. 439 Poonamalee High Road, Madras, her husband's residence. If, according to the appellant, she left on 17-11-1957, then the child born on 23-12-1958, cannot be the appellant's and that circumstance by itself would satisfy the ingredients of Section 10 (1) (f) of the Act. If, on the other hand, the respondent left in August 1958, as spoken to by her, the appellant should fail.

17. If the version of the respondent that she left in August 1958, is accepted, then the issue whether the appellant did have access to the respondent during the crucial periods necessarily looms large. As the words "access" and "non-access" are words of significance in matrimonial causes we are bound to adopt the tenuous course of construing such words of art in its correct and not in some vague and extended meaning. The word 'access' can be explained as an indicia of opportunity for marital intercourse. Like any other physical fact it could be proved by direct or circumstantial evidence. Direct evidence can only be secured through the spouses concerned. There was once a controversy in India — whether in bastardy proceedings, evidence of either spouse is admissible. In fact, a moot question was raised, whether the rule in *Russell v Russell*, 1924 AC 687 precluding such admission of the evidence of the husband is adaptable to Indian conditions. The final authoritative pronouncement is now rendered by the Supreme Court in *Venkateswarlu v. Venkatanarayana*, 1954-1 Mad LJ 152 (AIR 1954 SC 176) wherein their Lordships say that there is nothing in the Evidence Act

to prevent the spouses giving evidence of non-access.

In this case, the appellant who is a man of status and a well-known doctor, was anxious to have a child. He had an operation done to his wife in 1956. As stated already, the married life was not quite normal. But the appellant's anxiety to have children, after 14 years of marriage, can easily be visualised. The respondent was rigid and inelastic. She grew more turbulent and in 1957 there was a complete breakdown. He would say that after 1956 "the quarrels increased and we lived separately in the same house not having access to each other". The explosive conduct of the respondent when she left her husband's roof in a taxi after having cursed and spat at the house is a strong circumstance to reflect the mind of the respondent and in what circumstances she left. This incident throws considerable cloud on the propriety of behaviour of the respondent in relation to her matrimonial home. It is no doubt imperative for the Courts to foster and protect the marital tie as it is a matter concerning society at large and is of grave public importance. A fortiori it is so, when a matter arises whether the husband should be deemed to have access to wife at the crucial time such that the resultant child may be legitimised instead of bastardised.

In this case non-access to the wife before she left is spoken to by the husband. Such evidence is admissible, but should be considered with caution, and, as pointed out by Panchapakasa Ayyar, J., in *Dr. Dwarka Bai v. Nainan Mathew*, AIR 1953 Mad 792, with a lynx eye. As corroboration of such evidence is practically impossible and indeed not required, the surrounding circumstances, an overall picture and the conduct of the parties do act as legal accessories to weigh such uncorroborated testimony. Even in cases where adultery or any other matrimonial offence is alleged, the offence complained of should be proved beyond reasonable doubt. Undoubtedly, a matrimonial proceeding is an ordinary civil proceeding. But as it involves the disruption of a marital tie, law imposes a stricter degree of scrutiny of the evidence, if uncorroborated. Such corroboration is demanded as a rule of precaution and prudence so that a well instructed mind may be able, after bringing to bear its own observations and experiences of life, to judge from the pros and cons of each particular case, whether the sole ipse dixit renders possible the theory set out. The words of Sinha, J., in AIR 1957 SC 176, 184, may be usefully quoted:

"..... though corroboration is not required as an absolute rule of law the Courts insist upon corroborative evidence, unless its absence is accounted for

to the satisfaction of the Court. In this connection the following observations of Lord Goddard, C. J., in the case of *Lawson v. Lawson*, 1955-1 All ER 341, 343 (A) may be referred to:— 'These cases are not cases in which corroboration is required as matter of law. It is required as matter of precaution.....' "In the ultimate analysis, the evidence of the husband and other evidence and circumstances ought to be clinching and cogent to exclude the possibility of innocence of the person against whom the matrimonial offence is alleged.

.....
(After discussing the evidence his Lordship proceeded).

18. From the above discussion we are constrained to take the view that even before she left her husband's abode, the appellant did not have 'access' to her or opportunity for sexual intercourse during the year 1957.

19. The next immediate question is when did she leave her husband's roof? Is it on 17-11-1957 as stated by the appellant or in August 1958 as stated by the respondent?

.....
We have therefore no hesitation to hold that the respondent left in November 1957 and not in August 1958.

20. We have now to consider whether matrimonial offence within the meaning of Section 10 (1) (f) can be said to have been committed by the respondent, beyond reasonable doubt. (His Lordship discussed the evidence and proceeded.)

.....
It is not so much the unchastity of the wife that is the subject-matter of these proceedings; but it is the factum of the birth of a child beyond the period of twelve months after the cessation of marital consortium between the spouses. As pointed out by a Full Bench of this Court in *John Howe v. Charlotte Howe*, ILR 38 Mad 466=(AIR 1916 Mad 338) (FB)—

"a child born eleven months after the cessation of marital intercourse was illegitimate and that the petitioner was entitled to a divorce".

We need not go so far, as the overwhelming probabilities in this case assuredly point out that a marital offence within the meaning of Section 10 (1) (f) has certainly been committed and it has been brought home to the respondent beyond reasonable doubt. Mere strictures on the appellant for not having expressly mentioned about the curious circumstances of the birth of a child after the respondent left him in November 1957 would tantamount to mincing matters.

It is an accepted canon of law as stated by Bowen, L. J., in *Cropper v. Smith*, (1884) 26 Ch D 700 "Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy". Fol-

lowing the salient principle we find that the respondent, after the solemnisation of the marriage, had sexual intercourse with a person other than her spouse. Whilst rendering our finding as such, we have borne in mind that the question of legitimacy is of importance to the State and to the child and that this universal adage has to be applied in a matrimonial action.

21. Learned Counsel for the respondent however relied upon AIR 1967 Mad 85, to state that this Court whilst exercising jurisdiction under the Letters Patent ought not to interfere with the findings of fact rendered by the learned appellate Judge. AIR 1967 Mad 85 was a case in which Venkatadri, J., virtually heard a second appeal in a matrimonial action. In those circumstances Anantanarayanan, C. J., (as he then was) and Ramakrishnan, J., were of the view that the findings of the lower Court are binding in second appeal and Venkatadri, J., had no jurisdiction to re-assess the evidence and come to any other conclusion even if the learned Judge thinks that the evidence ought to be appreciated differently or that some part of the testimony ought not to be believed. We may however advert to a decision of the Division Bench of this Court in *Md. Maraicaire v. Veyanna Meeru Thevar*, AIR 1954 Mad 894 and to the dicta of the Supreme Court in *Earnist John White v. Kathleen Olive White* 1958-2 Mad LJ (SC) 125=(AIR 1958 SC 441), *Rajamannar, C. J.* and *Rajagopala Ayyangar, J.*, in AIR 1954 Mad 894 observed—

"Ordinarily, we are never inclined to interfere in cases where one learned Judge has exercised a discretion, but in the circumstances of this case, we are convinced that the learned Judge wrongly refused to exercise the discretion in favour of the appellant, and we are not satisfied that the ground on which the learned Judge refused to exercise this discretion in his favour is well founded."

More apposite is the following observation of Kapur, J., speaking for the Supreme Court in 1958-2 Mad LJ (SC) 125=(AIR 1958 SC 441)—

"The Supreme Court will not ordinarily interfere with the findings of fact given by the trial Judge and the appeal Court; but if in giving the findings the Courts ignore certain important pieces of evidence and other pieces of evidence which are equally important are shown to have been misread and misconstrued and if the Supreme Court comes to the conclusion that on the evidence taken as a whole no tribunal could properly as a matter of legitimate inference arrive at the conclusion that it has, interference by the Court will be called for".

While respectfully adopting the observations of the Supreme Court as above,

we may point out that that was a case in which the Supreme Court interfered in a matrimonial case. We have already amply justified our stand in coming to a conclusion different from Jagadisan, J. The learned appellate Judge was not exercising jurisdiction in second appeal either. In certain important particulars, the evidence has been misread and misconstrued. We are therefore of the view that the findings of fact of the lower Appellate Judge in the peculiar circumstances of this case can be re-assessed by us in the manner we did as above.

Having regard to the normal course of events and human conduct, we find that the appellant has proved his case that the respondent is guilty of an offence within the meaning of Section 10 (1) (f), and whilst therefore allowing the appeal grant the appellant a decree for judicial separation. This appeal is therefore allowed, but in the peculiar circumstances of this case, there will be no order as to costs.

RGD. Appeal allowed.

AIR 1969 MADRAS 248 (V 56 C 56)

RAMAPRASADA RAO, J

Kaluvaroya Pillai and others, Appellants v Ganesa Pandithan and others, Respondents.

A. A. O Nos. 276, 294 to 298 of 1964, D/- 1-12-1967 against order of Sub Court, Cuddalore in A. S. No 151 of 1963

(A) Civil P. C. (1908), O 43, R. 1 (n) and O 41, R. 23 — Scope — Remand of case on some issues — Appeal against remand — Appellant cannot canvass all findings of fact.

Where the lower appellate Court agrees with the trial Court on its findings on some of the issues but reverses or finds unable to accept the findings on some other issues raised in the case and considers it necessary, in the interest of justice to remand the case, the appellate Court hearing an appeal against the order of remand can and should advert itself only to such of those findings on the point upon which the order of remand has been made. The appellant thus cannot canvass all the findings of fact arrived at by the lower appellate Court. A litigant, however, in order to avoid the prescribed statutory bar in S 105 (2) Civil P. C. can and indeed ought to file an appeal against an order of remand. In such an appeal under O 43, R. 1 (u) he can agitate not only the legality or propriety of the order of remand, but also the findings of facts attended upon the remit order. Case Law discussed. (1890) ILR 14 Bom 14 (FB) Expl (Paras 7, 9)

(B) Civil P. C. (1908), Ss. 100-101, O. 43, R. 1 (u) — Lower Appellate Court substituting its own judgment and decree to that of trial Court and remanding case — Remedy — Remedy is to file a second appeal and not an appeal under O. 43, R. 1 (u). (Para 4)

Cases Referred: Chronological Paras

(1965) W P. Nos 1316 and 1317 of 1963 and 135 to 145 and 928 of 1965 (Mad) 11

(1964) 77 Mad LW (SN) 32, Ramachandra Chettiar v Karuppiiah 11

(1960) AIR 1960 Mad 81 (V 47)= 72 Mad LW 683, State of Madras v Sulaika Beevi Ammal 11

(1958) AIR 1958 Mad 95 (V 45)= 1956-2 Mad LJ 260, Govindaswamy Naidu v Tanjore Palace Devasthanam 11

(1952) AIR 1952 Mad 323 (V 39)= 1952-1 Mad LJ 71 (FB), Periannan v A. S. Amman Kovi 11

(1951) AIR 1951 Mad 218 (V 38)= 1950-2 Mad LJ 379, Kanakayya v. Lakshmayya 9

(1951) AIR 1951 Mad 883 (1) (V 38)= ILR (1951) Mad 835, Venkatarama Iyer v. Unnamalai Ammal 9

(1941) AIR 1941 Mad 530 (V 28)= ILR (1941) Mad 850 (FB), Secy. of State v. A. Jagannadham 9

(1928) AIR 1928 Mad 430 (V 15)= 27 Mad LW 483, Jainulabideen Marakayar v. Habibulla Sahib 9

(1926) AIR 1926 Mad 475 (V 13)= 91 Ind Cas 462, Seshamma v Kuppanaiyengar 8, 10

(1897) ILR 20 Mad 152=6 Mad LJ 232, Sankaran v Raman Kutti 8

(1890) ILR 14 Bom 14 (FB), Bhau Bala v. Bapaji Bapuji 8

(1881) ILR 3 All 675=(1881) All WN 46, Badam v. Imrat 8, 9

R. Gopalaswamy Iyengar and S. Desikan, for Appellants, K. Parasaran, for Respondents.

JUDGMENT:— The above batch of civil miscellaneous appeals are against the order of the Subordinate Judge, Ramanathapuram in A S 151 of 1963, 27 of 1959 and 29 to 32 of 1959, whereunder he modified the judgment and decree of the District Munsif, Ramanathapuram, in the Original suits tried by the latter, and remanded the same on a particular aspect. The appeals before the lower Appellate Court were all connected and filed by the appellants against the respondents in those civil miscellaneous appeals. In all the suits the respondents claimed that the suit lands were panna lands and therefore they had domain over the same and that the appellants are bound to recognise such right in them as iruwaramdars and liable to pay rent therefor. Both the Courts below found concurrently that the lands situate in the village of Karungulam is a pre-settlement dharmanasam

grant which were iruwaram pannai lands of the respondents. On an examination of the oral and documentary evidence, the Courts below found that the suit lands are such lands of the respondents. They also found that the respondents collected swamibogam in respect of the suit lands which by itself is an important circumstance indicating that the lands in question are private lands. The learned District Munsif, however, found that the appellants were the tenants of the respondents. But the lower Appellate Court came to a different conclusion and held that the evidence on record was not sufficient to make out a case of tenancy of the appellants in the respective suit lands under the respondents.

The learned Subordinate Judge, therefore, having come to a different conclusion from that of the learned District Munsif that the respondents are not entitled to arrears of rent from the appellants came to the conclusion that the appellants were in any event liable to pay to the respondents mesne profits in view of their admitted possession of the lands during the fasli or faslis in question. He, therefore, remanded the suits to the trial Court for the limited purpose of determining the quantum of mesne profits payable to the respondents by the appellants. He also gave a direction that the respondents will have the liberty to suitably amend the plaint so as to secure such mesne profits as and when reckoned by the trial Court. The result of the order of remand is that he confirmed the findings as regards the character of the lands and the right of the respondents to own and possess them as iruwaram pannai lands, but remitted the suit for a further enquiry as to the ascertainment and quantification of the mesne profits to which the respondents would be entitled to by reason of the occupation of such pannai lands by the appellants. As against this order of remand the present batch of civil miscellaneous appeals are filed.

2. C. M. A. No. 276 of 1964 is also an appeal against an order of remand and by consent this was also heard along with the above batch of civil miscellaneous appeals. In this case, the lower Appellate Court remanded the suit for a fresh enquiry, because the learned District Munsif in that suit did not frame an issue about the release, which release was pleaded in the plaint, and because of certain other important circumstances attendant with the trial of the suit. He also framed two issues and set aside the decree of the trial Court in full and practically directed a retrial of the suit. As against this order of remand this civil miscellaneous appeal was filed.

3. The main legal contentions addressed before me revolve on the question

whether in an appeal against an order of remand, the appellant can canvass all the findings of fact arrived at by the appellate Court or whether the findings of fact relating to and circumscribing the order of remand only could be agitated therein.

4. Before considering the arguments of the learned Counsel for appellants, it is easy to dispose of C. M. A. No. 276 of 1964. Though this is a case in which the lower appellate Court remanded the suit, it appears to me that the totality of the suit has been remanded to the trial Court for reconsideration in view of certain irregularities inhered therein. As a matter of fact the lower appellate court set aside the judgment and decree of the trial Court in full. Though it gave a liberty to the respondents to have a retrial in the trial Court, presumably, in the interests of justice, it appears to me that the lower appellate Court has substituted its own judgment to that of the trial Court and in the peculiar circumstances of the present case it is not open to the appellants in this civil miscellaneous appeal to canvass the entire judgment and decree of the lower appellate Court by filing an appeal under Order XLIII, Rule 1 (u), C. P. C. I shall presently advert to the right of an appellant in a civil miscellaneous appeal to canvass the correctness of the findings other than those relating to the order of remand in such an appeal. But in so far as this appeal is concerned, as there has been a substitution of the judgment and decree of the appellate Court to that of the trial Court, the only remedy available to the appellants in this case was to file a second appeal, if they were so advised, and not to file an appeal under Order XLIII, Rule 1 (u), C. P. C. Thus in the peculiar circumstances and on the facts of this case, it is not open to the appellants to canvass the other findings of the lower appellate Court.

5. The main arguments addressed in the batch of appeals relate to the scope of a civil miscellaneous appeal under Order XLIII, R. 1(u), C. P. C. The relevant provisions in the Civil Procedure Code which have a bearing on the question are Order XLI, Rule 23, Order XLIII, R. 1(u) and Sections 104 and 105. Order XLIII concerns itself with appeals from orders and Rule 1 (u) provides that an appeal shall lie under Section 104 as against an order under Rule 23 of Order XLI remanding a case where an appeal would lie from the decree of the appellate Court. Order XLI, Rule 23 reads as follows—

“Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the appellate Court in reversing or setting

aside the decree under appeal considers it necessary in the interests of justice to remand the case, the appellate Court may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand".

Analysing Order XLI, Rule 23, the appellate Court can remand a suit under two circumstances — (a) if the trial Court has disposed of the suit upon a preliminary point which is not necessarily a preliminary issue, and the decree is reversed in appeal, and (b) when the appellate Court reverses or sets aside the decree under appeal considers it necessary in the interests of justice to remand the case. Order XLIII, Rule 1 (u) provides for an appeal against such an order under Order XLI, Rule 23. In fact, Section 104 enables the preferment of such an appeal, as it is one which is otherwise expressly provided for in the body of the Code.

6. Order XLI, Rule 23, C. P. Code as it reads now, was introduced in Madras in 1930. The provisions which are apposite in the old Code which have a bearing on orders of remand are Sections 562 and 588.

7. On a prima facie reading of the relevant provisions relating to appeal against orders, it is clear that in such appeals against orders of remand, the Court which has seisin of such an appeal can probe into the legality, propriety and regularity of the facts and circumstances attendant on and revolving upon the order of remand as such and cannot enter into or delve deep into a discussion regarding the findings which are unconnected with and alien to the order of remand. The appellate Court has the right to differ or confirm the findings on certain issues arising in the suit. If the appellate court so confirms some amongst various findings of the trial Court, but finds itself unable to concur with the other findings of fact in relation to other issues tried by the trial Court, then under Order XLI, Rule 23, C. P. C., the appellate Court has the right in the interests of justice to remand the case for a re-examination and re-adjudication on such issues which according to the appellate Court have not been correctly and properly appreciated by the trial Court.

As already stated, Order XLI, Rule 23, C. P. C. provides two contingencies which would enable an appellate Court to remand a suit. If the trial Court decided on a preliminary point and if the said

decision is reversed by the appellate Court, it could, under the powers vested as above, remand the case for a fresh trial. This is not, however, the case in this batch of appeals. We are here concerned with the other contingency expressly provided for in Order XLI, R. 23, C. P. C. This is a case where the lower appellate Court agreed with the trial Court on its findings on some of the issues, but reversed or found unable to accept the findings of the trial Court on some other issues raised in the case, and therefore considered it necessary, in the interests of justice, to remand the case. The phrase 'considers it necessary in the interests of justice' is of very wide connotation and vests in the appellate Court a discretion to do so. Such discretion, unless perversely exercised, cannot be lightly interfered with in an appeal against the order of remand. It therefore appears to me that the only reasonable interpretation that could be put on the provisions relating to appeals against orders, after collectively understanding the provisions quoted above, is that the appellate Court hearing of an appeal against an order of remand can and should advert itself to such of those findings on the point upon which the order of remand has been made. That this is the view that has to be taken is fortified by the embargo put upon a litigant under Section 105 (2), C. P. C. who fails to prefer an appeal against an order of remand in time.

Section 105 (2) postulates that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness. The correctness of an order of remand has to be treated distinctly and separately. Whilst, therefore, considering its correctness, propriety or regularity, the correctness of ancillary, incidental or connected issues cannot be gone into in a civil miscellaneous appeal against such an order of remand. An appeal against an order of remand is self-contained. An order of remand generally is based on certain facts. It is such facts which could be canvassed in an appeal against that order. Therefore, if the appellate Court, while reversing a judgment of the trial Court on some issues which in the interests of justice necessitates a remand, it is only such facts, conclusions and decisions which have a bearing on the order of remand that could be canvassed in an appeal against such an order.

8. At this stage it is convenient to consider the case law relating to the subject. The earliest case under the old Code is that reported in *Badam v. Imrat*, (1881) ILR 3 All 675. That was a case in which the trial Court disposed of the case on a preliminary point as to limitation. The first appellate Court reversed this find-

ing and remanded the suit for fresh trial. The High Court, on appeal, held, by a majority that—

"That object would be defeated if the appellant were restricted in pleading that the remand had been made contrary to the provisions of S. 562 of the Civil Procedure Code, and forbidden to urge the more vital and radical objection to the correctness of the adjudication on the preliminary point."

Following the above, a Full Bench of the Bombay High Court in *Bhau Bala v. Bapaji Bapuji*, (1890) ILR 14 Bom 14 was of the view that in an appeal against an order of remand "the correctness of the remand order, in all legal respects 'was before the High Court for adjudication.' With great respect, the words "in all legal respects" appearing in the judgment were never meant, in my opinion, to be literally understood, so as to comprehend an adjudication on merits unconnected with the order of remand. In *Sankaran v. Raman Kutti*, (1897) ILR 20 Mad 152, this Court approved the ratio in (1881) ILR 3 All 675. In *Seshamma v. Kuppanaiyangar*, AIR 1926 Mad 475, the facts are that a preliminary point was decided by the trial Court, which decision was reversed in appeal and the case was remanded for trial of the other issues. *Venkatasubba Rao and Madhavan Nair, JJ.*, observed—

"Although the appeal has taken the form of a civil miscellaneous appeal against an order of remand the Subordinate Judge is a final Judge of fact and the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal."

Though the question in the present batch of appeals did not arise as such, there is sufficient indication here that the finding on facts relevant for the decision of the first appellate Court to remand the suit, can be canvassed in an appeal against such an order.

9. The more apposite case which has settled the apparent controversy is *Jainulabideen Marakayar v. Habibulla Sahib*, 27 Mad LW 483=(AIR 1928 Mad 430). There the Division Bench observed:

"To accede to the appellant's contention would be practically to convert the appeal from the order of remand into an appeal from the decree itself, because if the appellants are to be allowed to raise points decided against them by the lower appellate Court in order to sustain the decree of the Court of first instance, the respondents also must equally be permitted to contest the findings of the appellate Court against them, in order to sustain the decree of the lower appellate Court. In our opinion such a procedure is altogether unwarranted....."

This was approved by a Full Bench of our Court in *Secretary of State v. A. Jagannadham*, AIR 1941 Mad 530 (FB). *Viswanatha Sastry, J.*, in *Kanakayya v. Lakshmayya*, 1950-2 Mad LJ 379 at p. 382=(AIR 1951 Mad 218 at p. 220), clinches the subject by observing—

"An order of remand has an independent existence and is not submerged or dissolved in the final decree. A separate right of appeal is provided against such an order. Not only, is a right of appeal provided by Order 43, Rule 1, clause (u) but an obligation is cast by Section 105 (2), C. P. Code, upon a person dissatisfied with an order of remand to appeal against it on pain of losing his right to object to the propriety or the correctness of the order or the findings on which it is based in the later stages of the litigation."

It is significant to note that according to the learned Judge "the propriety or the correctness of the order of the findings on which it is based" can only be canvassed in an appeal under Order XLIII, Rule 1 (u), C. P. C. This was approved later by a Division Bench of our Court in *Venkatarama Iyer v. Unnamalai Ammal*, ILR 1951 Mad 835=(AIR 1951 Mad 883 (1)). We need not multiply further authorities. All the case law starting from (1881) ILR 3 All 675 is one way. In my view, it is now well settled that a litigant in order to avoid the prescribed statutory bar in Section 105 (2), C. P. C., can and indeed ought to file an appeal against an order of remand, but the only limitation in the conspectus of the ratio of the decisions cited is that in such an appeal under Order XLIII, Rule 1 (u), C. P. C. he can agitate not only the legality or propriety of the order of remand, but also the findings of fact attendant upon the remit order.

10. Learned Counsel for the appellants seriously contended before me however that in such a civil miscellaneous appeal, the findings of fact other than those relating to the order of remand, could be pressed into service. In the view that I have held, it is not necessary to consider them. If it could be gone into, it should be as if this Court were hearing a second appeal. See AIR 1926 Mad 475.

11. Even otherwise, in *C. M. A. 294* to 298 of 1964, both the Courts below concurrently found that the respondents are *iruwaramdars*, who had the benefit of *Swamibogam* and were dealing with the property in their own right in *othis* and *sale deeds*. The estate in question is admitted to be a post-1936 estate. According to the well-known decisions rendered by our Courts in *Periannan v. A. S. Amman Kovil*, 1952-1 Mad LJ 71=(AIR 1952 Mad 323) (FB) and *Govindaswamy Naidu v. Tanjore Palace Devasthanam*, 1956-2 Mad LJ 260=(AIR 1958 Mad 95), even in the case of

a whole inam village becoming an estate under Act XVIII of 1936 there can be private lands which are domain or home farm lands of the land-holder. The mere fact that the land-holder is an absolute land-holder is not decisive — See State of Madras v Sulaika Beeviammal, 72 Mad LW 683=(AIR 1960 Mad 81). In dealing with pannai lands which became an estate by virtue of the 1936 Amendment Act, Srinivasan, J., in Ramachandra Chettiar v Karuppiiah, (1964) 77 Mad LW 32 (SN), observed—

"In so far as pannai lands are concerned, it is not necessary that the land-holder should establish continuous cultivation, for the lands were undoubtedly at their inception one in which the land-holder held both the rights. In such an event, what has to be shown is something of a negative nature, that is to say, that no other person had been conferred with occupancy rights therein. That would be already indicated by such acts as dealing with the property." In the instance case, even the presumption arising under Section 185 of the Madras Estates Land Act, 1908, is favourable to the respondents and found to be so having regard to the othas and other dealings had by the respondents. Venkataraj, J., in W P Nos 1316 and 1317 of 1963 and 135 to 145 and 928 of 1965 (Mad), following the well-known decision of this Court, observed—

"In W P 521 of 1957, it has been observed that the description of the lands as Iruwaram in the sale deeds can be taken into consideration, as other evidence under Section 185 (3) of the Estates Land Act. The sale deeds can also be taken into consideration along with other evidence to consider the character of the land. In W. P. No 340 of 1961 Veeraswami, J., has held that Kudi othas could conclusively point to an assertion on the part of the land-holder to treat the lands as pannai or private".

I have adverted to these decisions only to affirm that the Courts below came to the correct conclusion as regards the character of the land and as to the rights of the respondents. Even otherwise, the appellants' contentions cannot be accepted.

12. As regards the facts revolving around the remit order in C M. A. 294 to 298, there is nothing palpably irregular and improper necessitating an interference. Having found that the relationship of the landlord and tenant does not exist between the respondents and the appellants the lower appellate Court was constrained to send back the suit for the reckoning and quantification of the mesne profits. This is but a natural corollary to the finding as above. No doubt, the lower appellate Court could have undertaken

the enquiry by itself, but it does not tantamount to shirking the responsibility, if the parties are given the liberty to make consequential amendments in the pleadings and secure the rightful relief after full hearing in the trial Court. The remit order is therefore well founded and C M. A. Nos 294 to 298 of 1964 are dismissed. But there will be no order as to costs.

13. In C. M. A. No 276 of 1964 the remit order of the lower appellate Court relates to the issue whether the release deed which was filed in the lower appellate Court was admissible or not and for a reconsideration of the issue of the alleged remarriage. The lower appellate Court allowed the interlocutory application filed for the reception of a document filed before it and this was done in the interests of justice. In such circumstances, the lower appellate Court remitted the suit for a fresh trial on a point concerning the alleged forfeiture of rights in the properties by Rajammal due to the alleged remarriage. Incidentally, the question also has to be viewed in the light of the alleged release deed directed to be received by the lower appellate Court as additional evidence. It is in such circumstances that the lower appellate Court could not agree with the judgment and decree of the trial Court and set it aside in full. As in its opinion, a fresh examination was necessitated as regards the material issues in the case, it remitted the suit for fresh trial. This is not a case in which it could be said that the first appellate Court shirked its responsibility. In fact, in all fairness, it gave liberty to both parties, to adduce oral and documentary evidence afresh. I do not therefore think that the remit order is in any way illegal, improper and irregular. C M. A. No 276 of 1964 is therefore dismissed. There will be no order as to costs. No leave.

MVJ/D.V.C.

Order accordingly.

AIR 1969 MADRAS 252 (V 56 C 57)

NATESAN, J.

V. O C Arumugham Pillai, Appellant v A. Ilango and others, Respondents.

Second Appeal No 857 of 1965, D/- 28-7-1967 against decree of Sub Court, Tuticorin in A. S. No 150 of 1963

(A) Evidence Act (1872), Ss. 101 to 104 — Benami Transaction — Determination — Motive, source of consideration, possession of property and its enjoyment, custody of title deeds are the features whose effect either severally or cumulatively has to be considered — Onus lies on the person who pleads benami nature.

Motive, the source of consideration, possession of the property and its enjoy-

LL/AM/F845/68

ment, custody of title deeds, are various features, which may severally or cumulatively weigh and tilt the scale one way or other in the matter of determining the benami transaction. But these features are not exhaustive of the circumstances on which the final conclusion of the Court has to be based. Nor can it be said that in all cases the presence or absence of one or the other of these circumstances will be helpful in deciding the real position. At times other considerations than motive, possession and source of consideration may play a vital part in the determination. In certain circumstances only one or the other of the above specified elements may alone be of assistance.

(Para 4)

Motive for benami is not always conclusive. But when the purchase in the names of one or other or some of the members of the family is consistent with an intention to make the acquisitions for the family and there is nothing unusual in such acquisition, certainly, the Court may give some weight to the absence of motive and absence of an acceptable explanation for taking the sale deeds by the father in the names of his sons. Even as the absence of a motive need not necessarily exclude the theory of benami, the fact that some motive is shown will equally not bar the rejection of the plea of benami.

(Para 4)

As regards consideration it is not whose hand that physically passed the consideration that is material; it is the source of the money that is important. The source of consideration is only one of the tests and it cannot conclude the matter.

(Paras 5A & 8)

The onus initially lies on the person who pleads that the transaction is benami. AIR 1938 Mad 8 & (1899) ILR 26 Cal 227 (PC), Rel. on.

(Para 8)

(B) Civil P. C. (1908), Ss. 100 and 101 — Question of fact — Question of Benami is a question of fact — When the decision of the lower court is given on merits, on consideration of well-recognized principles for determination findings will not be interfered with in second appeal.

(Paras 3 & 8)

Cases Referred: Chronological Paras (1938) AIR 1938 Mad 8 (V 25)=

1937-2 Mad LJ 606, Sitamma v. Sitapati Rao 8
(1899) ILR 26 Cal 227=26 Ind App 38 (PC), Ramnarain v. Md. Hadi 8

Sundaram Iyer and T. K. Subba Rao, for Appellant; D. Ramaswami Aiyangar, for Respondents.

JUDGMENT:— The first plaintiff has preferred this second appeal, having failed in both the courts below in his suit for a declaration that the suit properties belonged to him alone and for an injunction restraining defendants 1 and 2 from in-

terfering with his possession and enjoyment of the same. The appellant (first plaintiff) is the father, the second defendant is his eldest son, the first defendant is his second son, the second plaintiff and the third plaintiff being his third and fourth sons respectively. The suit properties originally belonged to the Zamindar of Ettayapuram and formed part of his pannai lands. Items 2 and 3 of the plaint schedule, totalling an extent of 15.62 acres of punja lands in Sinnur village, are covered by the sale deed Ex. A. 8, dated 21-2-1956 executed by the Zamindar in favour of the first defendant that is, the second son for a stated consideration of Rs. 1,500/-.

The plaint-schedule first item is another 30 acres of punja lands in the said village and have been conveyed by the Zamindar for a consideration of Rs. 5000 under the deed of sale Ex. A. 5 dated 23-2-1958 in favour of the four sons, that is, plaintiffs 2 and 3 and defendants 1 and 2. It is the appellant's case that the sale deeds Ex. A. 5 and A. 8 were taken by his benami in the names of his sons for his exclusive benefit and use, out of his own funds. He claimed that the suit items belonged to him absolutely and that the first defendant's attempt to alienate the properties and interfere with his possession and enjoyment necessitated the suit. The defendants denied the exclusive claim put forward by the appellant to the properties. The defence in the main was taken up by the second defendant, who pleaded that the properties belonged to the family as such and are not the individual absolute properties of the first plaintiff. The plea of benami acquisitions by the appellant for his sole and his exclusive use in the names of his sons was repudiated even as the appellant's claim of his exclusive possession and enjoyment of the suit properties.

2. As in the context of the dispute the figuring of the other sons as plaintiffs looks somewhat intriguing, I may as well refer to certain features in this regard, which are brought out in the evidence.

.....

3. As the contest emerged at the trial and is pressed before me, the question for decision in the case is, whether the two sale deeds are only benami for the appellant or they are purchases for the joint family of the appellant and his undivided sons. The question of benami is essentially one of fact and when the decision has been given on the merits, bearing in mind the well-established principles for the determination of the question of benami, the second appellate Court has no jurisdiction to interfere in the matter. Now the trial Court, the District Munsif, Koilpatti, on a consideration of the evidence has rejected the motive or reason for the benami put forward by the appel-

lant. The plaint did not set out specifically the reason for going in for a benami transaction. It was stated vaguely that for certain reasons the sales were taken benami. In the evidence it was trotted out that the sales were taken benami, apprehending land ceiling enactments.

Another reason given for the benami was that as a Government servant, he did not want to take sales in his own name. The lower appellate Court concurred with the trial Court in rejecting the motive put forward for the benami. It is pointed out that a Government servant could purchase lands in his name with the permission of the Government and that he could have equally taken the lands in the name of his wife and daughters. No explanation was given by the appellant for not seeking the permission of the Government to make the purchases, if they were bona fide purchases. Admittedly in 1957, he had accepted a gift of 17 acres from the Zamindar. He had not taken any prior permission from the Government to receive the gift. He would state in his evidence that he later intimated to the Government of the gift. According to the trial Court, the taking of documents in the name of the father and the sons probablisises more the case that the acquisitions were made to benefit the entire family and not merely the appellant. Learned counsel for the appellant attacked the reasoning of the Courts below for rejecting the motive put forward. I cannot say that the Courts below have gone egregiously wrong in their reasoning to call for interference with their finding in second appeal.

4. Learned Counsel then suggested that the absence of motive for benami is not always conclusive on the question. True, but when the purchase in the names of one or other or some of the members of the family is consistent with an intention to make the acquisitions for the family and there is nothing unusual in such acquisition, certainly, the Court may give some weight to the absence of motive and absence of an acceptable explanation for taking the sale deeds in the names of his sons. Even as the absence of a motive need not necessarily exclude the theory of benami, the fact that some motive is shown will equally not bar the rejection of the plea of benami. While on questions of benami, the Court will not indulge in suspicion and surmise. It will have to take into consideration the facts and circumstances as established by the record and from an overall picture of the entire evidence, draw its inference. Motive, the source of consideration, possession of the property and its enjoyment, custody of title deeds, these are various features, which may severally or cumulatively weigh and tilt the scale one way

or other. But these features are not exhaustive of the circumstances on which the final conclusion of the Court has to be based. Nor can it be said that in all cases the presence or absence of one or the other of these circumstances will be helpful in deciding the real position. At times other considerations than motive, possession and sources of consideration may play a vital part in the determination. In certain circumstances only one or the other of the above specified elements may alone be of assistance.

5. Coming to the question of consideration, the trial Court was not prepared to accept the appellant's case of his source for the purchase money. It referred to the fact that the parties had an ancestral house, that the compensation for its acquisition had been received by the appellant and that the maternal grandfather was a man of property, whose only issue was the appellant's wife. Taking into consideration the further fact that the second defendant had been earning from 1953 onwards and that the letters produced by him showed that the appellant had been repeatedly asking him for moneys, the trial Court concluded that in the circumstances, it could not be said that the appellant advanced his exclusive and separate funds to get the suit properties. The discussion by the trial Court on the question of consideration is very brief, but the conclusion is categorical. The claim of the appellant of his savings is disposed of summarily with the observation that there was no evidence worthy of credence in regard to the alleged savings. It would accept the borrowing by the appellant of a sum of Rs. 2500 under the promissory note Ex. A. 1 on 11-1-1958, just before the purchase under Ex. A. 5.

The appellate Court, on the question of savings, whether the appellant had savings and whether those savings were utilised as consideration for the sales, under Exs. A. 5 and A. 8, after some discussion, observes that the appellant had not filed into Court his accounts to show whether he had savings and those savings were utilised for the purchases. But on the question of consideration, generally the appellate Court would state that the appellant had paid consideration for Exs. A. 5 and A. 8, by his borrowings and by sale of the jewels of his wife. Learned Counsel appearing for the appellant rests his appeal mainly on this finding of the learned Subordinate Judge and would contend that adequate attention has not been given by the lower appellate Court to its own conclusion that the consideration for the sales had passed from the appellant. Counsel contends that who paid the consideration is an important criterion, when considering the plea of benami and could at times be decisive.

Learned Counsel points out that while the trial Court rejected the appellant's case of his providing in entirety the consideration, the appellate Court has found contra; but the significance of this finding has, however, been lost sight of by the Court. On this, Counsel for the respondent, before me, urges that the finding as to consideration to the extent it may be said to be in favour of the appellant has been arrived at in a perfunctory manner without that analysis and scrutiny of the evidence, which may be expected of the appellate Court. He contends that the finding, if it is to be read as differing from the trial Court and as meaning that the entire consideration for the sales were found by the appellant, could not be maintained at all on the evidence. Learned Counsel would further submit that the learned Subordinate Judge had only said that P. W. 2 had paid consideration for Exs. A. 5 and A. 8 and not that he paid the entirety of the consideration.

5-A. But it is not whose hand that physically passed the consideration that is material; it is the source of the money that is important. As the criticism of the learned Counsel for the respondents does not appear to be wholly unjustified, it has become necessary to examine the evidence, in the case, oral and documentary, somewhat in detail, not ordinarily called for in a second appeal. In the finding there is also some vagueness about the source of the purchase money. Earlier, I have remarked that the trial Court has been very brief in its discussion on the question of consideration; even the exhibit numbers and rank of the witness whose evidence is relied on is not given in this part of the judgment. The only redeeming feature in the discussion on the question by the appellate court is, it makes some reference to exhibit marks and the rank of the witnesses, whose evidence the courts relies upon or is taken into consideration. But as will be seen presently it cannot easily escape the charge of being perfunctory. It will be convenient here to set out the relevant part of the appellate Court's judgment, which deals with the question of consideration.

... ..
(After discussing the facts his Lordship proceeded)—

6. The very submission of the appellant and his own evidence, may not lead to the conclusion that the consideration for the sales Exs. A. 5 and A. 8 was found at any rate in full by him. It appears as if the learned Subordinate Judge has merely set out briefly in the judgment, the arguments advanced that the bills Exs. A. 9 to A. 12 prove the passing of the consideration, without looking into the documents and scrutinising the same. True, it is unnecessary that the Court

should set out in detail in all cases contents of documents. But certainly the Court has to examine whether at all the documents relate to the issue in question and could advance the case of either party. Can it be said that the learned Subordinate Judge had applied his mind to all the relevant evidence before him when he gave his finding as to the passing of consideration for Exs. A. 5 and A. 8 and to a certain extent varied the finding given by the trial Court?

That the discussion has been summary can equally apply to the trial Court's judgment. If the trial Court had been a little more elaborate and had briefly indicated the contents of the documents, it may not be necessary for the appellate Court to refer in detail to the contents of the documents, particularly when it is confining the findings. In this case, all that was necessary was to see whether the bills in question and if so, which of them, could be related to the purchases; and the material documents are few. The discussion by the appellate Court in the circumstances is to say the least unsatisfactory containing just a catalogue or listing of the documents without any consideration of their probative value. While prolixity and elaborate setting out of the contents of documents or evidence should be avoided, when the Code enjoins that the judgment must contain reasons for the decision, the reasons set out must be founded on the evidence, oral and documentary. Justice must not only be done, but the judgments of the lower Court which are subject to appeal must do justice to the cases of the opposing parties, particularly on facts.

The purpose of the requirement is obvious, it eliminates charges or arbitrariness and infuses confidence in the litigant public, that the decision has been given after an understanding of the case. Under our system, the judgment is not mere formal conclusion, but a reasoned pronouncement, that within the bonds of reason no defeated litigant may leave the Court, with the feeling that the Court has failed to consider his case. No doubt, the omission to make special mention of pieces of evidence or failure to refer in detail to the evidence on any particular aspect or issue do not lead to any presumption that the evidence has not been adequately or reasonably considered. But here, the appellate judgment does not show any real scrutiny of the evidence; for, if there had been such scrutiny, there would have been no reliance on at least on some of the documents. I am perfectly conscious that the subordinate judiciary is hard pressed for time. I have also a feeling that in this case the Courts and Counsel have not had that co-operation from the parties or some of them at least as would have been expect-

ed. But all the same, it is imperative, that Courts below deal reasonably with facts and set out what the evidence consists of and how it proves or advances the case of one or the other of the parties. The lower Appellate Court is the final Court of fact and its findings have been given a sanctity under Section 100, C P Code. The responsibility of that Court is, therefore, all the greater.

7. To take up the contention of the respondent that the learned Subordinate Judge does not find that the entire consideration for the sales had been paid by the appellant, there is something to be said for this. The learned Subordinate Judge only states that it could be said that P W 2 had paid consideration for Exs A. 5 and A. 8 from the borrowings and by sale of the jewels of his wife. There is no specific finding varying that of the trial Court that the exclusive separate funds of the first plaintiff were not shown to have gone for the purchaser. The District Munsif refers to the letters of the appellant to the second defendant for moneys and things. In Ex. B 12, he writes to the second defendant to send money for going in for a further purchase from the Zamindar.

8. But even assuming in favour of the appellant that the entire consideration for the sales had been provided by the appellant, that may not be conclusive of the question. As it is, when it is not clearly made out that the consideration has wholly been provided by the father even assuming that the sons have not proved their contribution, the mere fact that a good part of the consideration is proved to have proceeded from the father cannot be decisive of the question. I have pointed out already that for the purchase under Ex. A. 5, proceeds from the acquisition of the ancestral house could have gone in.

In this connection I may refer to the observations in *Sitamma v. Sitapati Rao*, 1937-2 Mad. L.J. 606=(AIR 1938 Mad 8). After pointing out that the onus lies in the first instance on the person, who pleads that the transaction is benami, it is observed as follows—

"The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to Jagannadha Rao, whether in a similar measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction, though it is an important criterion".

In *Ramnarain v. Md. Hadi*, (1899) ILR 26 Cal 227 (PC), the Privy Council held as follows—

"The first court had attributed too much to the fact that the plaintiff had supplied the purchase money, an important fact in most of the cases raising the question of benami, or not benami, but not the only test of ownership."

The source of consideration is only one of the tests and it cannot conclude the matter and in the present case the matter for enquiry is, whether the father a member of an undivided family when making the purchase decided to hold the property exclusively for himself or intended when acquiring the property to acquire for the family. If the acquisition by the father had been in his own name, and the consideration had proceeded from his personal funds then there will be little difficulty in holding in the absence of evidence of very clear intention to treat it as family property, that it is his self-acquisition. But the properties have been purchased in the names of the sons and the motive pleaded for the benami purchase has not been accepted. The Courts below are agreed in holding that it had been treated as the property of the family and was so looked upon by P. W 2 himself.

Correspondence produced clearly show that the property had been treated as property in which all the members of the family were interested and this is the basis on which the lower Appellate Court has rejected the appellant's plea of benami and affirmed the decision of the trial Court. Ex. B 12 is the letter dated 2-3-1956 by the appellant to his second son already referred to. Herein he intimates his son, that he had purchased 26 acres of land at a very concessional rate and paid the full costs and the document had also been registered.

.....
(After discussing the facts his Lordship proceeded.)

The learned Counsel for the second respondent submits that the Zamindar was parting with the Pannal lands which under the settlement proceedings have been given to him at heavy concession and he was obviously intending to benefit the family of V. O. C. the father of the appellant and not the appellant alone. It may well and properly be so. Several other considerations, the status of the family and the position in which the several parties were placed, the fact that the second defendant to an extent was contributing for the expenses of the family, the manner of the acquisition, all, according to learned Counsel for the respondent, properly led to the conclusion that the acquisitions must have been for the family. The ultimate conclusion on the question as I set out at the begin-

ning whether the lands were acquired by the appellant by himself benami in the names of his sons is a pure question of fact and this question has been concurrently found against the appellant by both the Courts below. The Courts below on evidence which could sustain the finding, find that the acquisitions should have been for the benefit of the joint Hindu family consisting of the appellant and his sons. The appellant and the other members of the joint family, all have interest in the lands and the courts below find that the appellant has not made out his case of exclusive possession and enjoyment of the lands and that property. Once it is found that the lands have been acquired for the family, on an overall picture of the case having regard to the fact that the sons were serving in different places, no question of the appellant attempting to prove the benami character of the sales by his payment of kists or his management of the lands, can arise. These are normal happenings and modes of enjoyment in Hindu families. Even though the Courts below have in their judgments sacrificed a full and careful analysis of the case of the parties at the altar of brevity not always a steady one, the ultimate finding of fact is perfectly justified on the evidence on record. The failure of the Courts below to advert to and deal with the evidence, oral and documentary, as fully as they ought to have done in a case of this kind, has not affected the decision of the case on the merits.

9. In the result the second appeal fails and is dismissed. Having regard to all the features of the case, I am not awarding any costs. No leave.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 257 (V 56 C 58)

NATESAN, J.

M. M. Valliammai Achi and others, Appellants v. KN. PL. V. Ramanathan Chettiar and others, Respondents.

Second Appeal No. 1749 of 1962, Memoranda of objections and A. A. O. No. 43 of 1963, D/- 30-11-1967, against order of Dist. J., Tiruchirapalli, D/- 9-7-1962.

(A) Civil P. C. (1908), S. 100 — Finding of fact — Finding as to non-reconstitution of firm after its dissolution is one of fact — Partnership Act (1932), Ss. 6, 39.

The finding that there was no re-constitution of the firm which got dissolved with the death of one of the partners and the finding that there was no settlement of accounts of the firm at any time are findings of fact which are unimpeachable

in second appeal.

(Para 5)

(B) Evidence Act (1872), Ss. 17 and 18 — Entries in partnership books are prima facie evidence against each of them.

While entries made by one partner without the knowledge of the other would not prejudice the latter as between himself and his co-owners, as regards partnership books these being accessible to all the partners and being kept under the surveillance of them all, they are prima facie evidence against each of them and therefore also for any of them against the others.

(Para 5)

(C) Partnership Act (1932), S. 47 — Surviving partners of dissolved firm can sell assets of firm in the course of winding up.

The surviving partners in the course of winding up can sell the assets (immovable properties) of the firm. Section 47 of the Partnership Act continues the authority of partners for the purpose of winding up, and the authority of a partner under that section to do all things necessary for the purpose of winding up the affairs of the firm also includes the right to sell the partnership property.

(Para 6-A)

(D) Partnership Act (1932), Ss. 46, 48 — Lien of partner's representative on assets of partnership after dissolution is on surplus of assets — Suit by legal representative of deceased partner for share in assets of partnership is governed by Article 106, Limitation Act — Trusts Act (1882), S. 88 — Limitation Act (1908), Article 106 — Contract Act (1872), S. 171 — Limitation Act (1963), Article 5.

A partner's or his representative's lien with reference to partnership assets is on the surplus of the assets of the firm and not on any particular item of property belonging to the partnership. On the dissolution of a firm, all the properties belonging to the partnership have to be sold and the sale proceeds, after discharging all the partnership debt-liabilities, have to be divided among the partners according to their respective shares, and this is the general rule. The lien of a partner is not one on any specific assets of the partnership existing on the death of a partner such as would fetter its conversion into money. The right of a representative of a partner is really a claim against the surplus assets on realisation — whether the surplus assets consist entirely of the proceeds of realisation or whether they include some specific items of property which existed on the death of the partner. The proper remedy of a partner in the circumstances is to have accounts taken to ascertain his share and if the right to sue for accounts is barred by limitation, the partner cannot sue any partner in possession of the assets for a share therein. If after

taking accounts and discharging the mutual rights and obligations of the partners or their representatives an asset which has been forgotten or treated as valueless afterwards falls in, that asset no doubt will be divided between the partners or their representatives in proportion to their shares in the partnership. AIR 1922 PC 115 & AIR 1954 Mad 1101 (FB), Rel. on. (Para 8)

The character of any particular asset of the partnership, has little to do in ascertaining the share to which a partner or his representative may be entitled in the property of the firm on dissolution. AIR 1966 SC 1300 & (1902) ILR 25 Mad 149 & AIR 1926 Mad 1040, Rel. on. (1911) 11 Ind Cas 288 & AIR 1929 Sind 182 & (1908) ILR 30 All 279, Ref. (Para 8)

A suit for division of immoveable property forming part of partnership assets after the dissolution of partnership is governed by Article 106 of the Limitation Act (1908). (1911) 11 IC 288, Ref. (Para 8)

In this respect there is no distinction between a suit by partner or legal representative of a deceased partner. The right declared under Section 46 of the Partnership Act enures both to the partner of a dissolved firm and his representatives. A suit by the heirs or legal representatives of a deceased partner for accounts and a share of profit and assets would be governed by Article 106 of the Limitation Act (1908), and time would commence to run from the date of death of the partner on which date the partnership must be deemed to be dissolved in the absence of any agreement for taking in, the legal representatives of the deceased partner as partners. AIR 1923 PC 136 & (1902) ILR 25 Mad 26, Rel. on. (Paras 9,10)

The fiduciary relationship between the surviving partners and representatives of a deceased partner as regards his interest in the partnership property which gets statutory recognition under Sec. 88 of the Trusts Act does not alter the nature of the suit as one filed under Article 106 of the Limitation Act, if for ascertaining the profits of the dissolved partnership an account has to be taken or rendition of accounts by the partners is called for. Article 106 of the Limitation Act governs a suit by a representative of a deceased partner against the surviving partners who hold the assets in a fiduciary capacity. AIR 1964 All 53, Rel. on; (1941) 45 Cal WN 1063, Dist.; AIR 1954 Punj 278 & AIR 1958 Andh Pra 48, Ref. (Para 9)

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v. Abdul Kader Saheb 9, 10
(1902) ILR 25 Mad 149=11 Mad LJ
353, Sundarsanam v. Narasimhulu 8
K. S. Desikan, N. Srivatsamani and K.
Raman, for Appellants; R. Gopalaswami
Iyengar, M. Srinivasan and K. N. Bala-
subramanian, for Respondents.

JUDGMENT:—The above second ap-
peal arises out of a suit for partnership
accounts and a half share in the immo-
vable properties described in the plaint
schedule. The defendants who opposed
the action having succeeded in the trial
Court but failed with respect to the im-
movable properties on appeal, have pre-
ferred the second appeal.

One Vallappa Chettiar, father of the
plaintiffs, Kuppan Chettiar, father of the
12th defendant, and Meyyappa Chettiar,
the deceased husband of the 1st defend-
ant and father of defendants 2 to 11,
were doing money lending business from
11-11-1921 in Perambalur under the name
and style of 'PL. M. Vallappa Chettiar'.
Vallappa Chettiar was entitled to a half
share and the other two partners, Kuppan
Chettiar and Meyyappa Chettiar, were
each entitled to a quarter share. The
suit properties were acquired for the
moneys due to the partnership under Ex.
A-3 in 1924 and formed assets of the part-
nership. To this extent the facts were
admitted.

Vallappa Chettiar died in March 1933
and Kuppan Chettiar, in 1947. According
to the plaintiffs who are joined in their
case by the 12th defendant in the action,
on the death of Vallappa Chettiar, the
partnership was reconstituted, the plaintiff
taking the place of the father Vallappa
Chettiar. Similarly on the death of Kup-
pan Chettiar in 1947, the partnership was

again re-constituted, the 12th defendant stepping into the place of his father. The suit for accounts of the partnership was instituted by the plaintiffs in June 1959, within three years after the death of Meyyappa Chettiar in December 1956. It is the further case of the plaintiffs and the 12th defendant, that on re-constitution of the firm after the death of Valliappa Chettiar, the suit immovable properties were withdrawn from the partnership and agreed to be enjoyed by the plaintiffs and the two surviving partners as co-owners. On this basis a share in the suit properties was claimed and rendition of accounts of the dissolved partnership was also prayed for.

2. The first defendant and her children, defendants 2 to 11, denied re-constitution of the partnership and withdrawal of the suit properties from the partnership. It was said in defence that on the dissolution, the partnership was wound up by the surviving partners and in discharge of the debt due to one Muthuraman Chettiar the suit properties were sold on 1-2-1935 for a consideration of Rs. 4,000/-. Muthuraman Chettiar owed a sum of Rs. 3,500/- to his sister, the first defendant, towards her Stridhana according to the family custom, and this amount had been deposited with the firm. Subsequently Muthuraman Chettiar sold the properties by his power of attorney agent who was none other than Meyyappa Chettiar to the first defendant under Ex. B-6 on 17-4-1950. The 13th defendant in the suit, a contesting defendant, purchased the properties from the first defendant under Ex. B-7 on 10-11-1958 for a consideration of Rs. 10,500/-. The contesting defendants repudiated the case of the plaintiffs that the deposit, sale and subsequent transactions were all sham and nominal. Maintaining the validity of the sale and its binding nature, it was also pointed out that the suit was barred by limitation. The further case of the contesting defendants was that the partnership was dissolved on the death of Valliappa Chettiar, that there was no re-constitution, and that the accounts of the partnership were settled in December 1933. The sale having been effected in 1935, it is said that there was also adverse possession with reference to the suit properties.

3. The learned Subordinate Judge, Tiruchirappalli, accepted the defence put forward. He found that the suit partnership firm which was dissolved in March 1933 was not re-constituted and continued. He held that the sale under Ex. B-9 was a valid document binding on the partnership having been for a debt due by the partnership to the vendee. The subsequent transfer in favour of the 1st defendant was also held to be justified and proper. The sale in favour of the

13th defendant was found to be fully supported by consideration. The claim of the plaintiffs that the suit properties were withdrawn from the partnership was found against and it was held that the properties had been sold in the course of winding up of the business. The plea of adverse possession and enjoyment of the properties by the vendees under Exs. B-6, B-9 and B-7 was upheld, finding that the claim for accounts was barred, the suit for a share of the assets of the firm was held barred by limitation under Article 106 of the Limitation Act. In the circumstances, the suit was dismissed in its entirety.

4. There was an appeal by the plaintiffs, as also Memo of Cross-objections by the 12th defendant who paid court-fee claiming his 1/4th share in the suit properties.

With reference to the case of the plaintiffs and the 12th defendant as to re-constitution of the partnership and their claim that accounts of the partnership were not settled, the learned District Judge set before himself the following four points for consideration:

"1. Whether after the death of the plaintiffs' father, the partnership was re-constituted composing of plaintiffs, Meyyappa Chettiar and Kuppan Chettiar as partners?

2. Whether, after the death of Kuppan Chettiar, the partnership was again re-constituted composing of the plaintiffs, Meyyappa Chettiar and the 12th defendant as partners?

3. Whether the accounts of the partnership were settled on 18-12-1933 as contended by the 1st defendant? and

4. Whether the claim for accounting is in time, if there was no re-constitution of the partnership as alleged by the plaintiffs?"

On these four points the learned District Judge, on an evaluation of the evidence, held that the partnership stood dissolved in March 1933 on the death of Valliappa Chettiar that it was not re-constituted either in 1933-34 or 1947, and that the accounts of the dissolved partnership were not settled at any time.

On the question of limitation, he found that under Article 106 of the Limitation Act the suit for accounts of the dissolved partnership filed more than 12 years after dissolution was barred by limitation. It was not found that the suit properties had been withdrawn from the partnership.

He disagreed with the finding of the learned Subordinate Judge as to the validity of the sale of the suit properties. He held that the alleged deposit with the firm by Muthuraman Chettiar was not true, and that the sale under Ex. B-9 was not bona fide but was a fraudulent transaction to defeat the rights of the other

co-owners The plea of adverse possession set up by the contesting defendants was found against

On the question of limitation as regards a share in properties the learned District Judge was of the view that though as pointed out by the Judicial Committee in *Gopala Chetty v Vijaya Raghavachariar*, ILR 45 Mad 378=(AIR 1922 PC 115) if the remedy for accounts is barred a suit for a share of the assets is also barred, different considerations would arise as regards the claim for partition of immoveable properties that belonged to a dissolved partnership. In the learned District Judge's view, with reference to unmoveable properties the surviving partners and legal representatives of a deceased partner become co-owners on dissolution and that therefore there could be no question of limitation in the present case reality of the sale having been found against. In this view, the appeal was allowed with reference to the claim for share in the immoveable properties. The plaintiffs were held entitled to a half share, and the 12th defendant, to a quarter share. Mesne profits for six years prior to the suit were decreed in favour of the plaintiffs. The 12th defendant was awarded only future mesne profits. The 13th defendant was given the remaining 1/4th in the properties.

The 12th defendant subsequently applied to the District Judge for review of the judgment and decree praying for past mesne profits also and against the order allowing the review the contesting defendants have preferred C. M. A. No 43 of 1963. In the second appeal the contesting defendants question the correctness of the decision of the lower Appellate Court and attack particularly its view on the question of limitation that there is a distinction between immoveable properties and other assets of the dissolved partnership. The plaintiffs have preferred memo of cross-objections from the rejection of their claim to accounts. The 12th defendant has also preferred memo of cross-objections, but that relates to the past mesne profits which he has since been able to secure by way of review.

5. The finding that there was no re-constitution of the firm which got dissolved with the death of Valliappa Chettiar in March 1933 and the finding that there was no settlement of accounts of the firm at any time are findings of fact which as they stand are unimpeachable in second appeal. Quite properly, counsel for the respondents does not canvass the correctness of these findings before me in support of the decree 3

6. The appellants in second appeal however attack the finding as to the invalidity of the sale evidenced by Ex. B-9. It was submitted that certain essential features which the learned District Judge

himself had noticed while considering the other aspects of the case have been ignored by the learned District Judge on this part of the case. It was also urged that the burden has been wrongly thrown on the contesting defendants to establish the truth and validity of the sale.

The learned District Judge finds against the truth of the deposit of Rs 3,500/-. There is an entry in the books of account of the firm made on 26-8-1932 reciting that according to a letter a sum of Rs 3,500/- was deposited by Muthuraman Chettiar. The learned District Judge finds that this entry was made behind the back of Valliappa Chettiar after he fell ill. It is submitted for the appellants that the entry was admittedly found in the account book of the partnership. About the time Valliappa Chettiar died, the first plaintiff (his son) was about 24 years old. It is the admission of P. Ws. 1 and 3 that the first plaintiff after the death of Valliappa Chettiar handed over the account books of the suit partnership, Exs B-1 and B-2, to Meyyappa Chettiar, the first defendant's husband. There is evidence that the first plaintiff after the death of his father conveyed certain properties belonging to the suit partnership to one Kasthuri Naidu and for recovery of the properties the surviving partners had to institute a suit which was ultimately compromised. The learned District Judge notices that misunderstandings arose between the plaintiffs on the one hand and the surviving partners on the other soon after the death of the plaintiff's father. The first plaintiff had claimed exclusive title to the partnership in denial of the shares of Kuppan Chettiar and Meyyappan Chettiar. The suit O. S. No 362 of 1935 ended only in December 1935. It is long prior to this that the sale in favour of Muthuraman Chettiar had taken place in February 1935. For coming to the conclusion that re-constitution of the partnership pleaded by the plaintiffs was untrue, the learned District Judge observed.

"It is the categorical admission of the two plaintiffs in their evidence that they were in great financial strain ever since the death of their father. But curiously at no time in the course of about a quarter of century they made any demand for payment of their share of the income."

The learned District Judge also concludes that the partnership did not appear to have been run on profitable lines and that was perhaps the reason why neither the plaintiffs nor the 12th defendant took any step to get the accounts settled and to take their shares. It is in this background that learned Counsel for the appellants submits that the reasoning of the learned Subordinate Judge for upholding the truth of the deposit and the sale that followed must be considered.

The learned District Judge would not accept the entry in the partnership account book, remarking that about six months prior to his death Valliappa Chettiar who was in management of the partnership left Perambalur and the entry must have been made behind his back. It is remarked by the learned District Judge that the contesting defendants have not examined Sellamuthu Goundan to prove the truth about the deposit. Sellamuthu Goundan was the Kariasthan of the firm. It was conceded by P. W. 2 that the entry regarding the deposit of Rs. 3,500/- was in the handwriting of this Sellamuthu Goundan. It is submitted that in the present case none of the partners were alive and all the opposing parties were legal representatives of the deceased partners. While entries made by one partner without the knowledge of the other would not prejudice the latter as between himself and his co-owners, it has been repeatedly pointed out that as regards partnership books these being accessible to all the partners and being kept under the surveillance of them all, they are prima facie evidence against each of them and therefore also for any of them against the others. The failure of the learned District Judge to bear in mind these special features of this case, it is submitted, vitiates his findings. The submission is not without force; but in the view I take on the question of limitation, it is unnecessary to examine the matter further.

6-A. On the findings as they stand the partnership in question was dissolved in March 1933 with the death of Valliappa Chettiar. There was no settlement of accounts. The suit immoveable properties were not separated from the assets of the partnership by any agreement between the partners. The sale of the suit properties was not a bona fide one but a fraudulent transaction. The learned District Judge would go further and hold that even if the deposit alleged by the contesting defendants was conceded, Meyyappa Chettiar was not competent to sell away the shares of the plaintiffs and Kuppan Chettiar. This may not be a correct proposition of law, as the surviving partners in the course of winding up can sell the assets of the firm. Section 47 of the Indian Partnership Act continues the authority of partners for the purpose of winding up, and the authority of a partner under that section to do all things necessary for the purpose of winding up the affairs of the firm also includes the rights to sell the partnership property. The suit for accounts of the dissolved partnership is hopelessly barred by limitation and this is not a case where any claim is made or can be sustained as for profits earned by the utilisation of the deceased partner's interest in a business continued after his death. The only ques-

tion for consideration is whether the fact that the suit properties, though assets of the dissolved firm, are immoveable properties, makes a difference and entitles the plaintiffs to their share in the properties.

7. Learned Counsel for the appellants submits that the distinction which the learned District Judge has made that different considerations arise as regards the claim for partition of immoveable properties of a dissolved firm is wholly untenable and opposed to law. Learned Counsel points out that the question, as it stands to say, is beyond the pale of forensic controversy. If a suit for accounts is barred, equally a suit for a share in the properties of a dissolved firm — be they immoveable or other properties, is barred. It is urged that the partnership law makes no distinction in the matter of taking of accounts on dissolution between immoveable properties and other properties.

8. It is now settled law that a partner's or his representative's lien with reference to partnership assets is on the surplus of the assets of the firm and not on any particular item of property belonging to the partnership. On the dissolution of a firm, all the properties belonging to the partnership have to be sold and the sale proceeds after discharging all the partnership debts liabilities, have to be divided among the partners according to their respective shares, and this is the general rule. The lien of a partner is not one on any specific assets of the partnership existing on the death of a partner such as would fetter its conversion into money. The right of a representative of a partner is really a claim against the surplus assets on realisation — whether the surplus assets consist entirely of the proceeds of realisation or whether they include some specific items of property which existed on the death of the partner. The proper remedy of a partner in the circumstances is to have accounts taken to ascertain his share and if the right to sue for accounts is barred by limitation, the partner cannot sue any partner in possession of the assets for a share therein. If after taking accounts and discharging the mutual rights and obligations of the partners or their representatives an asset which has been forgotten or treated as valueless afterwards falls in, that asset no doubt will be divided between the partners or their representatives in proportion to their shares in the partnership.

The head-note in ILR 45 Mad 378 = (AIR 1922 PC 115), the leading case on the subject, which succinctly states the principle, runs thus:

"If a partnership has been dissolved and accounts have been wound up, the mutual rights and obligations of the partners therein being discharged, and an

asset which has been forgotten or treated as valueless afterwards falls in, it ought to be divided between the partners in proportion to their shares in the partnership. But if no account has been taken, the proper remedy of a partner in respect of an asset so received is to have an account taken; if his right to sue for an account is barred by limitation, he cannot sue the partner who has received the asset for a share of it."

I may here refer to the decision of a Full Bench of this Court in *Rajagopala Chettiar v. Palani Chettiar*, (1954) 2 Mad LJ 689=(AIR 1954 Mad 1101) (FB) where the question arose whether a suit for contribution by a partner who had paid more than his share of a decree jointly and severally passed against the partners would lie, if a suit for accounts of the partnership itself had become barred. Pointing out that there was no difference in principle between a plaintiff's claim to a share of the assets and a suit for contribution towards the liabilities discharged by the plaintiff in excess of his share, it was held that in the case of dissolved partnership the only right of a partner was to have the accounts taken and if that right was barred by the law of limitation he could have no right to claim any sum which would be an item in such a suit for accounts.

If this rule is applied, and that was so done by the trial Court, there is no question that the present claim for a share in the suit immoveable properties is barred by limitation. The suit properties are admittedly assets of the partnership and there has been no settlement of accounts whatsoever. They are not assets which have been realised subsequent to the taking of accounts. Their Lordships of the Judicial Committee in ILR 45 Mad 378 at pp 390 and 394=(AIR 1922 PC 115 at pp. 119 and 120), observed.

"If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share."

In the present case the plaintiffs seek to prove that these items of assets are available for division between the partners. Their Lordships in the case above cited also observed:

"The very items for which the respondent is now suing were actually items which would have come into the account on his claim against the appellants for a partnership account in the suit in which he failed."

That would have been so in the present case also. The reason for this rule stated by the Judicial Committee is that it might well be the case that one of the reasons why no final balancing of accounts took place was that A owed the partnership so much money that it was anticipated that B would hereafter receive a particular item which would operate substantially to balance the claim.

In the present case a share in the items is claimed a quarter century after the death of a partner. The plaintiffs were adult representatives of the deceased partner at the death and disputes about assets of the partnership had even then been raised in a manner. The properties had been dealt with by a surviving partner as in the course of winding up — ignoring for the moment the finding in that regard. One of the surviving partners died 12 years thereafter. In spite of this lapse of time, no share was claimed in the properties. The accounts do show a credit in favour of one Muthuraman Chettiar to whom the property was conveyed. The contesting defendants according to the Court below have not established the truth and validity of the same. It cannot be said what the finding would have been if accounts had been taken and balanced shortly after the dissolution, when two of the partners were alive. The silence for nearly quarter of a century is therefore significant.

Learned Counsel for the plaintiffs, Mr. R. Gopalaswami Aiyangar, did not seek to sustain before me the distinction the learned District Judge has made between immoveable assets and other assets of a dissolved firm, as he cannot in view of the well established legal proposition.

In English Law where the distinction is between real and personal property the position is stated thus in Lindley on Partnership, 12th Edition, at page 378:

"From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that in equity, a share in a partnership whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties."

The Supreme Court quotes this passage with approval in *Narayanappa v. Bhaskara Krishnappa*, AIR 1966 SC 1300 at p. 1303, where the Court had to consider whether a document evidencing relinquishment of interest of the partners in partnership assets which consisted also of immoveables was compulsorily registrable under Section 17 (1) of the Registration Act. Their Lordships of the

Supreme Court held that the interest of the partners in partnership assets was moveable property, and that the document evidencing relinquishment of that interest was not compulsorily registrable. After referring to the relevant section of the Partnership Act it is observed:

"From a perusal of these provisions it would be abundantly clear that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property."

Quoting from Lindley it is said:

"What is meant by the share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only which on the death of a partner passes to his representatives, or to a legatee of his share and which on his bankruptcy passes to his trustee."

Clearly the above extracts indubitably establish that the character of any particular asset of the partnership, has little to do in ascertaining the share to which a partner or his representative may be entitled in the property of the firm on dissolution. There is a direct decision of this Court on this question in Sundarsanam Maistri v. Narasimhulu Maistri, (1902) ILR 25 Mad 149 at pp. 165, 166 where it is said:

"It was further contended by the Learned Advocate-General that the three years' period of limitation prescribed by Article 106 would be inapplicable to houses and lands purchased by the first defendant from the profits of the partnership. This contention would certainly hold good if it had been alleged and proved that, from time to time, portions of the assets of the partnership were, by the agreement of the partners, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners.

If the plaintiff's suit on the footing of partnership were sustainable, and the same be not barred by limitation, the remedy he would be entitled to in this suit would be, not to a decree for partition of partnership properties, but to an order for winding up the business of the partnership by sale of its effects, including lands and houses, providing for the payment of its debts, if any, distributing the surplus of the sale proceeds accord-

ing to the shares of the plaintiff and first defendant respectively."

In that case the plaintiff sued for a share in the partnership which admittedly was possessed of immoveable property. It was argued that in respect of immoveable property the suit would be in time, although as a suit for dissolution of partnership it was barred by limitation. It was held that the only suit which could be brought was for winding up of the partnership business and for distribution of the properties and not a suit for partition of the partnership properties. On that basis the suit was held barred by limitation. This decision and Venkata Ratnam v. Subba Rao, ILR 49 Mad 738=(AIR 1926 Mad 1040) which relied on it, find approval by the Supreme Court in AIR 1966 SC 1300 at pp. 1303 and 1304. Reference may also be made to Gobardhan v. Ganesh Lal, (1911) 11 Ind Cas 288 where it was held that a suit for division of immoveable property forming part of partnership assets after the dissolution of partnership is governed by Article 106 of the Limitation Act. The decision in Ismail v. Tayaballi, AIR 1929 Sind 182 which has followed Sundarsanam Maistri v. Narasimhulu Maistri, (1902) ILR 25 Mad 149 and the one in Niaz Ahmad v. Abdul Hamid, (1908) ILR 30 All 279 may also be cited here.

9. The stand taken by the appellants on the question of limitation thus being impregnable, Learned Counsel for the plaintiffs, Mr. R. Gopalaswami Aiyengar would submit that Article 106 of the Limitation Act had no application to a suit by the legal representatives of a deceased partner.

Learned Counsel submitted that the surviving partners stood in a fiduciary capacity in relation to the representatives of a deceased partner, and that the right of the representatives being only to the deceased partner's share in the surplus assets, limitation would not run against them till accounts have been taken and surplus ascertained or accounting was demanded and refused even if no steps were taken to settle the accounts for decades rather a startling submission having regard to the catena of decisions on the question.

On the findings of the Courts below Section 37 of the Partnership Act has no application whatsoever. The assets of the old partnership were not embarked upon by the surviving partners in new partnerships in succession for the cause of action to arise on the death of Meyyappa Chettiar in 1956. The right declared under Section 46 of the Partnership Act enures both to the partner of a dissolved firm and his representatives. The question has been decided by the Judicial Committee even in 1923 in Mussammat Jatti v. Banwari Lal, ILR 4 Lah 350=

(AIR 1923 PC 136) It is sufficient to set out the head-note

"When a member of a partnership firm dies there is a dissolution of the firm and his widow is barred by the Indian Limitation Act, 1908, Sch. I Article 106, from suing for an account more than three years after his death, in the absence of proof of an agreement whereby she became a partner in his place the fact that the deceased partner's share continued to be dealt with in the partnership books is no evidence of such an agreement."

In the present case the plaintiffs and the 12th defendant have failed in their case that by a subsequent agreement the partnership was continued with the representatives of the deceased partners. The suit must therefore have been instituted within three years after the death of Vallappa Chettiar in 1933. But the suit was instituted only in 1959.

Even earlier this Court applied the three year period of limitation to a suit by representatives of a deceased partner in *Ahuna Bibi v. Abdul Kader Sahab*, (1902) ILR 25 Mad 26. Article 106 of the Limitation Act of 1877 which came up for consideration in that case corresponds to Article 106 of the Limitation Act, 1908, applicable to the present case. In that case five persons commenced partnership and one of them died in 1890. No accounts were taken, nor were the representatives of the deceased partner taken into the partnership. The surviving partners continued to carry on the business and in 1891 one of the surviving partners died. Even then no accounts were taken, nor were the representatives of the second deceased partner taken into the partnership. The other surviving partners continued the business. In 1898 the legal representatives of the second deceased partner instituted a suit against the surviving partners and the representatives of the other deceased partner for an account and for a share of the profits of the partnership which was formed in 1890, on the death of the predecessor of the plaintiffs. The third plaintiff to the suit was a minor at the death of the partner in 1891 and on the date of the suit.

On the question of limitation raised, this Court held that the suit by the representatives of the partner who died in 1891 was really one for an account and a share of the profits of the partnership which was dissolved by the death in 1891, and that the Article applicable was Article 106 of the Limitation Act. However the bar of limitation in that case was saved by the application of sections 7 and 8 of the Limitation Act as the third plaintiff was a minor when the cause of action arose and continued to be a minor when the suit was filed.

In *Gopi Nath v. Satish Chandra*, AIR 1964 All 53 it is pointed out that the fidu-

ciary relationship between the surviving partners and representatives of a deceased partner as regards his interest in the partnership property which gets statutory recognition under Section 88 of the Trusts Act does not alter the nature of the suit as one filed under Article 106 of the Limitation Act, if for ascertaining the profits of the dissolved partnership an account has to be taken or rendition of accounts by the partners is called for. It is held in that case that Article 106 of the Limitation Act governs a suit by a representative of a deceased partner against the surviving partners who hold the assets in a fiduciary capacity.

10. For the respondent the decision in *Nilmadhab Nandi v. Nirada Sundari Das*, (1941) 45 Cal WN 1065 at p. 1066 was cited and the following passage therein was relied upon:

"A suit brought on the death of a partner by his legal representatives for accounts of the partnership business since such partner's death, is not governed by Article 106 of the Limitation Act, inasmuch as the right of the legal representative is not to a share of the profits of a dissolved partnership within the meaning of Article 106, Limitation Act, but is a right accruing to him by the subsequent dealings with the assets belonging to the deceased partner."

The principle enunciated above can have no application to the facts of the present case. The reference was to a case where the business was continued and profits were being made by the use of the assets of the deceased partner in the dissolved partnership. The distinction is pointed out in *Nagarajan v. Robert Hotz*, AIR 1954 Punj 278 where (1902) ILR 25 Mad 26 is referred to and relied on. In that case it was held that a suit for rendition of accounts by the legal representative of the deceased partner for the period between the coming into force of the partnership and its dissolution by the death of the partner was governed by Article 106, the suit being clearly one for rendition of partnership accounts. But it was said that a suit for rendition of accounts by the legal representatives of a deceased partner for the period after the death and dissolution of the partnership was not governed by Article 106, as the cause of action continued from day to day as long as the business was continued and the firm made profits utilising the deceased partner's assets in the business.

In *Peeran Sahib v. Jamaluddin Sahib*, AIR 1958 Andh Pra 48 the Andhra Pradesh High Court had to consider Section 37 of the Partnership Act and Articles 106 and 120 of the Limitation Act. Subba Rao, C. J. (as he then was of the Andhra Pradesh High Court) delivering the judgment for the Division Bench, referred to the decision of the Judicial Committee in

ILR 4 Lah 350=(AIR 1923 PC 136) and that of this Court in (1902) ILR 25 Mad 26, overruled the applicability of residuary Article 120, and held that a suit by the heirs or legal representatives of a deceased partner for accounts and a share of profit would be governed by Art. 106 of the Limitation Act, and that time would commence to run from the date of death of the partner on which date the partnership must be deemed to be dissolved in the absence of any agreement for taking in, the legal representatives of the deceased partner as partners. It is unnecessary to multiply cases, as the law appears to be well settled. They can be seen collected in Mitra's Law of Limitation and Prescription, 8th Edition, at page 541, under Article 5 of the Limitation Act of 1963 which is in identical terms with Article 106 of Limitation Act 1908.

11. The decree and judgment of the learned District Judge have therefore to be and are hereby set aside. The decree and judgment of the learned Subordinate Judge dismissing the suit with costs are restored. The second appeal is accordingly allowed, the two Memoranda of Cross-objections as well as the C. M. A. consequently fail and are dismissed without costs. The parties will bear their respective costs in the lower appellate Court. The appellants are entitled to their costs in this Court, against the contesting respondents that is the 1st plaintiff, and the 2nd plaintiff and the 12th defendant represented by their legal representatives.

12. Leave refused.

RGD

Appeal allowed.

**AIR 1969 MADRAS 265 (V 56 C 59)
VEERASWAMI AND RAMAPRASADA
RAO JJ.**

Krishnamurthi and Company, Tiruppur, Petitioner v. State of Madras represented by the Commr. of Commercial Taxes (Board of Revenue) Madras, and another, Respondents.

Writ Petns. Nos. 283 to 286 of 1968, D/- 27-9-1968.

Constitution of India, Arts. 14 and 19 (1) — Taxing Laws — Mere retrospective operation or peripheral and practical inequalities not sufficient to hold legislation unconstitutional — Madras General Sales Tax (Third Amendment) Act (19 of 1967), is not unconstitutional.

The extreme proposition that any retrospective taxation is by itself unreasonable cannot be accepted. The inhibition of ex post facto laws does not apply to imposition of taxes by retrospective legislation. But if the retrospectivity is in its effect confiscatory or operates as a cloak of an oblique legislative purpose remov-

ed from ostensible tax consideration, or so totally oppressive as might destroy the very source of taxation, it may be regarded as unreasonable.

So also the inequalities or practical difficulties which may be but peripheral and procedural result would not be sufficient by themselves to render the retrospective effect unreasonable so as to render the legislation as unconstitutional and to be struck down by the Court. Hence the Madras General Sales Tax (Third Amendment) Act (19 of 1967) is not violative of Articles 14 and 19 of Constitution on ground that Sections 2 and 4 of the Act give retrospective effect to the amendment. Case law discussed. (Paras 2, 3 and 5)

Cases Referred: Chronological Paras

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| (1968) 1968-21 STC 227 (Mad), Burmah Shell Co., Ltd. v. State of Madras | 1, 2 |
| (1966) AIR 1966 SC 416 (V 53)= 1966 (1) SCR 523, Jaora Sugar Mills v. State of Madhya Pradesh | 2 |
| (1966) AIR 1966 SC 764 (V 53)= (1966) 1 SCR 890, Jawaharmal v. State of Rajasthan | 4 |
| (1964) AIR 1964 SC 1581 (V 51)= (1964) 7 SCR 185, C. Krishna- moorthy v. State of Orissa | 2 |
| (1963) AIR 1963 SC 1667 (V 50)= 1964 (1) SCR 897, Rai Ramkrishna v. State of Bihar | 2 |
| (1962) AIR 1962 SC 1006 (V 49)= 1962 Supp (2) SCR 1, Chhottabhai v. Union of India | 2 |
| (1961) AIR 1961 SC 1534 (V 48)= 1961-12 STC 429, J. K. Jute Mills Co., Ltd. v. State of Uttar Pradesh | 2 |
| (1958) AIR 1958 Mad 158 (V 45)= 1957-8 STC 690, Guruviah Naidu and Brothers v. State of Madras | 2 |

V. K. Thiruvenkatachari for Subbaraya Iyer, Sethuraman and Padmanabhan, for Petitioner; Government Pleader, for Respondents.

VEERASWAMI, J.:— These are petitions under Article 226 of the Constitution by different assessees, but as they raise a common question as to the alleged invalidity of the Madras General Sales Tax (Third Amendment) Act, 1967 on the ground of its unreasonable retrospective operation, they have been heard together. Three of the assessees are each a public limited liability company registered under the provisions of the Companies Act and are leading dealers in mineral oils, including furnace oil, lubricating oils and greases. The other assessee is a partnership firm and a dealer in similar oils which it purchases from one or the other of the leading dealers and sells in retail. The first sales of lubricating oils and greases, under Entry 47 in the first Schedule to the Madras General Sales Tax Act, 1959, were charged to a single point tax at six per cent. With effect from

April 1, 1964, Madras Act VII of 1964 substituted it by a fresh entry, lubricating oils, all kinds of mineral oils (not otherwise provided for in the Act) quenching oils and greases. Till September 13, 1965, it is stated, the trade proceeded on the assumption that the substitution made no difference to sales of furnace oil and they were, as before, liable to multi-point tax at two per cent. The dealers paid and collected tax on that basis and the Revenue accepted it. One of the dealers having sought for it, the Board of Revenue by its resolution dated August 28, 1965 expressed its view that Entry 47 as amended included furnace oil and transformer oil. The leading dealers thereafter started from Sept. 14, 1965 charging tax at 6 per cent on the first sales of the oils and were assessed accordingly. One of them, however, disputed the Board's view in *Burmah Shell Co. Ltd. v. State of Madras* (1968) 21 STC 227 (Mad) with the result that this Court held on August 2, 1967, that Entry 47, as amended in 1964, did not include furnace oil. This led to the enactment of the Madras General Sales Tax (Third Amendment) Act, 1967, which received the assent of the Governor on December 29, 1967, and came into operation on January 5, 1968, the date of its publication in the Fort St. George Gazette Extraordinary. The Amending Act has recast Entry 47, as lubricating oils (not otherwise provided for in the Act), quenching oils and greases and inserted a new Entry 47-A, all kinds of mineral oils (other than those falling under the Entry 47 and not otherwise provided for in the Act) including furnace oil. Section 2 gives retrospective effect to the amendment but adopts the rates of tax as they existed from April 1, 1964 to November 30, 1965 and December 1, 1965 to June 17, 1967. Section 4 validates all taxes levied or collected or purported to have been levied or collected under the principal Act in the sale of the goods specified in Entry 47-A for the period April 1, 1964 to January 5, 1968.

2. It is contended that the retrospective imposition of a single point tax on furnace oil and other non-lubricating oils and the validation of levies prior to January 5, 1968, involving refusal or refund are ultra vires and void as they violate Articles 14 and 19 of the Constitution. The retrospective operation and the validation, according to the assesses, violated equality under the law and also constituted an unreasonable restriction. In our opinion, the attack cannot be sustained. It is entirely based on the absence of a scheme of licensing and provisions requiring maintenance of books of accounts and records related to first or other sales of furnace oil prior to January 5, 1968 and the hardship and difficulty in discharging the burden of proof envisaged

by Section 10 of the Madras General Sales Tax Act. In *Guruviah Naidu and Brothers v. State of Madras*, (1957) 8 STC 690=(AIR 1958 Mad 158) this Court acknowledged that a system of licensing was essential to keep track of the dealings in goods subjected to single point taxation as they passed from dealer to dealer within the State and observed that, if there was no system of licensing by reason of which there could be such a tracing of the dealings, there would be the possibility of an escapement from tax or of imposition of multi-point tax because of the inability of the trader to prove that his dealing was not one which attracted the tax or that the tax had been paid at earlier stages. This reasoning led to the conclusion that "a licensing system therefore was an inevitable adjunct to any system of single point taxation." So, it is urged that the retrospective provision in the amending Act has placed the dealers in an unenviable position in which the assesses find themselves unable to discharge the burden cast on them in establishing that their sales are not first sales during the period prior to January 5, 1968. They were not expected to maintain and preserve records necessary to show that the tax had been paid at an earlier point, in the successive sales and, therefore, it would be an unreasonable restriction to require them, they say, to prove that their transactions were not liable to tax. Further, such retrospective operation deprived the dealers of the opportunity to collect tax or pass on the tax burden to other dealers or consumers. The advance knowledge of tax incidence is a primary element of reasonableness in indirect taxation and this element is entirely lacking because the dealers could not have visualised prior to the Board's resolution aforesaid that there would be a liability for a higher rate of single point tax in respect of first sales of furnace oil. The petitioners add that these are not cases where there had been in fact tax levy in operation but subsequently some infirmity in the law led to a judgment of invalidity and then the Legislature resorted to a retrospective validation of the previous factual position by removing the infirmity. But (1968) 21 STC 227 (Mad) showed that sales of furnace oil were not within the purview of Entry 47 at all as amended in 1964. The retrospective effect of the amending Act, according to the petitioners, also offends the guarantee of equality since among others equally situated as for instance subsequent dealers, some of them may be taxed at single point rate, though erroneously, while others may altogether escape and likewise some first sellers may escape while others are charged.

Now, It is well settled that the power of the Legislature in a taxation entry is

plenary and it includes the power to legislate prospectively and retrospectively: *Jaora Sugar Mills v. State of Madhya Pradesh*, AIR 1966 SC 416. No question of legislative competency of an enactment can arise merely on the ground of its retrospective effect in taxation. *J. K. Jute Mills Co., Ltd. v. State of Uttar Pradesh*, AIR 1961 SC 1534=(1961) 12 STC 429 held that it would be competent to a Legislature to impose a tax on sales which had taken place prior to the enactment of the legislation. So too, it is now beyond dispute that fiscal statutes are subject to the test of Part III of the Constitution. But *Chhottabhai v. Union of India*, AIR 1962 SC 1006, pointed out that mere retrospectivity in the imposition of a tax could not per se render the law unconstitutional on the ground of its infringing the right to hold property under Article 19 (1) (f) or on the ground that it was unreasonable because it deprived a citizen of his right to pass on the tax to others. *Rai Ramkrishna v. State of Bihar*, AIR 1963 SC 1667 recognised that a taxing statute could be struck down as being unreasonable and so violative of Article 19 (1). So too, if the taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or it is confiscatory, it will be held to be unconstitutional as exceeding the limits prescribed by Articles 19 and 14. *C. Krishnamoorthy v. State of Orissa*, AIR 1964 SC 1581 refused to strike down Orissa Sales Tax Validation Act (7 of 1961) and observed:

"It is true that in considering the question as to whether legislative power to pass an Act retrospectively has been reasonably exercised or not, it is relevant to enquire how the retrospective operation operates. But because the retrospective operation may operate harshly in some cases, it cannot be said that the legislation itself is invalid. Besides, in the present cases, the retrospective operation does not spread over a long period either. In any event, in the circumstances of this case it would not be possible to hold that by making the provision of Section 2 of the impugned Act retrospective the legislature has imposed a restriction on the petitioners' fundamental right under Article 19 (1) (g) which is not reasonable and is not in the interest of the general public". We may take it, therefore, that the Court has the power and indeed it is its duty to strike down a fiscal legislation to be unconstitutional on the ground that its retrospective operation is unreasonable and offends the guarantee under Art. 19 (1). But it is neither possible nor wise to generalise what may constitute or be considered as unreasonable, as, in the nature of things, it is closely related to a variety of circumstances and the context. In the light of the principles of the cases refer-

red to by us, we are unable to accept the extreme proposition that any retrospective taxation is by itself unreasonable. The inhibition of ex post facto laws does not apply to imposition of taxes by retrospective legislation. But if the retrospectivity is in its effect confiscatory or operates as a cloak of an oblique legislative purpose removed from ostensible tax considerations, or so totally oppressive as might destroy the very source of taxation, it may be regarded as unreasonable. Mr. Thiruvengkatachari, who appeared for the petitioners, suggested that to satisfy the test of reasonableness for prospective tax laws, their incidence on burden should not be so high as to make the holding of property or carrying on business unremunerative according to the accepted current standard of yield or profit, even after allowing for progressive taxation. But he himself adds that one should make a pragmatic approach to the problem having regard to the particular system of taxation. In the particular circumstances of the petitions before us, we are not, however, called upon to express our view on this suggestion.

3. But learned Counsel presses upon us that in the present case, in view of the practical difficulties and inequalities produced by the impugned retrospective legislation which was referred to earlier, we should hold it to be unreasonable and arbitrary. We do not think that these inequalities and practical difficulties, assuming they exist which may be but peripheral and procedural result, would be sufficient by themselves to render the retrospective effect unreasonable and to enable us to strike down the legislation as unconstitutional on that ground. A system of licensing and legislation is not a *sine qua non* or a necessary condition to the validity of a single point scheme of taxation, prospective or retrospective. As a matter of fact, there are provisions in the Madras General Sales Tax Act, 1959 which require every dealer to get himself registered and to maintain correct and proper accounts of dealings. If the petitioners have complied with these provisions as they should have, they would be able to show that their sales are subsequent sales of furnace oil not liable to charge.

4. Learned Government Pleader defends the amending Act by pointing out that it is not a new retrospective levy but the legislation is curative in character. Even if it created such a new liability which in a sense is not the case, we do not think that it is confiscatory in character or so oppressive or burdensome as to hold that it is unreasonable or unconstitutional. *Jawaharmal v. State of Rajasthan*, AIR 1966 SC 764 upheld the validity of extra rates retrospectively imposed by legislation.

5 In our opinion the attack on the validity of the amending Act fails. The petitions are dismissed. No costs.

DGB/DVC Petitions dismissed.

AIR 1969 MADRAS 268 (V 56 C 60)

VENKATARAMAN, J

M. A. A. Raoof, Appellant v K. G. Lakshminpathi, Respondent.

A. A. O No 134 of 1967, D/- 9-7-1968, against order of City Civil Court, Madras in E P No 1458 of 1966

Civil P. C. (1908), S. 51 (b) and O. 21, R 46 — Attachment of shares — Jurisdiction of executing Court — Judgment-debtor residing within limits of jurisdiction — Executing Court can attach shares — Fact that place of business of Company is outside the jurisdiction, is immaterial.

The principle underlying S. 51 (b) is that if the property sought to be attached is within the limits of the jurisdiction of the Court, the Court can attach and sell the property. The fact that the place of business of the Company is outside the jurisdiction of the Court and the dividend due on the shares is also payable only in a place outside the jurisdiction of the Court is not material. There is nothing in O 21, R 46 to contradict this proposition. The provision which would determine the question of jurisdiction is only sub-rule (1) of O 21, R 46. Under that provision also it would be sufficient if the judgment-debtor in whose name the shares stand and to whom the prohibitory order is issued resides within the jurisdiction of the executing Court. Affixture of a copy of the prohibitory order on some conspicuous part of the court house and service of the copy of the order on the proper officer of the Corporation under sub-rule (2) are only additional formalities to be observed by the executing Court, but they are not determinative of the question as to which Court has jurisdiction to issue the prohibitory order. Case law discussed. (Para 2)

There is some analogy between a mortgage deed and shares in a Corporation and the situs of the shares is the place where the shares are held by the judgment-debtor. The provision laid down in O 21, R 46, C P C in the case of attachment of a share is materially different from the provision relating to a debt. In the case of a debt, the prohibitory order should be issued both to the creditor (prohibiting him from recovering the debt) and to the debtor (prohibiting him from making the payment) and therefore there may be reason for holding that, unless both the creditor and the debtor reside within the jurisdiction of

the executing Court, the executing Court would have no jurisdiction to issue the prohibitory order. But in the case of attachment of a share, sub-rule (1) requires the prohibitory order to be issued only to the person in whose name the share stands and therefore it is enough if that person (the judgment-debtor) resides within the jurisdiction of the executing Court. It is to be noted, that whereas sub-rule (1) makes a distinction between the three classes, namely, a debt, a share and other moveable property and prescribes a separate procedure for each, sub-rule (2) clubs them all together in respect of the affixture or despatch of the copy of the prohibitory order (Paras 4, 7)

Cases Referred: Chronological Paras

(1963) AIR 1963 All 313 (V 50)=

ILR (1962) 2 All 475, British

Transport Co. Ltd., Delhi v.

Suraj Bhan

(1961) AIR 1961 Andh Pra 417

(V 48)=(1951) 1 Andh WR 295,

Chimandas Methuram v. Maha-

devappa Firm

(1939) AIR 1939 Mad 811 (V 26)=

1939 Mad WN 573, Balusami v.

Official Assignee, Madras

(1933) AIR 1933 Cal 379 (V 20)=

ILR 60 Cal 782, Dharamidhar Roy

v P. D. Sethi

(1912) ILR 39 Cal 104=14 Cal LJ

228, Begg Dunlop and Co. v

Jagannath Marwari

K. N. Subramaniam, for Appellant, V.

Shyamalam, for Respondent

JUDGMENT:— This appeal raises an interesting question of the validity of attachment of certain shares belonging to the judgment-debtor. The decree-holder Lakshminpathi obtained a decree in O. S. No 2344 of 1960, on the file of the City Civil Court, Madras, by consent. He filed E. P. 1458 of 1966 to recover a sum of Rs. 8,000/- odd by attachment and sale of the shares which the judgment-debtor Raoof held in a company called Intrac Pharmaceutical (Pte) Ltd., Industrial Estate, Ambattur. An interim prohibitory order was issued both to the judgment-debtor and to the company. The company did not appear and object. The judgment-debtor appeared and took time to file a counter. He did not file the counter in time and so the attachment was made absolute. Against that order he has filed the present appeal.

2. The point taken on behalf of the appellant by his learned Counsel Sri K. N. Subramaniam is that, though the judgment-debtor Raoof lives within the jurisdiction of the City Civil Court, Madras and the shares also are with him, the City Civil Court had no jurisdiction to issue the prohibitory order, because the place of business of the company is Ambattur, outside the jurisdiction of the City Civil Court, and the dividend due on the shares

is also payable only at Ambattur. In my opinion this contention is not sound. Section 51 (b) C. P. Code states that subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree by attachment and sale or by sale without attachment of any property. Order 21, Rule 46 prescribes the mode of attachment. It is necessary to quote it in full:—

"46(1). In the case of — (a) a debt not secured by a negotiable instrument, (b) a share in the capital of a corporation, (c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court, — the attachment shall be made by a written order prohibiting — (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court; (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon; (iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor. (2) A copy of such order shall be affixed on some conspicuous part of the Court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the Corporation, and, in the case of the other moveable property (except as aforesaid) to the person in possession of the same. (3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same".

It is Section 51, C. P. C., which gives the jurisdiction to the Court to attach and sell the shares and therefore the question whether the City Civil Court had jurisdiction to attach the shares must be determined primarily with reference to this section. Order 21, Rule 46, C. P. Code, only prescribes the mode of attachment, though the provisions thereof may have to be borne in mind in determining the question of jurisdiction. The principle obviously underlying Sec. 51 (b), C. P. C., is that, if the property sought to be attached is within the limits of the jurisdiction of the Court, the Court can attach and sell the property. That is reinforced by the provisions of Sections 39 and 46, C. P. C., which provide for the transfer of the decree to a Court within whose limits the property sought to be attached and sold is situate. Applying this criterion, since the properties sought to be attached and sold are the shares of the judgment-debtor and they are with him in Madras within the limits of the juris-

diction of the City Civil Court, it would follow without furthermore that that Court had the jurisdiction to attach and sell. It is only necessary to add that there is nothing in Order 21, Rule 46, C. P. C., to contradict this result and I might go further and say that under Order 21, Rule 46, C. P. Code, also, the criterion would seem to be only the residence of the judgment-debtor against whom prohibitory order is to be made for transferring the shares or receiving any dividend therefrom. That is all sub-rule (1) of Rule 46 indicates. It may be noted that sub-rule (2) of Rule 46 only requires that a copy of the prohibitory order shall be affixed on some conspicuous part of the Court house and another copy to be sent to the proper officer of the Corporation.

In other words, the provision, which would seem to determine the question of jurisdiction, with which we are concerned, is only sub-rule (1) it would be sufficient if the judgment-debtor, in whose name the shares stand and to whom the prohibitory order is issued, resides within the jurisdiction of the executing Court. Affixture of a copy of the prohibitory order on some conspicuous part of the Court house and service of the copy of the order on the proper officer of the Corporation under sub-rule (2) are only additional formalities to be observed by the executing Court, but they are not determinative of the question as to which Court has jurisdiction to issue the prohibitory order.

3. Sri K. N. Subramaniam, the learned Counsel for the appellant, however, relies on the decision of Mockett, J., in *Balusami v. Official Assignee, Madras*, 1939 Mad WN 573=(AIR 1939 Mad 811). There some persons had been adjudged insolvents in this Court and against whom a decree had been obtained by one Obla K. Ramaswamiar. That decree itself was attached by one C. S. Varadachariar in execution of a decree in suit O. S. No. 97 of 1930 in the Madurai Sub-Court. The learned Subordinate Judge issued the prohibitory order to the Official Assignee of Madras prohibiting him from paying over the dividend due in respect of the decretal debt to anybody other than the attaching decree-holder C. S. Varadachariar. Objection was taken to this course by the Official Assignee on the ground that the Sub-Judge at Madurai had no jurisdiction to issue such a prohibitory order against the Official Assignee not resident within his jurisdiction and in respect of the dividends payable at Madras, which again was outside the jurisdiction of the learned Subordinate Judge. Mockett, J., upheld this objection and quoted Order 21, Rule 46, C. P. C., laying down that the attachment should be made by a written order prohibiting in

the case of the debt the creditor from recovering the debt and the debtor from making payment thereof until further orders of the Court. It meant, according to the learned Judge, that the Court in order to have jurisdiction must also have jurisdiction against the debtor so as to make the order prohibiting him from making the payment. In other words, according to the learned Judge, it was necessary that the debtor should be within the jurisdiction of the Court. In that case the debtor was the insolvent or rather the Official Assignee representing him, and he was not within the jurisdiction of the Sub-Court. No doubt the creditor (the original decree-holder Oba K. Ramaswami) was within the jurisdiction of the Subordinate Judge but that only satisfied the first limb of the provision in question. Such was the reasoning of the learned Judge.

4. It will be seen that the provision laid down in Order 21, Rule 46, C. P. C., in the case of attachment of a share is materially different from the provision relating to a debt. In the case of a debt, the prohibitory order should be issued both to the creditor (prohibiting him from recovering the debt) and to the debtor (prohibiting him from making the payment) and therefore there may be reason for holding that, unless both the creditor and the debtor reside within the jurisdiction of the executing Court, the executing Court would have no jurisdiction to issue the prohibitory order. But in the case of attachment of a share, sub-rule (1) requires the prohibitory order to be issued only to the person in whose name the share stands and therefore it is enough if that person (the judgment-debtor) resides within the jurisdiction of the executing Court. It may be noted that whereas sub-rule (1) makes a distinction between the three classes, namely, a debt, a share and other moveable property and prescribes a separate procedure for each, sub-rule (2) clubs them all together in respect of the affixture or despatch of the copy of the prohibitory order. That again would seem to indicate that sub-rule (2) is only an ancillary provision and that the main provision is sub-rule (1) on the question of jurisdiction.

5. Sri K. N. Subramaniam has not been able to cite any other decision to controvert the view which I have taken in respect of shares. Sri V. Shyamalam, learned Counsel for the decree-holder, has not been able to cite any direct case on the point, but the case which he has cited supports the view which I have taken. The case is the British Transport Co. Ltd., Delhi v. Suraj Bhan, ILR (1962) 2 All 475=(AIR 1963 All 313). There one Suraj Bhan had obtained a money decree against one Sardar Singh and filed the execution petition in the Court at Agra

by attaching inter alia an amount alleged to be payable to the judgment-debtor Sardar Singh by the appellant British Transport Co. Ltd., Delhi. The British Transport Co. Ltd., Delhi had taken on lease some buses belonging to Sardar Singh and was liable to pay for Sardar Singh's share Rs 4/- per day as rent. It was the total of such amounts that was sought to be attached. It was held that the rent was payable at Agra and therefore the debt was due to the judgment-debtor at Agra. The British Transport Co., Ltd., Delhi, however, took objection to the jurisdiction of the executing Court on the ground that they were residents at Delhi, outside the limits of the Agra Court. Their objection was repelled by the Court and it was held that under Section 51 (b), C. P. C., since what was sought to be attached was a debt its situs alone determined the jurisdiction, and since the debt was payable at Agra it was the Agra Court, which had jurisdiction. It was pointed out that it was not the situs of the debtor (The British Transport Co., Ltd., Delhi) that determined the question of jurisdiction. It was observed further that the mere circumstance that under Order 21, Rule 46, C. P. C. notice had to go to the debtor (garnishee) at Delhi outside the jurisdiction of the Court was immaterial. By way of analogy it was pointed out that even in the case of a regular suit, the Court may be properly seized of the suit on account of the accrual of the cause of action within the Court's limits and the defendants may be residing outside the jurisdiction, but that would not oust the jurisdiction.

The learned Judges distinguished the Bench decision of the Calcutta High Court in Begg Dunlop and Co v. Jagannath Marwari, (1912) ILR 39 Cal 104, as a case where the executing Court was held not to have jurisdiction because the debt due from the garnishee was itself not payable within the limits of the jurisdiction of the executing Court besides the circumstances of the garnishee being outside the jurisdiction of the Court. Some further inconveniences by adopting the contrary view were also pointed out. It may be noted that the case of 1939 Mad WN 573=(AIR 1939 Mad 811) also was similar to (1912) ILR 39 Cal 104. In that case the garnishee (Official Assignee) resided outside the jurisdiction of the Sub-Court and the debt also was payable outside the jurisdiction of the Sub-Court. However, if an occasion should arise, we may have to consider further how far the reasoning in ILR (1962) 2 All 475=(AIR 1963 All 313) is in conflict with the decision of Mockett, J., and which view is correct. But the point on which the decision of the Allahabad High Court would seem to help us is in the proposition that Section 51 (b) C. P. C. is primarily determinative

of the jurisdiction and whatever may be said about the case of a debt, the position is clear so far as a share in a company is concerned, both under Section 51 (b) and under Order 21 rule 46 C. P. C.

6. Sri V. Shaymalam cited also the decision of the Andhra Pradesh High Court in *Chimandas Methuram v. Mahadevappa, Firm*, (1961) 1 Andh WR 295= (AIR 1961 Andh Pra 417). But as I understand that case it is an authority only on a question arising under Order 38, Rule 5, C. P. C., namely that an attachment before judgment could be issued even in respect of property lying outside the territorial limits of the jurisdiction of the Court in a suitable case. That is because of the special wording of Order 38, Rule 5. The decision is not an authority in respect of an executing Court in view of the remarks in the concluding portion of the judgment stating that Section 46 C. P. C., governs only the attachment in execution of a decree and would not be pertinent in respect of attachment before judgment. We are not dealing with an execution of a decree and Section 46 would seem to apply and indicate that the criterion is the location of the property. But I have pointed out that even according to that criterion the City Civil Court had jurisdiction, because the shares are in Madras.

7. In *Dharanidhar Roy v. P. D. Sethi*, ILR 60 Cal 782= (AIR 1933 Cal 379), in execution of a money decree obtained in the Court of the Sub-Judge at Asansol, an attachment was sought to be effected of a mortgage debt due to the judgment-debtor. The judgment-debtor resided in Asansol limits and the mortgage deed was also with him. But his mortgagor was outside the limits of Asansol and the mortgaged property also was outside those limits. It was held that these circumstances did not affect the jurisdiction of the executing Court which had jurisdiction, because the judgment-debtor was within the limits of Asansol and the mortgage documents were within those limits. It was pointed out that the mortgage debt was a speciality debt and the rule applicable to a mortgage debt was that its situs was the location of the mortgage deed. It may be said that there is some analogy between a mortgage deed and shares in a Corporation and that the situs of the shares is the place where the shares are held by the judgment-debtor.

8. The result of the discussion so far is that the executing court had jurisdiction to issue the attachment warrant.

9. Learned counsel, Sri K. N. Subramaniam, finally submits that only 170 out of 220 shares attached belonged to the judgment-debtor and that the remaining 50 shares belonged to another. If the

50 shares stand in the name of somebody else, the executing Court had no jurisdiction to attach them as the property of the judgment-debtor. This may be brought to the notice of the executing Court in due course. Subject to this the appeal is dismissed.

MVJ/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 271 (V 56 C 61)
VENKATARAMAN, J.

Rangaswami Naicker, Appellant v. Rangammal (died) by proposed L. R., K. R. Venkataswami Naidu, Respondent.

A. A. A. O. No. 79 of 1965, D/- 26-6-1968, against order of Dt. J., Coimbatore, in C. M. A. No. 105 of 1964.

Civil P. C. (1908), Ss. 47, 146 and O. 21, R. 16 — Death of decree-holder — A claiming to be a legatee of the subject matter of the suit under a will executed prior to decree by the decree-holder filing execution application — Genuineness of will held should be decided in the execution proceedings itself — Ss. 213 and 57 of the Succession Act did not apply to oust the jurisdiction of the executing Court as the will was executed outside the city of Madras and the property also was situated outside that city — S. 146 applied to the case and not O. 21, R. 16, as there was no assignment of the decree under the will — ILR (1964) 2 Mad 363, Diss. AIR 1968 Mad 190, Foll. Case law discussed.

(Para 3)

| Cases Referred: | Chronological | Paras |
|---|--|-------|
| (1968) AIR 1968 Mad 190 (V 55)= | ILR (1967) 3 Mad 218, Ponniah Pillai v. Nateraja | 4 |
| (1968) AIR 1968 Punj 108 (V 55)= | ILR (1967) 2 Punj 334, Behari Lal v. Karamchand | 3 |
| (1965) AIR 1965 Andh Pra 81 (V 52)=(1964) 2 Andh WR 81, | Satyanarayana v. Sindhu Bai Sharma | 4 |
| (1964) 1964-2 Mad LJ 563=ILR (1964) 2 Mad 363, Sampat Mudaliar v. Sakuntala Ammal | | 4 |
| (1964) AIR 1964 Pat 311 (V 51), | Ramnath v. Anardei Devi | 4 |
| (1962) AIR 1962 SC 232 (V 49)= | (1962) 3 SCR 391, Andhra Bank Ltd. v. Srinivasan | 4 |
| (1960) 1960 Ker LT 1077=1960 Ker LJ 1372, Mani Davasia v. Varkey. Scaria | | 4 |
| (1959) AIR 1959 Ker 180 (V 46)= | ILR (1958) Ker 1159, Chinnankesavan v. Gouri Amma | 4 |
| (1958) AIR 1958 SC 394 (V 45)= | 1958 SCR 1287, Saila Bala Dassi v. Nirmala Sundari Dassi | 4 |
| (1955) AIR 1955 SC 376 (V 42)= | (1955) 1 SCR 1369, Jugalkishore Saraf v. Raw Cotton Ltd. | 4 |

P Venkataraman, for G Ramanujam and J Kanakaraj, for Appellant; T. R. Ramachandran, for Respondent.

JUDGMENT:— This appeal arises out of proceedings in the execution of the decree in O S No 431 of 1962 on the file of the District Munsif, Coimbatore. The suit was instituted by one Rangammal, a Hindu widow, against her husband's brother's son, Rangaswami Naicker, the appellant herein, to recover possession of 336 acres of land in a village in Coimbatore. The suit was compromised on 28-6-1963, according to which the plaintiff was entitled to a specified extent of 1 acre 12 cents and the defendant to the remainder. Rangammal, however, died the very next day after the decree. Earlier, on 17-10-1962, she had executed a registered will in favour of her brother, Venkataswami Naidu, bequeathing the subject-matter of the suit, namely, 336 acres and another house, not concerned in the suit. The will, of course, would take effect only on her death. Founding on the will, the legatee, Venkataswami Naidu, filed E P No 860 of 1963, out of which this appeal arises, to execute the decree. In column 1, he described himself as legal representative of the deceased Rangammal, the decree-holder. In column 11, he prayed that he might be recognised as the heir (legal representative) of the decree-holder Rangammal, and possession might be delivered to him under Order 21, Rule 35, C P. C.

2. The judgment-debtor, Rangaswami Naicker, resisted the petition on the grounds (1) that the will was not genuine, (2) that its genuineness had to be established in proceedings other than in execution of O. S. No 431 of 1962 and (3) that but for the will he would be the heir-at-law of Rangammal under the Hindu law.

3. The question whether the genuineness of the will could be gone into in the execution proceedings was tried as a preliminary point. The learned District Munsif held that it could be gone into in the execution proceeding itself in view of Sections 47 and 146 C. P. C. The view was upheld on appeal by the learned District Judge. Hence this further appeal by Rangaswami Naicker. The contention of his learned counsel is that Venkataswami Naidu should be referred to a separate suit to establish the will and only thereafter he could be allowed to execute the decree. No authority however is cited for this proposition and this proposition is opposed to the statutory provisions like Sections 47 and 146, C. P. C. When Venkataswami Naidu claims to be the legal representative of the decree-holder Rangammal and further claims to be entitled to execute the decree in that capacity, the question has necessarily to be tried under Section 47 by the executing Court.

Section 47 (2), no doubt, says that the executing Court may treat a proceeding under that section as a suit, but where the question is one primarily relating to execution, there is no need to convert it into a suit. Apart from this there is no provision of law which ousts the jurisdiction of the executing Court under Section 47, C P. C. Thus Section 213 of the Indian Succession Act will not apply so as to oust the jurisdiction of the executing Court, because it clearly enacts that so far as a will made by a Hindu is concerned, it will only apply where the will is of the classes specified in clauses (a) and (b) of Section 57, and if we turn to clauses (a) and (b) of Section 57, they refer to a will executed within the city of Madras or relating to property situated in Madras city. But here, the will was executed outside the city of Madras and the properties also are situated in Coimbatore District. Hence Sec 213 will not apply. See also the decision in Beharilal v Karamchand, AIR 1968 Punj 108.

4. It is thus clear that it is the executing Court which has to determine whether Venkataswami Naidu is the legal representative under Section 47. A question may arise about the exact provision under which the Court may proceed. The possible provisions are Order 21, Rule 16, and Section 146, C P. C. Order 21, Rule 16, C P. C. will not apply because the will does not assign the decree; in fact, it does not refer to the suit at all. Hence there has not been any assignment in writing or by operation of law under Order 21, Rule 16, C P. C. according to the criterion laid down by their Lordships of the Supreme Court in Jugalkishore Saraf v Raw Cotton Ltd., (1955) 1 SCR 1369=(AIR 1955 SC 376). But, Venkataswami Naidu can maintain the petition under Section 146, C. P. C. as a person claiming under Rangammal. This is clear from the above decision itself and also the decision in the Andhra Bank Ltd. v. Srinivasan, (1962) 3 SCR 391 at pages 410, 411=(AIR 1962 SC 232 at p 239) where their Lordships held that even a partial legatee under a will can be legal representative under Sec. 2 (11) C. P. C.

It has been held in a number of cases following Jugalkishore Saraf v Raw Cotton Ltd., (1955) 1 SCR 1369=(AIR 1955 SC 376) that where a transferee of the subject-matter of the suit is not a transferee of the decree and therefore cannot apply under Order 21, Rule 16, C P. C., he can nevertheless apply under Section 146 C. P. C. to execute the decree. See Sala Bala Dassi v. Nirmala Sundari Dassi, 1958 SCR 1287=(AIR 1958 SC 394), Chinnakesavan v Gouri Amma, ILR (1958) Ker 1159=AIR 1959 Ker 120, Mani Davasia v Varkey Scaria, 1960 Ker LT 1077, Ramnath v Anandei Devi, AIR 1964 Pat 311, Satyanarayana v. Sindhu Bai Sharma,

AIR 1965 Andh Pra 81 and Ponniah Pillai v. Nataraja, AIR 1968 Mad 190. There is only one decision in which a dissenting note has been struck and that is by Jagadisan, J., in Sampath Mudaliar v. Sakuntala Ammal, (1964) 2 Mad LJ 563=ILR (1964) 2 Mad 363, where the learned Judge held that once a decree is passed, unless there is an assignment in writing of the decree to satisfy Order 21, Rule 16, C. P. C., Section 146 cannot be invoked and that Section 146 would be controlled by Order 21, Rule 16, C. P. C. For the reasons discussed in the decisions cited above, I respectfully dissent from the view taken by Jagadisan, J., and agree with the view of Kailasam, J., in AIR 1968 Mad 190, that as pointed out by their Lordships of the Supreme Court, Section 146 is very wide in its terms and would permit a transferee like the respondent herein to maintain an execution petition, even though the decree as such has not been transferred to him under Order 21, Rule 16, C. P. C. Their Lordships have emphasised that Section 146, C. P. C. will apply so long as there is no prohibition to the contrary. There is no such prohibition here. It may also be pointed out that Das, J., points out at pages 1405 and 1406 in (1955) 1 SCR 1369=(at page 395 in AIR 1955 SC 376) that in such a case, it is the duty of the executing Court alone under Section 47 to determine the question whether the transferee person seeking to execute the decree could be said to claim under the decree-holder under Section 146.

5. It is quite clear therefore that the executing Court is the proper Court to determine the question whether the will is genuine and the property in question was bequeathed to the claimant Venkataswami Naidu thereunder. The appeal is therefore dismissed, but without costs. No leave.

MVJ/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 273 (V 56 C 62)

KAILASAM, J.

Mahalakshmi Textile Mills, Pasumalai, Petitioner v. Government of Madras, Represented by the Secy. to Govt. Department of Industries, Labour and Housing Madras, Respondents.

Writ Petns. Nos. 892 and 893 of 1968, D/- 12-8-1968.

Payment of Bonus Act (1965), Ss. 36, 10 and 34 (3) — Interpretation of Ss. 36 and 10 — Application under S. 36 — No absolute discretion in Government to refuse to grant exemption — It is bound to exercise its powers under S. 36 and pass such order as it thinks fit giving reasons

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for the same — Civil P. C. (1908), Preamble — Interpretation of Statutes.

On an application by an establishment for exemption under S. 36 of the Payment of Bonus Act, the Government is bound to exercise its powers conferred under S. 36 and pass such order as it thinks fit giving reasons for the same. Section 36 makes it necessary for the Government to exercise its power having regard to the financial position and other relevant circumstances of the concerned establishment. Therefore it cannot be said that the Government has got an absolute discretion to refuse to grant exemption. Case law discussed. (Para 3)

The provisions of an enactment should be read together giving effect to all of them. Though S. 10 of the Act requires payment of minimum bonus of four per cent reading Ss. 10 and 36 together would make it clear that it is the duty of the Government to have regard to the financial position and other relevant circumstances of an establishment and grant exemption in appropriate cases. The rights of parties are involved by a decision of the Government under S. 36 of the Act. If it decides to grant exemption from payment of minimum bonus the Labour would be affected adversely and if it refuses to act in deserving cases, the management would be affected. In such a situation, it is the duty of the Government to consider the financial position and other relevant circumstances of any establishment and come to its conclusion giving reasons for it. The fact that the agreement entered into by the labourers accepting three per cent bonus is contrary to provisions of S. 34 (3) would not help the Government in declining to give its reasons for its order rejecting the application.

(Paras 2, 3)

Cases Referred: Chronological Paras

(1968) 1968-1 All ER 694=(1968)

2 W LR 924, Padfield v. Minister of Agricultural etc.

2

(1961) AIR 1961 SC 1731 (V 48)=

(1962) 2 SCR 169, P. J. Irani v. State of Madras

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M. K. Nambiar, for K. K. Venugopal and L. N. V. Subramaniam, for Petitioner; Govt. Pleader, for State.

ORDER:— W. P. No. 892 of 1968 is filed by Mahalakshmi Textiles Mills, Pasumalai, Madurai, for the issue of a writ of certiorari calling for the records relating to the order of Government of Madras in 152935/Lab.A.2/67-2 I.L.H. dated 8-2-1968, declining to exempt the petitioner-mills from payment of minimum bonus for the year 1965-66 and quashing the said order. W. P. No. 893 of 1968 is by the same petitioner for the issue of Writ of Mandamus directing the Government of Madras represented by the Sec-

retary, Department of Industries, Labour and Housing to grant the exemption as prayed for by the petitioner in its application dated 24-11-1967 for a partial exemption under Section 36 of the Payment of Bonus Act, 1965. As the two writ petitions raise the same question, they will be dealt with together. According to the petitioner-mills the mills incurred a loss of Rs 13,58,788.68 for the year 1965. On 26-9-1966, the petitioner applied under Section 36 of the Payment of Bonus Act for exemption under Section 10 of the Act. On 30-11-1966 the company's liability according to the petitioner was Rs. 56,52,000. The Government refused the exemption prayed for on 2-12-1966. On 23-12-1966, the Government referred the question of bonus for the year 1965-66 to the Industrial Tribunal.

Against the order of reference, the petitioner has filed W P No 625 of 1967 which is pending in this Court. On 9-1-1967 the petitioner applied for exemption and the Government refused to review its order dated 2-12-1966 by its order dated 9-2-1967. The petitioner again applied for exemption for 1966 on 29-8-1967 and the Government by its order dated 3-9-1967 refused to grant exemption. On 9-10-1967, 1142 out of 1173 workmen agreed by settlement to receive 3 per cent bonus subject to exemption being given by the Government. The petitioner mills paid 2 per cent bonus for 1965 and 1966 on 18-10-1967 and 19-10-1967, subject to the Government exempting the petitioner from the operation of the provisions of Section 10 of the Act. On 24-11-1967, the petitioner applied to the Government for partial exemption to enable it to pay 3 per cent bonus for each year. On 31-12-1967, according to the petitioner the total liability of the mills was Rs 60,85,000/-. In January 1967 the petitioner paid further one per cent bonus. On 8-2-1968, the Government rejected the application without stating the reasons and the writ petition No 832 of 1968 was filed on 29-2-1968 against that order. The order dated 8-2-1968 runs as follows—

"The management of the Mahalakshmi Textiles Mills Ltd., Pasumalai is informed that its request for partial exemption under Section 36 of the Payment of Bonus Act 1965 from payment of minimum bonus for the years 1965 and 1966 under the above Act, cannot be complied with". The attack against this order is that the Government has failed to give reasons for not complying with the request of the petitioner.

2. Section 10 of the Payment of Bonus Act, 1965 provides that every employer shall be bound to pay to every employee in an accounting year a minimum bonus which shall be four per cent of the salary or wage earned by the employee

during the accounting year whether there are profits in the accounting year or not. S 36 of the Act enables the Government to exempt certain establishments from the operation of all or any of the provisions of the Act. The section reads thus:

"If the appropriate Government having regard to the financial position and other relevant circumstances of any establishment or class of establishment, is of opinion that it will not be in the public interest to apply all or any of the provisions of this Act thereto, it may, by notification in the Official Gazette exempt for such period as may be specified therein and subject to such conditions as it may think fit to impose such establishment or class of establishment from all or any of the provisions of this Act."

Reading Section 10 and Section 36 of the Act together, it is clear that the employer is bound to pay minimum bonus of four per cent of the salary or wage earned by the employee during the accounting year. But the Government has power to exempt the operation of Section 10 from the payment of minimum bonus having regard to the financial position and other relevant circumstances of any establishment which is unable to pay minimum bonus. Therefore it would be the duty of the Government to take into account the financial position and other relevant circumstances of the establishment, and come to a conclusion whether the operation of Section 10 with regard to that establishment should be stayed or not. It was contended on behalf of the Government that the granting of exemption under Section 36 of the Act was purely within the discretion of the Government and the petitioner could not complain if it refused to grant exemption, while it might be open to the labour to question the correctness of the order of the Government granting exemption. I am unable to accept this contention. The provisions of an enactment should be read together giving effect to all of them. Though Section 10 of the Act requires payment of minimum bonus of four per cent, reading Sections 10 and 36 together would make it clear that it is the duty of the Government to have regard to the financial position and other relevant circumstances of an establishment and grant exemption in appropriate cases.

It is unnecessary to decide the question whether the exemption should be of the operation of the entire Section 10 or whether it would be open to the Government to say that the provisions of Section 10 would be modified by imposing a payment of bonus of 3 per cent. But it is clear that the rights of parties are involved by a decision of the Government under Section 36 of the Act. If it decides to grant exemption from payment of minimum bonus the Labour would be affected

adversely and if it refuses to act in deserving cases, the management would be affected. In such a situation, it is the duty of the Government to consider the financial position and other relevant circumstances of any establishment and come to its conclusion giving reasons for it. In construing the duty of a Minister in dealing with a complaint by the Milk Producers and his declining to refer the complaint to a Committee, the court expressed itself as follows in *Padfield v. Minister of Agricultural etc.*, 1968-1 A.E. R. H. L. 694, at page 714.

"If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reasons whatsoever for taking a contrary course, the court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions. In the present case, however, the Minister has given reasons which show that he was not exercising his discretion in accordance with the intention of the Act of 1958."

The Court issued a direction requiring the Minister to consider the complaint of the appellants according to law.

3. The learned Government Pleader submitted that Section 36 is analogous to Section 29 of the Madras Buildings (Lease and Rent Control) Act of 1960 which enables the Government to exempt any building or class of buildings from the operation of all or any provisions of the Act. The Supreme Court in construing the provisions of Section 13 of the Madras Buildings (Lease and Rent Control) Act 1949 which are in pari materia with Section 29 of the 1960 Act, held in *P. J. Irani v. State of Madras*, AIR 1961 SC 1731, that any individual order of exemption passed by the Government could be the subject of judicial review by the courts for finding out whether it was discriminatory so as to offend Art. 14 of the Constitution, whether the order was made on grounds which were germane or relevant to the policy and purpose of the Act and whether it was not otherwise mala fide. The provision granting power to exempt any building or class of buildings from all or any other provisions of the Act, under the Madras Buildings (Lease and Rent Control) Act is different and is of a general nature. But Section 36 of the Payment of Bonus Act makes it necessary for the Government to exercise its power having regard to the financial position and other relevant circumstances of the concerned establishment. In the circumstances the contention that the Government has got an absolute discretion to refuse to grant exemption cannot be accepted. It has to exercise its mind, come to its con-

clusion and pass an order giving reasons therefor.

The plea of the Government that the agreement entered into by the labourers accepting three per cent bonus is contrary to Section 34 (3) of the Act would not help the Government in declining to give its reasons for its order. It may be that the agreement which is contrary to the provisions of the section will not be binding on the employers. In this case, what the petitioner applied for was that subject to the Government granting exemption of the operation of Section 10 of the Act, the employees would be willing to accept three per cent as bonus. Whether this is contrary to the provisions of Section 34 (3) of the Act or not, the decision of the Government in deciding the question as to whether exemption under Section 36 should be granted or not is affected. On a consideration of all the facts in this case, I am satisfied that the Government is bound to exercise its powers conferred under Section 36 and pass such order as it thinks fit giving reasons for the same.

4. The writ petitions are allowed and the order of the Government is quashed. The Government will consider the application of the petitioner afresh and proceed according to law. There will be no order as to costs.

LGC/D.V.C.

Petitions allowed.

AIR 1969 MADRAS 275 (V 56 C 63)

KAILASAM, J.

K. R. Seshan, Petitioner v. Deputy Inspector General of Police, Southern Range, Madurai and others, Respondents.
Writ Petn. No. 1661 of 1966, D/- 11-12-1967.

(A) Civil Services — Madras Civil Services (Classification, Control and Appeal) Rules (1953), R. 17 — Enquiry against one K, a Sub-Inspector of Police on probation — Charge relating to unsatisfactory work while in charge of a police station during certain period — Charge being subject matter of previous enquiry resulting in extension of probation by six months — K having been punished once, this charge ought not to have been again made subject-matter of fresh enquiry.

(Para 4)

(B) Civil Services — Madras State and Subordinate Services Rules, R. 27 (c) Explan. III — Scope — Madras Civil Services (Classification, Control and Appeal) Rules (1953), R. 17 — Enquiry against a member of service — Question of termination of probation — Framing of specific charge relating to punishments accumulated — Permissible.

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Under Explan. III of Rule 27 (c) of Madras Subordinate Services Rules, the probation of a member of a service can be terminated for general unsatisfactory work or incapacity without the need for enquiry into the specific charge. In cases where the competent authority proposes to terminate the probation of a member for specific charges in addition to or distinct from general inefficiency or incapacity is required to frame specific charges and follow the detailed procedure laid down in Rule 17 (b) of the Madras Civil Services (Classification, Control and Appeal) Rules. In an enquiry held for the purpose of terminating the probation, there can be no objection to framing of a specific charge relating to the punishments accumulated by a member of the service. It may be that in a case of grave misdemeanour, where the dismissal of such a member is in contemplation, he may be prejudiced by his past conduct being enquired into at that stage. But the fact of accumulation of punishments during the period of probation is a material circumstance to be taken into account in deciding whether the probation should be terminated or not. (Para 8)

(C) Constitution of India, Arts 226, 311 — Certiorari — Administrative Orders — When open to interference — Departmental enquiry against a Sub-Inspector of Police resulting in termination of his probation — Proceedings of authorities not vitiated by any error of procedure — Order terminating probation, not interfered with — (1963) 2 Lab LJ 60 (Mad) held impliedly overruled by AIR 1963 SC 779.

In petition under Article 226 of Constitution against termination of probation of a member of service, the Court cannot interfere in the case of a sentence, provided the sentence is justified by the rules and if the order can be supported on any finding for which the punishment can lawfully be imposed. Therefore if the Court is satisfied, that the authority would have passed the order on the basis of the other relevant and existing grounds and the exclusion of irrelevant and non-existent grounds could not have affected the ultimate opinion or decision of the authority, it will not interfere. The question as to whether the authority has specifically stated that it would have sustained the punishment on that ground or not is not material. AIR 1954 SC 179 & AIR 1966 SC 740 & AIR 1963 SC 779, Rel. on. Observation to contrary in AIR 1965 Mad 491, held obiter; (1963) 2 Lab LJ 60 (Mad), held impliedly overruled by AIR 1963 SC 779. (Para 12)

In departmental enquiry against a Sub-Inspector of Police resulting in the termination of his probation, the grounds made out were the delay in submission of the fourth quarterly inspection notes, reprehensible conduct in giving evidence

in the Sub-Magistrate's Court contrary to facts recorded in the case diary, delay in submission of case diaries, delay in submission of currents and accumulation of four punishments during the period of probation as Sub-Inspector. Even though charge of accumulation of punishments during probation was not taken into account in imposing the punishment, in the other charges the authority would have terminated the probation. Charge of reprehensible conduct in giving evidence was serious and punishment imposed could not be said to be excessive.

Held that the proceedings of the authorities were not vitiated by any error of procedure. The order terminating probation was correct and not interfered with under Article 226. (Para 15)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1353 (V 54)=
(1967) 2 SCR 583, State of Maharashtra v. Babulal Takkamore 11
(1966) AIR 1966 SC 740 (V 53)=
1966 Cri LJ 608, Ram Manohar v. State of Bihar 9
(1965) AIR 1965 Mad 491 (V 52)=
(1965) 2 Lab LJ 44, Bank of Madura v. B. M. Employees' Union 13
(1963) AIR 1963 SC 779 (V 50)=
(1963) 1 Lab LJ 239, State of Orissa v. Bidyabhushan 10, 13
(1963) 1963-2 Lab LJ 60 (Mad), Royal Printing Works v. Industrial Tribunal 13
(1954) AIR 1954 SC 179 (V 41)=
1954 Cri LJ 456, Shubban Lal Saksena v. State of U. P. 9

S. Ramaswami, for Petitioner; R. Krishnamurthy and T. Selvaraj, for Govt. Pleader, for Respondents

ORDER:— This petition is filed by a Sub-Inspector of Police, whose probation was terminated, for the issue of a writ of certiorari after calling for the records connected with the order of the Deputy Inspector-General of Police dated 11-1-1963 which was confirmed on appeal by the Inspector-General of Police on 30-9-1963 and by the Government of Madras on 4-9-1965

2. The petitioner was enlisted as a constable in 1935 and was promoted as Sub-Inspector in 1949.

3. He was reverted in 1952 for want of vacancies. Again on 8-10-1958 he was promoted to officiate as Sub-Inspector and put on probation for two years. On 30-5-1960 a charge memo was served on him by the Superintendent of Police, Ramanathapuram, and ultimately (the probation of) the petitioner was extended by one year on 5-9-1960 by way of punishment. Again on 25-4-1962 a charge memo was served on the petitioner which was received by him on 20-5-1962. Six charges were framed against him. The first charge related to unsatisfactory work

while in charge of Neikuppai Station during the period from 31-3-1959 to 16-11-1959. Under the first charge there were four specific instances of unsatisfactory work in Neikuppai Station. The second charge related to unsatisfactory work while in charge of Manamadurai Station during the period from 9-2-1961 to 29-6-1961. In that he delayed the submission of IVth quarterly Inspection Notes of Manamadurai Station from 10-2-1961 to 31-5-1961.

The third charge related to reprehensible conduct in giving evidence in Sub-Magistrate's Court, Srivilliputtur on 7-12-1961 contrary to facts recorded in the case diary in Rajapalayam Taluk Station Cr. No. 145 of 1961. The fourth charge related to (delay in) submission of case diaries, and not submitting case diaries after F. I. Rs. in Kalayarkoil station in several cases and the fifth charge related to non-submission of C-1 currents in various cases in spite of reminders from the Inspector of Police, Sivaganga. The 6th charge was accumulation of four punishments during the period of probation as Sub-Inspector. The enquiry officer found that all the charges had been proved against the petitioner. The Deputy Inspector-General of Police accepted the findings of the enquiry officer and terminated the probation of the petitioner. On appeal the Inspector-General of Police agreed with the Deputy-Inspector-General of Police and dismissed the appeal. A further appeal to the Government also failed and hence this writ petition.

4. So far as the first charge relating to unsatisfactory work while in charge of Neikuppai Station during the period 31-3-1959 to 16-11-1959 is concerned, it is admitted that the charges were the subject-matter of a previous enquiry which resulted in the extension of the probation of the petitioner by six months. The petitioner having been punished once before charge No. 1 ought not to have been again made the subject-matter of a fresh enquiry. The plea of the petitioner regarding this charge will have to be accepted.

5. Regarding Charge No. 2, that is delay in submission of the IVth Quarterly Inspection notes of Manamadurai Station from 10-2-1961 to 31-5-1961, the enquiry officer found that the reference was pending when the delinquent took charge and it was his duty to clear off this current file or to have reported if it was not handed over to him on his taking charge. In the absence of any report about this current file by the delinquent the officer inferred that the current file was at the station and as its submission was delayed by the delinquent for such a long time it was not excusable. The officer also found that the delinquent is not able to

establish that this reference was among the papers taken away by his predecessor. In the result he declined to accept the explanation for the delay.

6. The learned Counsel for the petitioner submitted that the reasoning of the enquiry officer that the delinquent has not established that the reference was among the papers taken away by the predecessor is not proper as the burden is on the prosecution to prove that the paper had been left and that the paper was available with the petitioner. The Enquiry Officer accepted the evidence of P. W. 4 that the reference was received at the Manamadurai Station as recorded in the station registers and was pending when the delinquent took charge and he ought to have attended to the clearing of the current or should have reported if it was not handed over to him on his taking charge. I am unable to say that the reasoning of the Enquiry Officer is unsupportable. Regarding Charge No. III, that is, reprehensible conduct in giving evidence in Sub-Magistrate's Court, Srivilliputhur on 7-12-1961 contrary to facts recorded in the case diary it is common ground that the evidence which the petitioner gave in Court was not in conformity with the case diary records.

The statement of the petitioner that he recorded a statement from the first accused and recovered M. O. 1, recorded the confessional statement of accused No. 2 and in pursuance thereof seized M. O. 2 and then recorded the confessional statement of accused No. 3 and seized M. O. 3 is contrary to the record in the case diary which showed that confessional statements of the accused and mahazars recorded that M. O. 1 was recovered at 8-30 a.m., M. O. 2 at 7-30 a.m. and M. O. 3 at 7-45 a.m. It is also entered in the case diary that the petitioner arrested accused Nos. 1 to 3 at Sankaralingapuram at 5-00 a.m. on 26-9-1961 and examined them and recorded their confessional statements, from accused No. 1 at 5-15 a.m., from accused No. 2 from 6 to 6-30 a.m. and from accused No. 3 from 6-45 to 7-15 a.m. There is a clear variation between the evidence he gave in Court and the case diary records. His explanation that the evidence of the petitioner was misunderstood by the Sub-Magistrate was rightly rejected by the Enquiry Officer.

7. The fourth charge relates to delay in submission of case diaries and not submitting case diaries after F. I. Rs. in Kalayarkoil crime numbers. The finding is that the petitioner had delayed the submission of case diaries and his plea that the delay was due to his work in Courts and investigation was not accepted. Charge No. 5 relates to non-submission of currents in spite of reminders from the Inspector of Police, Sivaganga. On

this charge the Enquiry Officer found as a fact that no reminders had been sent of the currents by the Inspector but there was delay in submission of the records. Though the act of non-submission is not aggravated, as it has not been proved to have continued in spite of reminders, the charge that there was delay in submission is made out.

8. Regarding the 6th Charge, accumulation of punishments during the period of probation the fact that the petitioner received the four punishments is not disputed. But it is contended that the Enquiring Authority was prejudiced by including this charge relating to past conduct and as such the entire enquiry is vitiated. In this connection the learned Counsel, Mr Ramaswami, referred to the Subordinate Services Rule No 27, which provides for the termination of the probation of a person. Explanation III to Rule 27 (c) is the relevant rule. It provides that the probation of a member of a service can be terminated for general unsatisfactory work or incapacity without the need for enquiry into the specific charge. In cases where the competent authority proposes to terminate the probation of a member for specific charges in addition to or distinct from general inefficiency or incapacity he is required to frame specific charges and follow the detailed procedure laid down in Rule 17 (b) of the Madras Civil Services (Classification, Control and Appeal) Rules.

In this case, charges were framed and the matter proceeded as if for inflicting a punishment, not for termination of the probation on grounds of general unsatisfactory work or incapacity. Charge No. 3 is that the petitioner was guilty of reprehensible conduct in giving evidence contrary to the facts recorded in the case diary. This charge will not be one of unsatisfactory work or incapacity. That the proceedings were by way of punishment is made clear by the show cause notice given by the Deputy-Inspector-General of Police dated 11-11-1962 in which he stated that "if no further representation was received within the stipulated time it will be considered that you have no representations to make and (orders on) the punishment roll will be disposed of on its own merits". The Deputy-Inspector-General in his order dated 11-1-1963 has stated that it was a punishment roll for cessation of probation for unsatisfactory work and reprehensible conduct.

Thus the termination does not appear to be for general unsatisfactory work or incapacity. On the other hand, the Department proceeded to frame specific charges in addition to and distinct from general inefficiency and incapacity. In an enquiry held for the purpose of terminat-

ing the probation, I do not think there can be any objection to framing of a specific charge relating to the punishments accumulated by the petitioner. It may be that in a case of grave misdemeanour, where the dismissal of the petitioner is in contemplation, the petitioner may be prejudiced by his past conduct being enquired into at that stage. But the fact of accumulation of punishment during the period of probation is a material circumstance to be taken into account in deciding whether the probation should be terminated or not. I do not think there can be any objection to this course as admittedly the petitioner was given ample opportunity to rebut the charge.

9. Mr Ramaswami, the learned Counsel for the petitioner, submitted that in any event as Charge No 1 had failed and regarding Charge No V the charge as framed had not been established, the punishment cannot be sustained. In support of this contention the learned Counsel relied on a decision of the Supreme Court in *Ram Manohar v State of Bihar*, AIR 1966 SC 740. The Supreme Court was dealing with the case of detention. Following its earlier decision in *Shubhan Lal Saxena v State of Uttar Pradesh*, AIR 1954 SC 179 the Supreme Court held that as the detention order mentioned two grounds, one of which is in terms of the rule while the other is not, it could not be said to what extent the valid and invalid grounds operated in the mind of the authority concerned and contributed to the creation of his subjective satisfaction which formed the basis of the order of detention and therefore the order will have to be set aside.

10. In *State of Orissa v Bidyabhusan*, AIR 1963 SC 779 the Supreme Court was dealing with the validity of the order of the High Court, directing the Government to reconsider the order of dismissal, on the ground that out of the charges framed certain charges were held to be unsustainable. There were two charges against the officer in that case. The first charge related to five specific heads charging the officer with having received illegal gratification while the second related to possession of means disproportionate to his income as Sub-Registrar. The High Court held that there was evidence to support the findings on heads (c) and (d) of charge No 1 and the findings on charge No. 2. The High Court was of the view that as the findings on two of the heads under charge No 1 could not be sustained the Government should be directed to decide whether on the basis of those charges proved punishment of dismissal should be maintained or else where a lesser punishment would suffice.

The Supreme Court held that when the findings of the Tribunal relating to two out of five heads of the first charge and

the second charge were found not liable to be interfered with by the High Court and those findings establish that the respondent was prima facie guilty of grave delinquency the High Court had no power to direct the Government of Orissa to reconsider the order of dismissal. The Supreme Court proceeded to observe that in the case in which an order of dismissal of a public servant was impugned the Court is not concerned to decide whether the sentence imposed, provided it is justified by the rules, is appropriate having regard to the gravity of the misdemeanour established. In conclusion the Supreme Court held that if the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. Thus this decision clearly lays down that the Court cannot interfere in the case of a sentence, provided the sentence is justified by the rules and if the order can be supported on any finding for which the punishment can lawfully be imposed.

11. The decision is subsequently referred to by the Supreme Court in *State of Maharashtra v. B. K. Takkamore*, AIR 1967 SC 1353 and the position of law is stated thus at page 1359:—

"An administrative or quasi-judicial order based on several grounds, all taken together, cannot be sustained if it be found that some of the grounds are non-existent or irrelevant and there is nothing to show that the authority would have passed the order on the basis of the other relevant and existing grounds. On the other hand, an order based on several grounds some of which are found to be non-existent or irrelevant, can be sustained if the Court is satisfied that the authority would have passed the order on the basis of the other relevant and existing grounds, and the exclusion of the irrelevant or non-existent grounds could not have affected the ultimate opinion or decision."

Therefore if the Court is satisfied, that the authority would have passed the order on the basis of the other relevant and existing grounds and the exclusion of irrelevant and non-existent grounds could not have affected the ultimate opinion or decision of the authority, it will not interfere.

12. Mr. Ramaswami, the learned Counsel for the petitioner, submitted that the decision of the Supreme Court would indicate that the order of the administrative or quasi-judicial tribunal cannot be sustained if there is nothing on the record or in the order of the authority which would indicate that on the relevant and existing grounds it would have sus-

tained the punishment. In support of this contention the learned Counsel referred to the latter portion of the judgment in which the Supreme Court referred to the wording of the show cause notice in which it was stated that several grounds jointly and severally appeared serious enough to warrant action under Section 408 (1) of the Act which would imply that the administrative tribunal was willing to base the punishment on any of the grounds. I am unable to accept this contention for it is made clear by the Supreme Court that it is for the Court to be satisfied whether the authority would have passed the order on the basis of relevant and existing grounds, excluding the irrelevant and non-existing grounds. The question as to whether the authority has specifically stated that it would have sustained the punishment on that ground or not is not material. This is made clear in the concluding portion of the judgment where it is stated:—

"We are reasonably certain that the State Government would have passed the order on the basis of the second ground alone."

The question therefore to be decided in cases where certain charges are found to be unsustainable is whether the Court would be satisfied that on the charges on the relevant and existing grounds the administrative tribunal would have passed the sentence that had been imposed.

13. Mr. Ramaswami, the learned Counsel for the petitioner, submitted that a Bench of this Court in *Royal Printing Works v. Industrial Tribunal*, (1963) 2 Lab LJ 60 (Mad) has held that when the punishment meted out by the management is a consolidated one on the ground that all the charges have been proved, if two of the charges could not be validly sustained against the worker, it would follow that the punishment cannot be sustained. This decision was rendered before the decision of the Supreme Court in *State of Orissa v. Bidyabhusan*, AIR 1963 SC 779. But the learned Counsel pointed out that a latter Bench of this Court in *Bank of Madura v. B. M. Employees' Union*, (1965) 2 Lab LJ 44= (AIR 1965 Mad 491) declined to accept the contention that the decision in (1963) 2 Lab LJ 60 (Mad) held anything contrary to AIR 1963 SC 779. The Bench based its decision on the ground that the worker was a cashier when he was dismissed from service and the cashier who belonged to D category cannot be dismissed by the Secretary under Regulations 25 to 27. The attempt of the learned Counsel to show that the dismissal order made by the Secretary had the approval of the management and therefore the dismissal by the Secretary was valid was not accepted by the Court.

As the decision was based on this point

the other observations are in the nature of obiter dicta. That apart, I find factually that the observation of the Court that there is nothing contrary to the Supreme Court case in (1963) 1 Lab LJ 239=(AIR 1963 SC 779) in the decision of the Madras High Court in (1963) 2 Lab LJ 60 (Mad) is not correct. As pointed out earlier, the Supreme Court has held that in cases where the order may be supported on any finding as to substantial misdeemeanour for which the punishment can lawfully be imposed, it is not for the Court to interfere, whereas the Bench in (1963) 2 Lab LJ 60 (Mad) has proceeded on the basis that when once it is seen that two of the three charges could not be validly sustained against the worker, it would follow that the punishment cannot be sustained. The contention of the learned Counsel based on the decisions in (1963) 2 Lab LJ 60 (Mad) and (1965) 2 Lab LJ 44=(AIR 1965 Mad 491) cannot therefore be accepted.

14 The question for consideration is whether on the charges that had been made out, the Court is satisfied that the authority would have passed the order on the basis of relevant and existing grounds to the exclusion of the grounds found to be not sustainable. The grounds that are made out are, the delay in submission of the fourth quarterly inspection notes, reprehensible conduct in giving evidence in the Sub-Magistrate's Court contrary to facts recorded in the case diary, delay in submission of case diaries, delay in submission of currents and accumulation of four punishments during the period of probation as Sub-Inspector. Even accepting the contention of the learned Counsel for the petitioner, that charge No VI should not be taken into account in imposing the punishment on the other charges, I am satisfied that the authority would have terminated the probation. Charge No III by itself is serious and the punishment imposed cannot be said to be excessive.

15. I am unable to say that the proceedings of the authorities are vitiated by any error in procedure. The order terminating the probation is therefore correct and this writ petition is dismissed. There will be no order as to costs.

SSG/DVC. Petition dismissed.

AIR 1969 MADRAS 280 (V 56 C 64)
KAILASAM, J.

The Public Prosecutor, Appellant v. Abdul Wahab and others, Respondents
Criminal Appeal No 432 of 1961, D/- 9-8-1967

Electricity Act (1910), Ss. 50, 39 — Ex-

CL/LL/B236/63

pressions "Person aggrieved" and "at the instance of" in S. 50 — Meaning — Complaint under S. 39 by Chief Engineer of Electric Supply Corporation held proper.

Where a prosecution under S 39 of the Electricity Act is instituted by a responsible officer namely the Chief Engineer of the licensee Electric Supply Corporation, who was appointed as the general power of attorney agent by the Managing Agents of the Corporation under the powers given to them by the Articles of Association of the Corporation, the prosecution is at the instance of the "aggrieved person" within the meaning of S 50 of the Act. When an attorney, manager or officer is appointed by the Managing Agents, his services are for and on behalf of the company. Absence of any complaint by the corporation or any resolution authorising the Chief Engineer to file a complaint will not invalidate the prosecution.

(Paras 8, 11)

Held that assuming that the Chief Engineer was not a power of attorney agent in the circumstances of the case he was acting "at the instance" of the Electric Supply Corporation within the meaning of S 50 "At the instance of" means "at the motion or solicitation of or request of" The phrase should be given wider meaning to exclude persons who had nothing to do with the company from giving a complaint. A complaint by responsible officers of the company, even though there is no specific authorisation would be "at the instance" of the company AIR 1936 All 742 & AIR 1938 Pat 15 (obiter), AIR 1944 Nag 380 & AIR 1956 Bom 354, Relied on, 1957 Cri LJ 233 (Raj), Distinguished (Paras 12, 13, 14)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 SC 666 (V 52)= | |
| (1965) 1 SCR 103=1965 (1) Cri LJ 605, Avatar Singh v. State of Punjab | 2 |
| (1957) 1957 Cri LJ 233 (Raj), Dhoolchand v State | 14 |
| (1956) AIR 1956 Bom 354 (V 43)= 1956 Cri LJ 701, State v Maganlal Chunilal | 13 |
| (1944) AIR 1944 Nag 380 (V 31)= ILR 1944 Nag 692, Provincial Govt. C P. & Berar v. Yoganandam | 13 |
| (1938) AIR 1938 Pat 15 (V 25)= 39 Cri LJ 206, Bhagalpur Electric Co v Hariprasad | 13 |
| (1936) AIR 1936 All 742 (V 23)= 38 Cri LJ 53, Viswanath v. Emperor | 13 |

Asstt. Public Prosecutor, for Appellant V. T. Rangaswami Aiyangar, for K. Hantharan, for Respondent No 1.

JUDGMENT:—This appeal is remanded by the Supreme Court for determination of the question whether the appellant is guilty of an offence under Section 39 of the Indian Electricity Act, 1910 as the

question whether the Chief Engineer, Kumbakonam Electric Supply Corporation was the "person aggrieved" had not been determined by this Court.

2. Six persons were tried by the Sub-Magistrate of Papanasam for an offence under Section 379, I. P. C. read with Section 39 of the Indian Electricity Act, 1910 and Section 44 (c) and (d) of the said Act. All the accused were acquitted by the Sub-Magistrate and the State filed an appeal against the order of acquittal. During the hearing of the appeal in this Court, it was submitted that the prosecution of an offence alleged to have been committed by the accused under Section 39 of the Indian Electricity Act could not be instituted except at the instance of an "aggrieved person". The question whether dishonest abstraction, consumption or use of electrical energy which was deemed to be theft by virtue of Section 39 of the Indian Electricity Act, 1910, will amount to an offence against that Act, or one under Section 379, I. P. C., was referred to a Full Bench. The Full Bench answered the reference as follows—

"The offence of dishonest abstraction, consumption or use of electricity will not be one coming within the mischief of Section 50 Indian Electricity Act, but one under Section 379, I. P. C., read with Section 39 of that Act".

After the expression of this opinion by the Full Bench, viz. the offence was one under the Indian Penal Code and hence Section 50 of the Indian Electricity Act, 1910, had no application, the preliminary objection that "the person aggrieved" had not launched the prosecution did not arise. On the facts, this court allowed the appeal against the first accused alone holding him guilty under Section 379, I. P. C., read with Section 39 of the Indian Electricity Act, 1910. On appeal, the Supreme Court, in view of its decision in *Avtar Singh v. State of Punjab*, (1965) 1 SCR 103=(AIR 1965 SC 666) holding that 'dishonest abstraction of electricity mentioned in Sec. 39 of the Act cannot be an offence under the Indian Penal Code' set aside, the conviction of the appellant under Section 379, I. P. C. But as the petitioner was also charged under Section 39 of the Indian Electricity Act, and as the questions whether the accused was guilty or not under Section 39 of the Indian Electricity Act, 1910 and whether the Chief Engineer, on the facts of the case, may be regarded as the "person aggrieved" to enable him to institute the proceedings, were not considered by this Court, the Supreme Court remanded the case with a direction that the question whether the appellant was guilty of an offence under Section 39 of the Indian Electricity Act 1910 may be determined. In pursuance of this remand, the matter comes up before this Court for disposal.

3. The learned Public Prosecutor at the time of the hearing of the appeal, requested that he may be permitted to adduce additional evidence and mark certain documents. That petition was ordered, as it was felt that in the circumstances of the case, the material documents should be permitted to be marked in evidence and that the Chief Engineer, Kumbakonam Electric Supply Corporation should be examined. The Chief Engineer was accordingly examined by this Court and Exs. P. 16 and P. 17 were filed.

4. Section 50 of the Indian Electricity Act, 1910 provides as follows—

"No prosecution shall be instituted against any person for any offence against this Act or any rule, licence or order thereunder, except at the instance of the Government or an Electrical Inspector, or of a person aggrieved by the same". In this case, the licensee is the Kumbakonam Electric Supply Corporation and the question is whether the prosecution is instituted by "a person aggrieved".

5. The accused applied for a temporary connection by Ex. P.2 to the Kumbakonam Electric Supply Corporation for the purpose of illuminating a marriage pandal. Under Ex. P. 3, dated 1-9-1960 the Kumbakonam Electric Supply Corporation permitted a temporary connection to the accused's house. In this communication, P. W. 1, the Chief Engineer, had signed "for the Kumbakonam Electric Supply Corporation". In the complaint, Ex. P. 4, P. W. 1, did not state that he was signing on behalf of the Kumbakonam Electric Supply Corporation, though he has signed the complaint. Ex. P. 4, however, states that the complainant is the Chief Engineer of the Kumbakonam Electric Supply Corporation.

6. The argument (agreement?) for the temporary service connection was signed by the first accused and P. W. 1, K. S. Seshadri, Chief Engineer, for Kumbakonam Electric Supply Corporation. The Memorandum and Articles of Association of the Kumbakonam Electric Supply Corporation Ltd., is marked as Ex. P. 16. Provision is made for the appointment of Managing Agents by Articles 83 to 88. Article 84 provides that the India Company (Pte.) Ltd., the first Managing Agents of the company and who have been reappointed Managing Agents of the company for a further period of ten years on and from 1-1-1950 shall continue and be the Managing Agents of the company. Under Article 85, the Managing Agents have been given full power and authority to appoint all or any attorneys and managers, engineers, officers, fitters, servants, or agents for the services of, and on behalf of, the company. Under Ex. P. 1, P. W. 1 was appointed as the general

power of attorney agent. On 25-4-1960, Kumbakonam Electric Supply Corporation Ltd. and the India Co (Pte.) Ltd., entered into an agreement by which India Co (Pte.) Ltd., was appointed as managing agents. It is recited that notwithstanding the appointment of India Co. (Pte.) Ltd., as the managing agents till 14-4-1961 the said appointment became terminated by virtue of Section 330 of the Companies Act, 1956 on the 15-8-1960 Kumbakonam Electric Supply Corporation and India Co. (P) Ltd., mutually agreed that India Co. (P) Ltd., be appointed as managing agents from 15-8-1960 to 15-8-1965. It was during this period that the offence was committed and the complaint was given by P W 1.

7. It will be seen that under the Articles of Association, the Managing Agents have the power and authority to appoint attorneys and managers, engineers, officers, etc., for the services of and on behalf of the company. When an attorney, manager or officer is appointed by the Managing Agents, his services are for and on behalf of the company. By the appointment under Ex. P. 1, P W 1 is entitled to act as an attorney or agent for and on behalf of the company.

8. The contention of the learned Counsel for the accused is that by Ex. P. 1, the managing agents appointed P W 1 as the power of attorney of India Co Ltd., and not on behalf of Kumbakonam Electric Supply Corporation. In support of this contention, the learned Counsel referred to certain passages in Ex. P 1 and submitted that the appointment could not be on behalf of Kumbakonam Electric Supply Corporation. He also submitted that as the power of attorney was executed in the year 1955 and as the Managing agents were reappointed in 1960, the power of attorney executed in the year 1955 would not be valid. It was contended on behalf of the accused that the person aggrieved is the Kumbakonam Electric Supply Corporation and a complaint should have been filed by the company itself by passing a special resolution authorising any person to do so, and in the absence of a specific authorisation, P W 1, the Chief Engineer, cannot be said to be acting at the instance of the Company.

The learned counsel referred to the general power of attorney, Ex. P 1, and submitted that the appointment of P W 1 was as the attorney for the managing agents. He relied on the phrase "to be our attorney in our name and on our behalf". The mention of the word "company" in the document, it was submitted, would refer to India Company (P) Ltd., and not the Kumbakonam Electric Supply Corporation. On a careful examination of the general power of attorney I am unable to accept this contention. It

may be seen that under Article 85 of the Articles of Association, the Managing Agents have been empowered to appoint attorneys and managers, engineers, or officers to act for and on behalf of the company. The articles of association and the agreement between the Kumbakonam Electric Supply Corporation and the India Co (P) Ltd., referred Kumbakonam Electric Supply Corporation, as the Company and India Co. (P) Ltd., as the Managing Agents.

In Ex. P. 1, the power of attorney, the words "a company registered under the Indian Companies Act 1913, and having its registered office at Oriental Buildings, Armenian Street, Madras" would refer to the Kumbakonam Electric Supply Corporation. This is made clear by the recital "to be our attorney in our name and on our behalf to do all or any of the following acts or things to the intent that the powers conferred shall extend to all matters in which the company is now or may hereafter become interested". The phrase "to be our attorney in our name and on our behalf" would certainly refer to India Co (P) Ltd. But the phrase "the powers conferred shall extend to all matters in which the company is now or may hereafter become interested" would refer to the Kumbakonam Electric Supply Corporation. Under Clause (1) of the power of attorney, P. W. 1 is authorised to give a discharge in respect of any property to which the company may be entitled to and to effect a compromise or release of any claim in respect of all property, money, securities and rights.

A distinction between a claim of the company and a claim against "us" (The India Co (P) Ltd.,) is discernible. Clause (5) of the powers of attorney makes the position clear, for it empowers P W. 1 to present for registration on behalf of the company any document executed by Sri C R. Ramaswami signing on behalf of India Co (P) Ltd., as Managing Agents of the Kumbakonam Electric Supply Corporation and to admit execution thereof, etc. A distinction is, therefore, maintained between the company and the Managing Agents, and P W 1 is authorised to present for registration any instrument or deed on behalf of the company executed by Sri C. R. Ramaswami signing on behalf of the India Company (P) Ltd.

9. It is clear that the power of attorney was executed by the Managing Agents empowering P W 1 to act on behalf of Kumbakonam Electric Supply Corporation. The power of attorney is in accordance with the powers conferred on the Managing Agents under Article 85 of the Articles of Association. No doubt, after the execution of the power of attorney on 25-4-1960 the Managing Agency agreement was renewed, as the agency

was terminated by virtue of Section 330, Companies Act of 1956. This re-appointment will not, in any way, affect the validity of the power of attorney. In view of the fact that there has been no break in the Managing Agency of the company and that the power of attorney executed by the Managing Agency in 1955 would continue to be in operation till it is revoked, it will have to be held that the appointment of P. W. 1 as the power of attorney agent of the Managing Agents would empower him to act on behalf of the company also. On a reading of Exs. P. 16 and P. 17 and also Ex. P. 1, I am satisfied that P. W. 1 was acting as the power of attorney agent of the Kumbakonam Electric Supply Corporation and the prosecution is at the instance of the aggrieved person.

10. It is admitted that the company did not file any complaint or pass any resolution authorising any person to file a complaint. But in the circumstances stated above, I find that the absence of such complaint or resolution will not invalidate the proceedings.

11. The learned Counsel for the accused submitted that P. W. 1 in his cross-examination in the trial Court admitted that he gave the complaint as the Chief Engineer and not as the power of attorney agent. This admission is relied on for submitting that the complaint was not given as the power of attorney agent. When his attention was drawn to this statement in his cross-examination in this Court, P. W. 1 replied that the power of attorney was already there and it could speak for itself. He wanted to impress by saying that he signed the complaint as Chief Engineer because he was responsible for any loss to the company. What P. W. 1 had stated in the evidence would not in any way affect the legal position. The mere fact that P. W. 1 stated that he gave the complaint as the Chief Engineer and not as the power of attorney agent would not alter the position. If the power of attorney was in force, as it had been found to be, he would be acting on behalf of the company and would be a person competent to institute the complaint.

12. Even assuming, that P. W. 1 was not a power of attorney agent, in the circumstances of the case, it can be found that P. W. 1 was acting at the instance of Kumbakonam Electric Supply Corporation. That P. W. 1 was acting on behalf of the Kumbakonam Electric Supply Corporation is clear from Ex. P. 3, the temporary permit granted to the accused. Though Ex. P. 4 was signed by P. W. 1 without specifically stating that it was on behalf of the company, it was given by P. W. 1, as the Chief Engineer of the Kumbakonam Electric Supply Corporation. Ex.

P. 12, the agreement between the Kumbakonam Electric Supply Corporation and the accused, is signed by P. W. 1 for the Kumbakonam Electric Supply Corporation as its Chief Electrical Engineer. The documents referred to above clearly show that P. W. 1, as Chief Engineer of the Corporation, was acting on its behalf.

13. The meaning of the phrase "at the instance of" is given in the Chambers Dictionary as "at the motion or solicitation of." In B. Ramanatha Aiyar's Law Lexicon, the same meaning is given. In *Viswanath v. Emperor*, AIR 1936 All 742, a Bench of the Court stated that the phrase "at the instance of" means merely "at the solicitation of or at the request of", that it had been introduced so as to make the provision a general one and that if it had been the intention of the Legislature that no case should be instituted in Court except by the Electrical Co., itself or other persons mentioned in Section 50 of the Act, the legislature would have used the ordinary phrase "on the complaint of" and the section would have been on the lines that no magistrate should take cognizance of any offence referred to in Section 50 of the Act except upon the complaint of certain persons. The Court further held that the prosecution should not be instituted by some independent busy-body who had nothing to do with the matter. The officers of the company discovered the theft and reported it to the police to make an investigation. In the circumstances, the Court held that the officers intended that prosecution should follow according to the result of the investigation and concluded that the prosecution was at the instance of the Electric Co. This decision would support the view that the phrase "at the instance of" should be given a wider meaning and it was intended for the purpose of excluding independent persons who had nothing to do with the company from giving a complaint. A complaint by reasonable (responsible?) officers of the company, even though there is no specific authorisation, would be "at the instance of" the company.

In *Bhagalpur Electric Co. v. Hariprasad*, AIR 1938 Pat 15, following the decision in AIR 1936 All 742, the Court expressed its opinion that when a responsible officer of a company reports an offence to the police and a prosecution is therefore set on foot, that will be considered to be a prosecution instituted 'at the instance of' the company. It is no doubt true that in the case cited, the complaint was presented by the residential engineer after obtaining an authorisation from the managing agents, and therefore the observations will be in the nature of an obiter dicta.

In *Provincial Govt. C. P. and Berar v. Yogananda*, AIR 1944 Nag 380, a Bench

of the Court was of the view that the expression 'at the instance of' does not mean 'on the complaint of' or 'with the sanction of' but only means 'at the asking' or 'the suggestion of' and the object of using that phrase was only to prevent indiscriminate prosecutions by persons without any expert knowledge of the working of electricity.

In *State v Maganlal Chumal*, AIR 1956 Bom 354, a Bench of the Bombay High Court was of the view that the object of the Legislature was that only persons aggrieved may set the law in motion, and in the case before the Court one Mr Gore the officer who acted for and on behalf of the company having set the law in motion, the prosecution must be regarded as having been instituted at the instance of the company. In this case also, sanction was obtained from the head office to lodge a complaint and therefore the observations are in the nature of an obiter dicta. In the four cases cited above, the Courts have taken the view that when the law is set in motion by a responsible officer for and on behalf of the company, the prosecution should be regarded as having been instituted at the instance of the company.

14. The learned Counsel for the accused relied on the decision in *Dhoolchand v State*, 1957 Cri LJ 233 (Raj), wherein it was held by the Rajasthan High Court that the Superintendent, Electrical and Mechanical department of the Government does not come within the meaning of the words "Government" or "Electric Inspector" as he is only a paid servant of Government and he cannot be said to have been aggrieved at the offence. The case can be distinguished on the facts, in that, the officer did not verify the truth of the complaint and left it to the police to check up and do the needful. Further, there is nothing in the evidence to show that the officer was acting on behalf of the Government. On a consideration of the authorities cited before me, I am of the view that when a prosecution is instituted by a responsible officer of the company, the requirement of Section 50 of the Indian Electricity Act, 1910 that the institution of the prosecution should be at the instance of the aggrieved person is satisfied.

15. In this case, P W 1, the Chief Engineer has stated that he was in entire charge of the administration of the Corporation including the accounts department. It is also clear that he was acting on behalf of the Corporation by signing agreement forms for giving connections to applicants. I accept the testimony of P. W 1 and find that he was acting on behalf of the company and as a responsible officer, he instituted the prosecution before the police. The signing of the complaint by P. W. 1 as K. S. Seshadri

without mentioning that he did so on behalf of the Corporation would not make any difference, because in the complaint itself he had stated that he was the Chief Engineer of the Corporation. I am satisfied that in the circumstances of the case, the requirement that the institution of the prosecution should be at the instance of the aggrieved person had been satisfied. There can therefore be no impediment in holding that the accused is guilty of an offence under Section 39 of the Indian Electricity Act, 1910, and the order of remand is answered accordingly.

16. Mr V. T. Rangaswami Aiyangar requested the Court to go into the facts and consider the question whether an offence under Section 39 of the Indian Electricity Act, 1910, had been made out. This request is beyond the scope of the remand, for, what is directed to be decided is the question whether the Chief Engineer of the Corporation may, on the facts of the case, be regarded as the person aggrieved, as the said question had not been determined by the High Court.

17. On a consideration of the facts before the remand by the Supreme Court, this Court allowed the appeal of the State in so far as the first accused is concerned and held that he was guilty of dishonest consumption of electrical energy. This is an offence under Section 39 of the Indian Electricity Act, 1910. A finding is therefore recorded that the accused is guilty of an offence under Section 39 of the Indian Electricity Act of 1910.

VGW/D.V.C.

Answer accordingly.

'AIR 1969 MADRAS 284 (V 56 C 65)

SRINIVASAN AND SADASIVAN, JJ.

A. V. Meiyappan, Petitioner v. Commissioner of Commercial Taxes, Board of Revenue, Madras and another, Respondents

Writ Petns Nos 782 to 784 of 1966, D/- 8-3-1967.

(A) General Clauses Act (1897), S. 3 (36) — Copyright is incorporeal moveable property. AIR 1939 All 305, Rel. on. (Point conceded) (Para 9)

(B) Constitution of India, Art. 366 (12), Sch. VII, List II Entries 54, 51, 52, 56 and List I Entries 92A, 30, 84, 89 — Levy of Sales Tax on incorporeal moveable property is not ultra vires Art. 366 (12) — Definition of 'Goods' appearing in Article 366 (12) is inclusive — Not limited to concrete goods only — S. 2 (i) and (n) of Madras Act (1 of 1959) is constitutional.

The word 'goods' has not been defined in Art. 366 (12) in an exhaustive manner so as to exclude incorporeal movable property from the definition. It may be that

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in so far as incorporeal movable property is concerned, there might be difficulties in levying the appropriate tax, such as those contemplated in Entries 30, 84, 89, List I, or Entries 51, 52 and 56 of List II of the 7th Schedule. But that cannot control the definition in any way. Notwithstanding the fact that the expression employed in defining "goods" embodies only the natural sense of the word, it cannot be said that 'goods' as defined has been restrictively defined and to comprise only materials, commodities and articles, that is to say, concrete goods. There is no restriction imposed by the Constitution upon the power to legislate in respect of sale or purchase of one class of movable property viz., incorporeal movable property. Definition of goods in S. 2 (j) of Madras Act 1 of 1959 meaning "all kinds of movable property" does not go beyond the meaning of the expression given to it under Art. 366 (12) and therefore, the legislation of S. 2 (n) in respect of sale or purchase of goods other than concrete goods is not ultra vires. 1899 AC 99 and AIR 1958 SC 560, Disting.

(Para 15)

(C) Sales Tax — Madras General Sales Tax Act (1 of 1959), S. 2 (n) and (j) — Right to exhibit film — Transfer of, by owner of film to distributor — Whether amounts to sale — Held on construction of agreement, that it amounted to lease and not outright sale.

Where the owner or producer of a film, instead of exhibiting the film himself, by entering into an agreement, confers upon another party the right to have the film exhibited for certain period as a distributor together with the ancillary right of making or causing to be made positive prints for purposes of exhibition, the agreement is that of lease and not sale, even though the right comes within the definition of goods under S. 2 (i).

(Paras 23, 28)

The fact that one of the clauses of the agreement envisages that the negative of the film, which is the master copy from which positive prints are taken from time to time, shall remain in the custody of the producer only as an agent and custodian of the distributor and that the producer is not to make use of the negative in any manner other than for the purpose of fulfilling the terms of the agreement, does not establish that there is transfer of ownership of the negative film, during the period of agreement, when the agreement also provides further that this part of the clause is expressly intended to operate only during the lease period and that after expiry of the lease period the distributor is to have no further rights with regard to negative or positive films. If the intention of the parties was to transfer the property in the negative to distributor, such wording is singularly in-

appropriate for the purpose. (Paras 24, 25)

In the circumstances that the producer was also running a laboratory and the distributor might require additional positive prints, their life-span being short, the clause might have been introduced for convenience and benefit of both the parties.

(Para 24)

Secondly, the fact that the agreement provided that the failure or default on the part of the distributor to carry out the agreement, entitled the producer only to claim unpaid consideration and that he could not get back or claim possession of positive or negative copies, did not also establish that the property in positive or negative copies, was transferred to the distributor. In view of the nature of film industry, wherein distribution and exhibition rights are usually transferred by the producer even before the film is ready and censor certificate is obtained and the distributor also in turn enters in contract with third parties before he is in position to distribute film for exhibition, such provision in the agreement does not amount to outright sale of the negative of film and only contemplates that having once conferred the right of distribution and exhibition to the distributor and having permitted him to enter into other engagements of like nature, the producer is prevented from claiming any lien on the world negative rights and his rights are restricted only to recovery of the consideration money.

(Para 26)

Thirdly, concept of sale cannot be spelt in the transaction merely because the agreement provides that the consideration is to be computed as the total of (a) the amount of the producer's declared cost of the film, plus (b) the profits to the producer @ 15% of the declared cost. In view of the nature of industry, if the producer guarantees his investment by providing a return of a percentage in addition to the cost that went into the making of the film, it cannot be said on that ground alone that he intended sale of the film.

(Para 27)

Procedure adopted by the Income-tax Department for arriving at depreciation value of the film as an income earning asset cannot give any clue to the real nature of the transaction between the producer and the distributor. Mere sale of a film regarded as material to another person by the owner of film would count for nothing at all unless there is the conferment of a right to exploit the film and it is this right which is more valuable and the supply of the film is ancillary to the exercise of that right.

(Para 28)

(D) Sales Tax — Madras General Sales Tax Act (1 of 1959), S. 3 (2), Sch. I Entries 6, 7 — Exposed film is different article from raw film — Exposed film can

be taxed under S. 3 (2), although it has suffered tax as raw film. (1966) 17 STC 138 (Guj) and AIR 1966 SC 1000, Rel. on. AIR 1961 SC 412, Disting. (Paras 31, 32)

(E) Sales Tax — Madras General Sales Tax Act (1 of 1959), S 12 (3) — Scope and validity — Power to impose penalty — Power is ancillary to taxing power — Assessing authority is to exercise power with proper judicial discretion — Can be exercised only in cases of wilful non-disclosure intended to evade tax.

It is well recognised that a power to penalise evasion of tax which is lawfully due, is ancillary to the taxing power and the penal provision cannot therefore be struck down. However, the power to impose the penalty for non-disclosure of any part of the turnover is not a routine act on the part of the assessing authority but one which invites the exercise of a proper judicial discretion on his part.

(Paras 33, 35)

Section 12(3) refers to the imposition of a penalty and penal provision of this nature cannot have been intended to apply to cases other than where a deliberate concealment by non-disclosure is involved. Having regard to the underlying intent of Sec. 12 (3), it is still necessary for the assessing authority to be satisfied that the non-disclosure is wilful and is designed to evade the tax. It can hardly be that the legislature thought that an innocent omission by oversight or some such reason should still invite penal consequences.

Where the turnovers relating to transactions of the kind involved were not being included in the several preceding years, due to the decision of the Sales Tax Appellate Tribunal, and the authorities also did not in the preceding years insist on the inclusion of such turnovers, imposition of penalty under S 12 (3) for non-disclosure of such transactions is wholly unjustified. (Para 35)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 1000 (V 53)=
 (1966) 17 STC 316, State of Madras v Swasthuk Tobacco Factory 31
 (1966) 1966-17 STC 138=(1965) 6 Guj LR 601, Gokaldas and Co. v. State of Gujarat 31
 (1961) AIR 1961 SC 412 (V 48)=
 (1960) 11 STC 827, Tungabhadra Industries Ltd v. Commercial Tax Officer, Kurnool 31
 (1960) C A. No 16 of 1959, D/- 26-2-1960 (SC), Singha Mall v. Parduman Singh 11
 (1958) AIR 1958 SC 500 (V 45)=
 1958 SCJ 696, State of Madras v. Gannon Dunkerly and Co., (Madras) Ltd. 13
 (1956) 1956 (1) All ER 306=(1956) 1 QB 650, Reynolds v John 11
 (1939) AIR 1939 All 305 (V 26)=
 ILR (1939) All 275, Mt. Savitri Devi v. Dwarka Prasad 8

- (1908) 1908-2 Ch 441=77 LJ Ch 742, Mansell v Valley Printing Co. 11
 (1901) 1901 AC 217=70 LJKB 677, Commr. of Inland Revenue v. Muller & Co's Margarin Ltd. 9
 (1899) 1899 AC 99=79 LT 473, Dilworth v Commr of Stamp 11
 (1897) 1897-1 QB 175=66 LJKB 137, Smelting Co of Australia v. Commr of Inland Revenue 9
 V K Thiruvengkatachari instructed by King and Partridge, for Petitioner (in all the Petns), Advocate-General for Special Govt Pleader, for Respondents (in all the Petns)

SRINIVASAN, J.:— In these writ petitions seeking the issue of appropriate writs, the validity of certain assessments to sales-tax made by the sales-tax authorities and the steps taken by them to revise assessments already made are brought into question. The case is somewhat out of the ordinary and to start with the following facts may be stated. The petitioner is a film producer, being the sole proprietor of Messrs A. V. M. Productions. In or about 1962, the petitioner obtained for the copyright of a story in Hindi entitled "POOJA KE PHOOL" and on the basis of that story, he produced a cinematograph film. In 1964, a Hindi version of a popular Tamil picture was also produced. The petitioner entered into an agreement with Messrs A. V. M. Limited, whereunder the petitioner leased to the latter entity the right to exploit the cinematograph film "POOJA KE PHOOL" for a period of 49 years on certain terms, which will be referred to in detail later. In respect of the second film, a similar agreement of lease was entered into in August 1963, with Messrs Murugan Brothers and this lease comprised 1/20th of the rights of the petitioner. Later by another agreement, a lease of 10/20th of the rights in that film for a period of 49 years, and a further agreement covering the balance of 9/20th of the rights, were granted to Messrs A. V. M. Limited. In respect of the agreement for the first film, the petitioner received over Rs 25 lakhs in 1964, and with regard to the second film, an aggregate of Rs 19 lakhs and odd was received by the petitioner in 1965. For the assessment year 1964-65, the petitioner submitted his return which did not include the above sums. The assessing authority, the Deputy Commercial Tax Officer, however decided to include in the assessable turnover the two sums mentioned above, treating the sums as representing the turnover of sales of films liable to a single point tax at 10% under the 1st Schedule to the Madras General Sales Tax Act I of 1959. The contention of the petitioner broadly stated is that these are not sales of any goods but represented only realisations of the rights to ex-

plait the films conferred upon him by the appropriate statute viz., the Copyright Act. It is claimed that such rights in the films are not corporeal or tangible rights, nor are the films goods which are the subject-matter of any sale; and that there was no transfer of property in these films. The view taken by the assessing authority that in effect what was contemplated was the sale of the films is attacked as wholly erroneous and unjustified. It was only the right of exploitation of the film, which, having regard to the nature of the industry, is the only method by which a producer can reap the results of his activities, that was the subject-matter of the lease agreement, and the petitioner contends that the transactions fall wholly outside the purview of the Madras General Sales Tax Act.

2. A second point has been taken that in any event the levy of tax at 10% under the First Schedule to Act 1 of 1959 is illegal. The First Schedule provides for a single point levy at 10% on certain specified goods (higher than the normal rate of tax on the turnover of sales or purchases of general goods); the petitioner claims to have paid tax at that rate at the time of the purchase of the raw films and it is said that even if the processed film is regarded as the subject-matter of the sale, it cannot be subjected to a tax over again under the First Schedule to the Act.

3. A third point relates to the levy of penalty. The assessing authority took the view that by reason of the failure of the petitioner to disclose in his returns these two sums of Rs. 25 lakhs and 19 lakhs as assessable turnovers, the penal provision of Section 12 (3) of the Act is attracted, and accordingly levied a penalty of Rs. 6,66,251/-, computed at one and a half times the quantum of tax on the amount not so disclosed. It is claimed by the petitioner that he is not bound to disclose these turnovers, for they are not turnovers relating to sales of goods and that the levy of penalty is illegal.

4. The above relates to the assessment for the year 1964-65. The next writ petition, W. P. No. 783 of 1966, relates to a notice issued by the assessing authority proposing to re-open and revise the completed assessment for the year 1963-64. Proceedings were launched by the assessing authority seeking to include in the taxable turnover a sum of Rs. 9,42,000 and odd received by the petitioner in respect of similar agreements relating to a lease of the exploitation rights of a tamil film "NANUM ORU PENN". For reasons similar to those which have already been indicated, the petitioner claims this amount is not assessable to tax. The assessing authority has in addition to proposing to include this amount, issued a notice proposing to levy a penalty as well.

The petitioner seeks the issue of a writ of prohibition in this case.

5. W. P. No. 784 of 1966 raises the question of a provisional assessment made for the year 1965-66 based upon the assessment for 1964-65. The assessing authority proposed by the notice to fix the turnover at Rs. 44 lakhs and odd and called upon the petitioner to pay a tax of Rs. 4,48,000 and odd thereon. In W. P. Nos. 782 of 1966 and 784 of 1966, the petitioner prays that the assessment orders, final in the first case and provisional in the second, may be quashed as illegal by the issue of writs of certiorari.

6. In the counter-affidavit filed on behalf of the respondents, the statement of facts is not denied. But what the respondents say is that "it was found that the petitioner had effected a sale of negative prints of these pictures for consideration received, though the transaction was described as a lease of the above pictures for a period of 49 years." It is the contention of the assessing authorities that a scrutiny of the provisions of the documents of lease so-called clearly establishes that the property in the films had effectively passed from the petitioner to Messrs. A. V. M. Limited. It is claimed that the negative of a picture is brought into existence, by expenditure of money, labour and skill; and that the species of moveable property is created apart from the intangible rights residing in the producer; and that the property was in fact transferred for valuable consideration received. It is stated that the transaction is "in substance of transfer of property in goods for valuable consideration and therefore liable to tax." The respondents also seek to distinguish between a copyright, which the petitioner has in the product of his labour and skill, which are the pictures, and the actual transactions that were put through; the latter, it is claimed, still represent a transfer of property in goods irrespective of whatever incorporeal rights might vest by the law of copyright in the transfer. It is alleged that the real nature of the transactions has been camouflaged and when once it is established that the ownership of the films has passed from one to the other by virtue of the transactions, it can evidence nothing more than a sale of goods.

A further point has been taken that in films of this kind, the value of a picture becomes completely wiped out by exhibition in the course of ten years or so, so that after the lapse of 49 years fixed in the agreements, the films, which are the subject-matter of the transactions have no surviving value at all. That is also relied upon to show that what passes under the documents is comprised of the entire rights of the lessor to the lessee, who are in reality the seller and the

buyer respectively. Turning to the levy of tax at 10%, the Department contends that the relevant entry in the first schedule to the Act cannot be read in the manner claimed by the petitioner. It is true that the raw film is liable to tax at a single point at 10%. But a film which has been processed is, a different product but still a film and can once again fall within the scope of this entry. It is claimed that a processed film is not the same as the raw film and though a different object, continues to be a film, and when the sale of such a film takes place, it can be taxed under this entry, that is to say, the Department claims that in interpreting the expression 'film', a processed film must be regarded as different from the raw film, and though on the purchase of the raw film tax might have been paid, that fact cannot obviate the levy of tax on the sale of a processed film.

7 The counter-affidavits have not however traversed the complaint of the petitioner with regard to the levy of penalty

8. By a further affidavit filed on behalf of the petitioner, an additional ground has been taken that the definition of 'goods' embodied in the Madras General Sales Tax Act is ultra vires the powers of the State Legislature in so far as such definition goes beyond the definition of 'goods' as found in the Constitution. It would suffice to say at this stage that by a further counter-affidavit filed by the respondents, the validity of this attack is questioned, and it is claimed that the Constitution-makers were not unaware of the enlarged definition of 'goods' in the various Sales-tax Acts at the time when "goods" was defined for purposes of the Constitution. It is urged therefore that the definition found in the Constitution is not exhaustive and the validity of the definition in the Sales Tax Act cannot therefore be questioned

9. Mr V. K. Thiruvengkatachari, learned Counsel for the petitioner, conceded in effect that copyright is a new form of property which has come to be recognised by law. This right was originally regarded as merely a negative right to prevent one person from appropriating the labour of another. It was undoubtedly only after the enactment of the Copyright Act in England that Copyright came to be regarded as a statutory right which right in the author of a work, for instance, was statutorily protected. Even earlier it was held in *Smelting Company of Australia v. Commissioners of Inland Revenue*, 1897-1 QB 175 that a share in a patent and a licence to use it are "property". An agreement for the sale of such share or licence was held liable to stamp duty under the relevant Act as if it were a conveyance on sale. Though the question

arose in that decision more with regard to the location of the property that it was property does not appear to have been doubted at all. In *Commissioners of Inland Revenue v. Muller & Co's Margarin Ltd.*, 1901 AC 217 goodwill was regarded as property, but it was pointed out in this decision that its legal conception as property involved the additional legal conception of existence somewhere. *Mansell v. Valley Printing Company*, 1908-2 Ch 441, which was rendered prior to the enactment of the Copyright Act in England pointed out that the remedy of a person against piracy was an action at common law, a suit in equity for injunction founded on the common law right. It was by common law that copyright or protection thereof existed in favour of works of literature, art or science, and the right of property of an author in his work was held to be incorporeal property. Copinger on "The Law of Copyright" (9th edition Page 1) points out that "Copyright Law is in essence concerned with the negative right of preventing copying a physical material existing in the field of literature and arts. Its object is to protect a writer and an artist from the unlawful re-production of his material. It is concerned only with the copying of physical material and not with the re-production of ideas, and it does not give a monopoly of any particular form of words or design. It is thus to be distinguished from the rights conferred by a patent, trade mark and design legislation". Salmond in his jurisprudence 11th edition, refers to copyright as an example of a right over immaterial property, which has been raised to the level of a legal right by Statute (P. 269). Copyright is referred to as an immaterial form of property recognised by law, being the product of human skill and labour or of a man's brains (p 462). In all the English text books and which it is unnecessary to refer at length, copyright has been regarded as incorporeal movable property and that view has been adopted in our country as well. It would be sufficient to refer to *Savitri Devi v. Dwarka Prasad*, AIR 1939 All 305

10. Proceeding on the basis that copyright is incorporeal movable property, the further contention of Mr. V. K. Thiruvengkatachari, for the petitioner, is that in so far as Parliament provided for the legislative competence of the State Legislature to enact laws with regard to sale of goods, Parliament must, for reasons to be mentioned hereafter, have intended to restrict such competence only to concrete goods and not abstract goods or incorporeal goods such as property represented by copyright. The Madras General Sales Tax Act IX of 1939 defined 'goods' as meaning "all kinds of movable property other than newspapers, actionable claims,

frame Rules under Art. 309 of the Constitution is co-extensive with that of the Legislature which can make a legislation in respect of a single individual. Therefore, it cannot be contended that the Governor has no power to make a rule under Art. 309 of the Constitution in respect of a single individual. AIR 1967 SC 1305, Explained. W. P. Nos. 858 & 913 of 1967 (Mys) & AIR 1969 Mys 59, Rel. on. (Para 13)

Scrutinising the appointment of the respondent as a Principal of Oorigum School of Mines, Oorigum Kolar Dist. by framing the Mysore Education Department Services (Technical Education Department) (Special Recruitment) Rules 1967, under Art. 309, from the point of view whether it had been discriminatory or violative of the principles of equal opportunity being given to the candidates equally qualified.

Held after considering the circumstances, that the State considered that the respondent was the only qualified person to be appointed as Vice Principal in the first instance and later as Principal. Hence the initial appointment could not be said to be discriminatory and vitiated for any valid reason. Further, taking into consideration that the respondent had held the post of the Principal from 15-2-1958 continuously upto the date of the framing the Rule, 9-2-1967, discharging his duties satisfactorily and that he held high academic qualifications in Geology, the regularisation of the appointment of the respondent as Principal, School of Mines, Oorigum with effect from 15-2-1958 could not be held to be unjustified. (Para 15)

Held however that it could not be gainsaid that at the stage of the initial appointment of the respondent as Vice Principal or Principal, it would have been advisable to strictly follow the method of recruitment prescribed in the 1957 Rules. It was only in the special circumstances of the case, that the view that the Government properly exercised its executive power to make the temporary appointment and subsequently regularised the same could be taken. But if the regularisation were ordered to be disturbed at this late stage great prejudice would be caused to the respondent. A rigorous application of the rule laid down by the Supreme Court in AIR 1965 SC 1293 was not warranted in this case. (Para 16)

Observations :

Any temporary appointment to any post in the State Civil Services should be made in accordance with the Rules governing such appointment. If no such Rules exist, the appointment should be made

in full conformity with the provisions of the Constitution under Articles 14 and 16. Any violation of the said provisions would vitiate the appointment. It is not that any appointment irregularly made would come within the meaning of the words 'local candidate' and the appointment of such a candidate could be regularised. It is only under exceptional circumstances that regularisation could be resorted to and even that could be done only if the appointment of the local candidates is not discriminatory or made without giving equal opportunity as required under Article 16 of the Constitution of India. The practice of appointing local candidates and continuing them as such for a long time and then regularising their services is a practice that can seldom be countenanced. (Para 20)

(B) Constitution of India, Art. 226 — Quo Warranto — Office in question not one either under the Constitution or under any Statute — Writ of quo warranto, if can issue. (Para 18)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 Mys 59 (V 56)= WP No. 2296 of 1965, Mythili v. State of Mysore | 12, 13 |
| (1967) AIR 1967 SC 1071 (V 54)= (1967) 1 SCR 128, State of Mysore v. S. V. Narayanappa | 12 |
| (1967) AIR 1967 SC 1305 (V 54)= 1967-2 Andh WR (SC) 44, D. Sadasiva Reddi, Vice-Chancellor, O. U. v. Chancellor Osmania University | 13 |
| (1967) Writ Petns. Nos. 858 and 913 of 1967 = 1968 (2) Mys LJ 491, Dr. S. T. Venkataiah v. State of Mysore | 12, 13 |
| (1967) 1967 (2) Mys LJ 40=11 Law Rep. 321, L. Pillappa v. State of Mysore | 12 |
| (1965) AIR 1965 SC 1293 (V 52)= (1965) 1 SC WR 878, Channabasa- viah v. State of Mysore | 16 |
| (1964) AIR 1964 SC 1854 (V 51)= (1964) 5 SCR 190, Champaklal v. Union of India | 12 |

In Nos. 473 and 482/67 K. A. Swamy, for Petitioners; Byra Reddy and V. N. Sathyanarayana, for Respondent No. 1; E. S. Venkataramiah High Court Spl. Govt. Pleader, for Respondent No. 2, In No. 497/67 H. B. Datar, for Petitioner; Byra Reddy and V. N. Sathyanarayana, for Respondent No. 3 and E. S. Venkataramiah, High Court Spl. Govt. Pleader, for Respondents Nos. 1 and 2. In No. 567/67 V. Krishna Murthi and V. Tarakaram, for Petitioner; E. S. Venkataramiah, High Court Spl. Govt. Pleader, for Respondent No. 1; and Byra Reddy and V. N. Sathyanarayana, for Respondent No. 2.

In No 1152/67 K. Jagannatha Shetty, for Petitioner; Byra Reddy and V. N. Sathyanarayana, for Respondent No. 1; and E. S. Venkataramiah High Court Spl. Govt. Pleader, for Respondent No. 2.

GOPIVALLABHA IYENGAR, J.: The petitioners in these Writ Petitions challenge the validity of the Rules called "The Mysore Education Department Services (Technical Education Department) (Special Recruitment) Rules 1967" made by the Governor of Mysore in exercise of the powers conferred on him by the proviso to Article 309 of the Constitution of India. As identical questions arise for decision in all the above Writ Petitions, a common order is passed. These Rules were published under a Notification dated 9-2-1967 which reads as follows:

GOVERNMENT OF MYSORE
No. ED 91 DGO 58 Mysore Government
Secretariat
Vidhana Soudha,
Bangalore dt. 9-2-1967
Maha 20 S. E. 1888

NOTIFICATION

In exercise of the powers conferred by the proviso to article 309 of the Constitution of India, and all other powers enabling him in this behalf, the Governor of Mysore hereby makes the following rules namely:

1. Title These rules may be called the Mysore Education Department Services (Technical Education Department) (Special Recruitment) Rules, 1967.

2. Provisions relating to regularisation of appointment of Principal, School of Mines Oorgaum, Kolar Gold Fields:

Notwithstanding any rule made under the proviso to article 309 of the Constitution of India, or any other rules or order in force at any time, Dr. T. Thimmiah, B.Sc., (Hons.) Ph. D. (Lond.) F. G. S. shall be deemed to have been regularly appointed as Principal, School of Mines, Oorgaum, Kolar Gold Fields, with effect from 15-2-1958.

By order and in the name of the Governor of Mysore

Sd/ S. N. Sreenath
Under Secretary to Govt.
Education Deptt.

This document is marked Exhibit 'F' in W. P. No. 473/1967 and will be referred to as Exhibit 'F' hereafter. Dr. T. Thimmiah referred to therein and the State of Mysore are impleaded as respondents in all the above writ petitions and they shall hereafter be referred to as Respondent and the State respectively.

2. The petitioner in W. P. 473/1967 is now serving as Principal of the Polytechnic at Mysore. He is a Graduate in Science with Physics, Chemistry and Mathematics. He took post-graduate degree in

Chemical Engineering of the Madras University.

3. The petitioner in W. P. 482/1967 is a graduate in Mechanical Engineering of the Mysore University. He is now serving as Head of Mechanical Engineering Section, in C. P. C. Polytechnic, Mysore.

4. The petitioner in W. P. No. 497/1967 is now posted in additional charge of Joint Director of Technical Education, Bangalore.

5. The petitioner in W. P. No. 567/1967 is a graduate of the Mysore University in Civil Engineering and is at present the Principal of the Polytechnic, Hassan.

6. The petitioner in W. P. No. 1152/1967 is also a graduate of the Mysore University in Civil Engineering and he is now working as the Principal of B. D. T. College of Engineering, Davangere.

7. The respondent holds a degree in B.Sc. (Hons.) and is a Ph. D. (Lond.) in Economics, Geology or Applied Geology. He is also a Fellow of the Geological Society. Incidentally, we may point out that the respondent, after his appointment as Assistant Geologist, went to England and acquired Ph. D. degree in Geology, obviously to improve his prospects.

8. The undisputed facts are that by its order dated 5-7-1967 (marked as Enclosure I) the Government of Mysore ordered the establishment of a School of Mines K. G. F. at Oorgaum. It was also provided that the School be placed under the administrative control of the Director of Technical Education Department, who may be permitted to exercise the powers of the Chairman of the Managing Committee till such time as the Managing Committee is constituted and starts functioning. The Director of Technical Education was required to submit definite proposals regarding the staff to be appointed.

The Director of Technical Education Department sought by his communication dated 21/29-7-57 the sanction of Government, amongst others, for the appointment of the respondent, (who was then working as an Assistant Geologist, Department of Geology) on a deputation basis for a period of two years as the Vice Principal of the School of Mines on his own pay and grade in the Department of Geology with a Special Pay of Rs. 75/- per mensem. By its order dated 17-8-1957 (marked Enclosure II) the Government of Mysore accorded sanction to the above proposal of the Director of Technical Education. It was further directed that the appointment of the Vice-Principal will be counted against one of the posts of Lecturers already included in the Teaching Staff as directed in the Government Order dated 5-7-1967.

One Mr. Issacson a Mining Engineer of the Kolar Gold Fields was also appointed as the Principal of the School on a part-time basis on an allowance of Rs. 200/- per mensem. Mr. Issacson continued as Principal till 15-2-1958. Thereafter the respondent was doing the duties of the Principal. On 25-9-1958 the Government issued a Notification appointing the respondent temporarily as Officiating Principal, School of Mines, K. G. F. with effect from 22nd July 1958, until further orders, in grade Rs. 500-30-800. On representations made by the respondent to the Government that he should be appointed as Principal with effect from 15-2-1958, when Mr. Issacson ceased to be the Principal of the School, the Joint Director of Technical Education sent a communication dated 16/17 December 1958 (marked Enclosure IV) to the Government of Mysore stating that the respondent was placed in charge of the post of the Principal, in the absence of Mr. Issacson and that the respondent has performed all the duties of the post of Principal from 15-2-1958, as the Permanent Principal was on leave.

Thereafter, the Government of Mysore issued a Notification dated 3rd April 1959 (marked Enclosure V) modifying the Notification dated 25th September 1958 and appointing the respondent temporarily as Officiating Principal, School of Mines K. G. F. with effect from 15th February 1958 until further orders.

9. It may here be mentioned that the petitioner in W. P. No. 473/1967 filed W. P. No. 185/1962 seeking a writ of quo warranto against the respondent or such other appropriate orders declaring the appointment of the respondent temporarily as Officiating Principal, School of Mines, K. G. F. as illegal and void.

The petitioner also sought for a Writ of Mandamus to be issued to the State to advertise the post of the Principal of Oorgaum School for appointment by itself or through the Public Service Commission. This Writ Petition was dismissed on 1-11-1963 on an affidavit being filed by the Government Pleader in that case. The material portion of the affidavit relevant for the purpose of these petitions, and taken into consideration in the aforesaid Writ Petition mentions that:

"The draft cadre and recruitment Rules of Technical Education Department have been framed and forwarded to the Public Service Commission. As per the provisions of the draft rules, the post of Principal of School of Mines has to be filled up by promotion from the cadre of Heads of Sections or by direct recruitment. For direct recruitment the qualifications proposed in draft rules are as follows:

'B.Sc. in Mining with at least II Class Certificate in Mine Manager's examina-

tion and two years experience in teaching or M.Sc. in applied Geology with five years teaching experience.'

4. The Rules, when finalised, would be applicable only to appointments to be made after the date of publication in the gazette. The matter of regularisation of the appointment of Dr. T. Thimmiah in the post was under consideration of Government and the Public Service Commission had agreed to the regularisation. The matter has yet to be considered by Government and a decision taken in that behalf."

In view of the above representation, this court took the view that no useful purpose would be served in pronouncing on the questions raised in the Writ Petition. It was also observed that the question of regularisation of the respondent's appointment will have to be considered separately if and when the appointment is regularised. Therefore the petitioner in that Writ Petition did not press the contention that the appointment of the respondent by the Government of Mysore under its orders dated 25th September 1958, as modified by the Government Order dated 3rd April 1959 was void. None of the petitioners in the other connected petitions has challenged the validity of the above said Notifications.

By virtue of the impugned Rules dated 9-2-1967 (marked Exhibit F), the appointment of the respondent has been regularised with effect from 15-2-1958. This Rule in effect is in identical terms with the Government Order dated 3rd April 1959. The petitioners attack the validity of these Rules on grounds common to all these Writ Petitions.

10. The first contention is that the initial order of appointment of the respondent as Officiating Principal being improper and in violation of Rule 16 (a) (ii) of the Mysore State Civil Services (General Recruitment) Rules, 1957, which was the rule in force at the time of the appointment in 1958 and 1959 it cannot be regularised. It is unnecessary to consider this contention in view of what we propose to say in regard to the contention of the respondent and the State that even though the initial appointment of the respondent was irregular, it is competent for the Governor to regularise the appointment by making a Rule in exercise of his powers under Article 309 of the Constitution. The High Court Special Government Pleader submits that an appointment to a civil post can be made in three ways; one is by promotion; the second is by direct recruitment through the Public Service Commission and the third is by regularising the appointment which has been made initially irregularly. He circumscribes his argument by stating that the power to regularise can

be exercised if there has been a long lapse of time after such appointment and there is no violation of the provisions of Articles 14 and 16 of the Constitution.

It is also submitted by him that there being no rule for regularisation, it can be made in exercise of the executive power of the State. The respondent, according to him, is to be considered as a local candidate as defined in the Mysore Civil Service Rules. Local candidate is defined in the Mysore Civil Service Rules as follows:

"A local candidate in service means a temporary servant not appointed regularly as per rules of recruitment to that service."

Taking this definition into consideration with the contention of the petitioners that the initial appointment of the respondent was irregular, the submission of the High Court Special Government Pleader that the respondent should be treated as a 'Local Candidate' has to be accepted.

11. The learned High Court Special Government Pleader invites our attention to Rule 1-A of the Mysore Government Servants Seniority Rules, 1957 which reads as follows:

"1-A Nothing in these Rules shall be applicable to any person appointed as a local candidate so long as as he is treated as such —

Provided that where his appointment is treated as regularised from any date, his seniority in service shall be determined in accordance with these Rules as if he had been appointed regularly as per rules of recruitment to the post held by him on that day."

Without expressing any opinion in regard to the seniority inter se amongst the candidates in these petitions, it is to be gathered that the Government has power to regularise an appointment and if thought fit, with effect from any particular date.

12. It must also be noticed that the vires of Rule 1-A not being attacked, the inference that we can draw is that regularisation is permissible. As pointed out by one of the petitioners, it is true that Rule 1-A comes under the Mysore Government Servants Seniority Rules, 1957, but it does not preclude us from drawing the inference that we have drawn as indicated above.

In AIR 1964 SC 1854, Champaklal v. Union of India, which is relied on by the High Court Special Government Pleader, the Supreme Court observes that:

"It is well recognised that the Government may have to employ temporary servants to satisfy the needs of a particular contingency and such employment would be perfectly legitimate. There can also be no doubt, if such a class of temporary servants could be recruited that there

would be nothing discriminatory or violative of equal opportunity if the conditions of service of such servants are different in some respects from those of permanent employees. There is no denial of equal opportunity if out of the class of temporary employees some are made quasi permanent depending on length of service and their suitability in all other respects for permanent employment eventually and thus assimilated to permanent employees." As contended by the Government Pleader, the above observations support the proposition that there can be a temporary employment without being discriminatory or violating the principles of Art. 16 and secondly it also provides for the recognition of temporary servants as quasi-permanent employees. These observations are made in connection with the creation of quasi-permanent employees who acquire special rights of their own. But this distinction does not take away the support it gives to the contention of the respondents as set out above.

The respondents place reliance on a decision reported in 1967 (2) Mys LJ 40, L. Pillappa v. State of Mysore, which proceeds on the ground that it is permissible to regularise an appointment and also fix a date from which such appointment becomes regularised. This is what has been done under the impugned rule, Exhibit F. In AIR 1967 SC 1071, State of Mysore v. S. V. Narayanappa, also it is recognised that appointments made by the State can be regularised.

In W. P. No. 2296 of 1965 (AIR 1969 Mys 59), the rule that was impugned related to 35 persons who were serving as Craft Teachers in the Department of Industries and Commerce. The Governor in exercise of the power under the proviso to Article 309 of the Constitution made Rules called "The Mysore Absorption of Instructors and Assistant Instructors in Tailoring Rules, 1965" which was published on 29-5-1965 Rule 2 of these Rules provided that:

"Notwithstanding anything contained in the Mysore State Civil Service (General Recruitment) Rules 1958, and the orders fixing the general qualification for Instructors and Assistant Instructors in Tailoring (i) the persons mentioned in column 2 of the schedule who were holding the posts mentioned in the corresponding entry in column 3 shall, with effect from the date of this order, be deemed to have been absorbed in the category of posts in the Mysore Education Department mentioned in the corresponding entry in column No 4 thereof."

This order was upheld, thus supporting the proposition that in exercise of the executive powers, the Governor is entitled to appoint or to regularise the appointment subject to the condition already referred to.

Our attention is also invited to a recent decision of this Court in W. P. Nos. 858 and 913 of 1967 (Mys). The appointments the correctness of which was questioned in these Writ Petitions were made prior to the Cadre and Recruitment Rules 1964 coming into force, as in this case. The Government had found it necessary to appoint a number of persons, to the posts of Associate Professors, Assistant Associate Professors, Readers, Lecturers and Registrars, in clinical subjects in the Government Medical Colleges and the Government Dental Colleges. They were also appointed in order to maintain in the Medical Colleges staffing standards as prescribed by the Indian Medical Council. These appointments were made both by promoting temporarily persons who were already in service and who had acquired post-graduate qualifications, and also by directly appointing as local candidates persons who possessed post-graduate qualifications. The services of some of such persons were sought to be regularised by a Rule issued under Article 309 of the Constitution of India. The question that came up for consideration before the Court was if the Government had no competence for regularisation of the local candidates. It was contended that the regularisation is violative of Articles 14 and 16 of the Constitution.

The court upheld the order of regularisation observing that:

"The executive power of the State extends to all matters relating to the State Public Services, and the power to regularise the services of local candidates is, in our opinion, only ancillary or incidental to the power of the State to manage its public services. It is not necessary that there must be a law already in existence before the Government can exercise its executive power to regularise the services of local candidates. No doubt such executive power cannot be exercised contrary to, or inconsistent with, any provisions of the Constitution, legislative enactment, or rules made under the proviso to Art. 309." The only test to find out if the regularisation of the services of the local candidate is valid or not, is to see if the appointment of the candidate as a local candidate was in violation of any provisions of the Constitution, legislative enactment or Rules made under the proviso to Art. 309. We shall consider this aspect of the matter at a later stage.

13. It was pointed out by the counsel for the petitioners that the impugned order Exhibit F refers to a single person. It was contended that a rule under Article 309 can apply only to a class and it cannot be made in respect of a single individual. In support of this contention, the learned counsel for the petitioners relied on the decision of the

Supreme Court reported in (1967) 2 An. W. R. (SC) 44 : (AIR 1967 SC 1305), *D. Sadasiva Reddi v. Chancellor, Osmania University*. This decision referred to by the counsel for the petitioners, does not lay down that the Governor has no power to make a Rule in respect of one person but holds that the particular Rule made in that case was discriminatory inasmuch as one individual was discriminated for no justifiable reason. If an individual can be considered to constitute a class by himself, we do not see anything objectionable if he is to be classified as constituting a class provided the classification is reasonable and not discriminatory or violative of any other provisions of the Constitution or law or Rules validly made.

In the decision referred to above the Supreme Court observes as follows:

"It is no doubt true, as pointed out by the learned Additional Solicitor-General, that a statute may direct its provisions against one individual person or thing, or against several individual persons or things."

This principle is, as pointed out above, accepted by our court in WP No. 2296 of 1965 : (AIR 1969 Mys 59); WP Nos. 858 and 913 of 1967 (Mys). It was not disputed that the settled view of the Supreme Court is that the power of the Governor to frame Rules under Art. 309 of the Constitution is co-extensive with that of the legislature which can make a legislation in respect of a single individual. Therefore, it cannot be contended that the Governor has no power to make a rule under Art. 309 of the Constitution in respect of a single individual.

14. It was next contended that the respondent should have taken his chance for appointment as Principal, School of Mines, Oorgaum K. G. F. in accordance with the Cadre and Recruitment Rules issued on 5th May 1964. In the relevant Cadre and Recruitment Rules it is laid down that the post of Principal, School of Mines, K. G. F. is to be filled up permanently from the cadre of Heads of Sections or by direct recruitment. It is not clear if any of the petitioners come under the class from which recruitment may be made by promotion or whether they satisfy the qualifications prescribed under the Cadre and Recruitment Rules for the purpose of direct Recruitment to the post of Principal of School of Mines, K. G. F. The grievance of some of the petitioners is that if the appointment of the respondent as Principal of the School of Mines is to be regularised with effect from 15-2-58, their claim for promotion to the post of Joint Director of Technical Education would be prejudiced. As mentioned already we do not express any opinion as to the inter se seniority

amongst the petitioners and the respondent. Therefore, the question as to whether such a grievance can arise or not does not arise for consideration before us.

15 (After considering the circumstances under which the appointment was made his Lordship proceeded)

Scrutinising the appointment of the respondent from the point of view whether it has been discriminatory or violative of the principles of equal opportunity being given to the candidates equally qualified, we are inclined to think that in the circumstances narrated above, the State considered that the respondent was the only qualified person to be appointed as Vice Principal in the first instance and later as principal. Hence the initial appointment cannot be said to be discriminatory. The appointment of the respondent as officiating Principal in 1959 cannot therefore be said to be vitiated for any valid reason. Further, taking into consideration that the respondent has held the post of the Principal from 15-2-1958 continuously upto the date of Exhibit F, viz. 9-2-1967, discharging his duties satisfactorily and that he holds high academic qualifications in Geology, it appears to us that the regularisation of the appointment of the respondent as Principal, School of Mines, Oorgaum with effect from 15-2-1958 cannot be held to be unjustified.

16. It cannot be gainsaid that at the stage of the initial appointment of the respondent as Vice Principal or Principal, it would have been advisable to strictly follow the method of recruitment prescribed in the 1957 Rules. It is only the special circumstances of this case as detailed above that can persuade us to take the view that the Government properly exercised its executive power to make the temporary appointment and subsequently regularise the same. We are aware that if the regularisation is disturbed at this stage great prejudice would be caused to the respondent.

The petitioners' counsel brought to our notice the following observations of the Supreme Court in AIR 1965 SC 1293, Channabasaviah v State of Mysore, that:

"It seems surprising that Government should have recommended as many as twenty-four names and the Commission should have approved of all those names without a single exception even though in its own judgment some of them did not rank as high as others they had rejected. Such a dealing with the public appointments is likely to create a feeling of distrust in the working of the Public Service Commission which is intended to be fair and impartial and to do its intended work free from any influence from any quarter. . . ." and,

"It is very unfortunate that these persons should be uprooted after they had

been appointed but if equity and equal protection before the law have any meaning and if our public institutions are to inspire that confidence which is expected of them we would be failing in our duty if we did not, even at the cost of considerable inconvenience to Government and the selected candidates do the right thing. If any blame for the inconvenience is to be placed it certainly cannot be placed upon the petitioning candidates, the candidates whom this order displaces or this court."

The observations were made with reference to the particular glaring facts of the said case. They do not on that account lose their force. However, keeping in view the above observations of the Supreme Court we have to see if the Rule should be applied to this case. In view of the facts and the circumstances narrated in detail in the course of this order, a rigorous application of the rule laid down by the Supreme Court is not warranted in this case.

17. It was submitted by the counsel for the petitioners that the respondent was appointed as Officiating Principal on a deputation basis, when he was appointed on 17-8-1957 and had a lien in the Department of Geology, which was his parent Department. It was further pointed out that the lien of the respondent was temporarily suspended with effect from 8th February 1966 under the order of the same date issued by the Director of the Department of Mines, Geology. It was, therefore, contended that the respondent continued as an Assistant Geologist in the Department of Geology and had been promoted from time to time according to rules. No provision of law has been pointed out to us that a Government servant who holds a lien on an appointment in his parent Department cannot be appointed as a local candidate for any other appointment and the same cannot be regularised later. Therefore, it appears to us that the fact that the respondent was on deputation at the time he was appointed as Officiating Principal of the School of Mines, does not prevent his being treated as a local candidate for the post of Principal of the Institution in question.

18. It was contended by Sri Byra Reddy, the learned counsel appearing for the respondent, that the petitioners cannot ask for a Writ of Quo Warranto for the reason that the office in question is not one either under the Constitution or created under any statute. It was further contended that the petitioners cannot be said to be aggrieved by the appointment of the respondent under Exhibits A and B, the Notification dated 25th September 1958 and 3rd April 1959 as they were not even qualified to seek the appointment even under the 1964 Cadre and

Recruitment Rules. It is unnecessary for us to advert to these contentions.

19. Another contention advanced by the respondent's counsel was that the petitioners ought to have challenged the orders referred to above as Exhibits A and B and not having done so far very nearly 10 years, their challenge now made in regard to the appointment of the respondent as Officiating Principal is highly belated. It is unnecessary to consider this contention also in view of our finding that Exhibit F cannot validly be impeached.

20. We should however make it clear that any temporary appointment to any post in the State Civil Services should be made in accordance with the Rules governing such appointments. If no such Rules exist, the appointment should be made in full conformity with the provisions of the Constitution under Arts. 14 and 16. Any violation of the said provisions would vitiate the appointment. The decisions in these petitions should not be taken as laying down the proposition that any appointment irregularly made would come within the meaning of the words 'Local candidate' and the appointment of such a candidate could be regularised. It is only under exceptional circumstances that regularisation could be resorted to and even that could be done only if the appointment of the local candidates is not discriminatory or made without giving equal opportunity as required under Article 16 of the Constitution of India. It is needless to say that the practice of appointing local candidates and continuing them as such for a long time and then regularising their services is a practice that can seldom be countenanced. The question relating to the inter se seniority amongst the petitioners and the respondent and their claim for any higher appointment is left open for determination according to rules governing that matter when the need to do so arises.

21. For the reasons mentioned above, we dismiss the Writ Petitions; but we make no order as to costs.

RGD Petitions dismissed.

AIR 1969 MYSORE 215 (V 56 C 44)

A. R. SOMNATH IYER
AND AHMED ALI KHAN, JJ.

K. S. Achuthan Proprietor, Bharat Motor Service, Bangalore and others, Petitioners v. State of Mysore represented by its Chief Secretary, Vidhan Soudha Bangalore and others, Respondents.

Writ Petns. Nos. 1562, 1890, 1891, 1958, 1959, 1882, 1892, 1954, 1955 and 2053 of 1968, D/- 19-8-1968.

LL/BM/F665/68

(A) Motor Vehicles Act (1939), S. 68D — Approval of scheme under — Scope of enquiry — Order when open to challenge — Constitution of India, Art. 226.

The adjudication made by Government under S. 68-D is subject to judicial review only in a very limited way. If an opportunity to make a representation and to be heard in support of the objections preferred to a draft scheme is made available and there is a judicial approach in the disposal of the objections, the mere fact that another view than the one taken by them is possible or that the order prepared by Government under section 68-D does not set out detailed reasons does not afford any ground for the denunciation of the scheme. AIR 1960 SC 1073 Followed. (Para 4)

(B) Motor Vehicles Act (1939), S. 68-C — Exclusive operation by corporation on notified route — Fact that passenger travelling on other route has, on overlapping portion of notified route, to travel in State bus — Does not amount to lack of co-ordination.

The element of co-ordination exists notwithstanding the fact that a passenger who has to perform a journey on a route other than the notified route, has, on the overlapping portion of the notified route, to perform a journey in a Corporation omnibus. Section 68-C, when it speaks of a properly coordinated service does not insist upon a scheme which enables such passengers to perform continuous journeys in the stage carriages operated by private operators. AIR 1966 SC 1661 Followed. (Para 9)

(C) Motor Vehicles Act (1939) S. 68-C — Approved scheme whether economical—Fare charged by operator is not a decisive factor.

Merely for the reason that the corporation rates are higher than those of the private operators it cannot be said that the approved scheme cannot work economically. The question whether a transport service is economical from the point of view of the passengers who travel in it can be looked at from two points of view and the fare charged by the operator is not a decisive factor. A transport service which charges a higher fare but affords better service and enables the passenger to reach his destination safely and without delay may, in the circumstance, be more economical from the point of view of the passengers travelling in it than a transport service which charges a lower rate but is undependable or is not sufficiently comfortable. (Para 14)

(D) Motor Vehicles Act (1939), S. 68-C — Exclusive operation on notified routes — Approved scheme, whether efficient — Performance of corporation in another area is not of relevance.

In judging the question whether the approved scheme would be an efficient

and adequate scheme with respect to the notified routes to which it refers, what the corporation did in another area in which an approved scheme was in force can have no materiality. (Para 15)

(E) Constitution of India Art. 226 — Motor Vehicles Act (1939), Ss. 68-C, 68-D — Draft scheme prepared in 1964 — Chief Minister according approval in 1967 — Opportunity to seek modifications given to persons making representations — Modifications not placed before Chief Minister — High Court cannot denounce approved scheme on those modifications while acting under Art. 226. (Para 18)

(F) Motor Vehicles Act (1939), Ss. 68-C, 68-D — Chief Minister according approval to scheme under S. 68D — Fact that he was determined to implement policy of nationalisation of transport services does not amount to bias on his part.

The mere fact that the State Government or the Chief Minister had determined to implement the policy of nationalisation in the sphere of transport services does not amount to any bias on the part of Government or on the part of the Chief Minister who may accord approval to the scheme under Section 68D. That there is a desire or duty on the part of Government to implement the policy of nationalisation does not mean that they would accord approval under section 68-D, whatever may be the nature of the draft scheme prepared under section 68-C. If the policy of Government is that there should be nationalisation, there can be no approved scheme in pursuance of such policy of nationalisation unless the scheme proposed under S 68-C measures up to the standards prescribed by it, what is plain is that Government would accord their approval to the scheme only when they are satisfied that the scheme would result in an efficient, adequate, economical and properly co-ordinated transport service such as the one to which section 68-C refers. (Para 20)

(G) Motor Vehicles Act (1939), S. 68-D — Approval of scheme under—Presumption—Evidence Act (1872) S. 114, Illus. (e).

There is a presumption that the grant of approval which is made under S 68D is preceded by a consideration of all the relevant aspects of the matter. AIR 1967 SC 1815 Followed (Para 21)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 295 (V 54)—
(1966) Supp SCR 311, Barium Chemicals Ltd. v. Company Law Board 24
(1967) AIR 1967 SC 603 (V 54)—
(1963) 2 SCR 152, Ramnath Verma v. State of Rajasthan 28
(1967) AIR 1967 SC 1815 (V 54)—
(1967) 3 SCR 329, Capital Multi-

purpose Co-operative Societies v. State of Madhya Pradesh 21
(1966) AIR 1966 SC 1661 (V 53)—
(1962) Supp (1) SCR 717, C. P. C. Motor Service Mysore v. State of Mysore 0

(1960) AIR 1960 SC 1073 (V 47)—
(1959) Supp (2) SCR 624, H. C. Narayanappa v. State of Mysore 4, 29

Gopala Krishna Shetty (in W. P. Nos. 1502, 1890, 1891, 1958, 1959 and 1882/68); Mohan Das N Hegde (in W. P. Nos. 1892, 1954, 1955 and 2053/68) and (in W. P. No. 1882/68 by M. Gopala Krishna Shetty, for K. Jagannatha Shetty), for Petitioners. E. S. Venkataramaiah, H. C. Spl. Govt. Pleader, for Respondents Nos. 1 and 2 (in W. P. 1562/68); for Respondents Nos. 1, 2 and 4 (in 1890, 1891, 1958 and 1959 of 1968), for Respondents Nos. 2 and 4 (in W. P. No 1892, 1954, 1955 and 2053 of 1968) and for Respondents 1 and 3 (in W. P. 1882/68), B. S. Keshava Iyengar, Central Govt. Pleader for Attorney General of India in all cases; U. L. Narayana Rao and K. S. Puttaswamy, for interveners (in W. P. 1562 of 1968)

SOMNATH IYER, J.: The Mysore State Road Transport Corporation constituted under the provisions of the Road Transport Corporation Act, 1950, published on August 18, 1964, a draft scheme under Section 68-C of the Motor Vehicles Act, 1939 for the operation of its services on certain routes in the Districts of Coorg, South Kanara and Chikmagalur. This scheme, which will be referred to as the Mangalore Scheme in the course of this judgment, was approved by the Chief Minister under Section 68-D of the Act on July 28, 1967. The approved scheme is impeached in these ten writ petitions on more than one ground by persons who were operating on some one or the other of the notified routes enumerated in the approved scheme.

2. On behalf of the petitioners six submissions were made. The first was that there was no application of the judicious mind by the Chief Minister to the question whether the scheme was in public interest and also to the question whether it results in an efficient, adequate, economical and properly co-ordinated transport services. The second was that the complete exclusion of private operators from some of the notified routes was not in public interest. The third submission was that the approved scheme stands vitiated by reason of the fact that the Chief Minister who accorded his approval to it was determined to implement the policy of nationalisation and so was biased. The fourth submission was that there was long delay in according approval to the scheme and that the approval accorded in the year 1967 on the basis of the situation which obtained in 1964 vitiated the scheme. The fifth and

sixth submissions covered the question whether the provisions of Sections 68-C and 68-H invaded the fundamental right guaranteed by Articles 19 and 31 of the Constitution; but at one stage these two submissions were withdrawn.

3. The first question to which we should address ourselves is whether there was no application of the mind of the Chief Minister when he gave his approval to the scheme under Section 68-D to the question whether the approved scheme would make available to the general public an efficient, adequate, economical and properly co-ordinated road transport service on the notified routes and whether for that reason that scheme was in public interest. In support of the argument that that fact of the matter did not receive adequate consideration from the Chief Minister, it was said that it was overlooked by the Chief Minister that the proposed scheme disclosed prima facie that it would neither work efficiently nor economically and that the proposed transport operation by the Corporation was neither adequate nor properly co-ordinated. It was said that no scheme could have been approved by the Chief Minister under Section 68-D unless the scheme which was initiated by the Corporation demonstrated the possibility of an adequate, efficient, economical and properly co-ordinated transport service and that it should have been obvious to the Chief Minister that there was no such possibility.

4. It is now well-settled proposition as can be seen from the pronouncement of the Supreme Court in *H. C. Narayanappa v. State of Mysore*, AIR 1960 SC 1073 that the adjudication made by Government under Section 68-D is subject to judicial review only in a very limited way. It was explained in that decision by the Supreme Court that if an opportunity to make a representation and to be heard in support of the objections preferred to a draft scheme is made available and there is a judicial approach in the disposal of the objections, the mere fact that another view than the one taken by them is possible or that the order prepared by Government under Section 68-D does not set out detailed reasons does not afford any ground for the denunciation of the scheme.

5. We find from the order made by the Chief Minister on July 28, 1967 that there was sufficient application of his mind to the questions which he had to consider. Indeed the Chief Minister set before himself all those questions and also formulated the grounds on which the draft scheme was assailed before him. He considered those objections, and, in the context of the materials produced by both sides reached the clear conclusion that the scheme was such as to

merit his approval. The question whether the proposed scheme would work efficiently and whether the services proposed were adequate and economical and in addition properly coordinated was considered by him in sufficient detail. He came to the conclusion that all the four elements which the scheme should fulfil did exist, and that the proposed scheme with the modifications which he made would be in public interest.

6. It is not disputed before us that the opportunity which is claimable under Section 68-C to produce objections and to be heard was in fact made available to the petitioners although, at some stage of the argument it was pressed on us that in some spheres that opportunity became unavailable. To that aspect of the matter, we shall advert at the appropriate stage. It was not disputed also by the learned Advocates appearing in these ten petitions that if all that it was possible for the Chief Minister to take a view different from that reached by him, that would not by itself entitle the petitioners to call in question the approval accorded by the Chief Minister. But, it was pressed on us by Mr. Gopalakrishna Shetty who led the argument that this is not a case in which it can merely be said that two views were possible but that the conclusion reached by the Chief Minister was an impossible conclusion. So, he asked us to say that since it was impossible for the Chief Minister to grant his approval to the scheme, the approved scheme falls to the ground.

7. In support of this argument, Mr. Shetty first asked attention to certain features of the scheme which displayed according to him, the non-existence of any of the four factors of which Section 68-C speaks. What is so portrayed by the approved scheme was, according to Mr. Shetty, that the approved scheme is neither efficient nor economical nor adequate and not at all a properly co-ordinated scheme. Although some of the submissions made by Mr. Shetty overlap the other submissions made by him in the sense that an argument in support of inadequacy was also an argument advanced in support of inefficiency, we shall deal with the postulates made by Mr. Shetty in the order in which he placed them before us.

8. In support of the chief criticism made of the conclusion reached by the Chief Minister that the approved scheme would produce a properly co-ordinated transport service, it was pointed out to us that on more than one notified routes there would be a transaction of the operation of private operations with respect to the portions which overlap the notified route. By way of an illustration, Mr. Shetty pointed out that in respect of the road

between Mudabidri and Killur via Guruvayankere and Belthangadi on which the petitioner in Writ Petition No 1562/68 operates, that operation has become no longer possible by reason of the fact that on the route between Mangalore and Channaray which is notified, all operators are completely excluded. The complaint before us was that the distance between Guruvayankere and Belthangadi is only two miles and that a passenger who performs a journey from Killur to Belthangadi had to alight from the private operator's stage carriage and board a corporation omnibus at Belthangadi and perform a short journey of 2 miles to Guruvayankere in order to board another private omnibus to reach Mudabidri. This privation which is the inevitable result of the exclusive operation by the Corporation on the notified route between Channaray and Mangalore is, according to Mr. Shetty, the most irrefutable proof of incoordination. It was said that similar consequences would ensue from the exclusive operation by the Corporation on quite a few other routes and that the incoordination displayed by such operation under the scheme was entirely missed by Chief Minister when he gave his approval to the scheme.

9. In *C. P. C. Motor Service Mysore v State of Mysore*, AIR 1966 SC 1661 it was explained by the Supreme Court that the element of co-ordination would exist notwithstanding the fact that a passenger who has to perform a journey on a route other than the notified route, has, on the overlapping portion of the notified route, to perform a journey in a Corporation omnibus. The enunciation made by the Supreme Court was that Section 68-C, when it speaks of a properly coordinated service does not insist upon a scheme which enables such passengers to perform continuous journeys in the stage carriages operated by private operators. In that context, the Supreme Court said this:

"Under Section 68-C, the State Transport Undertaking may take over whole routes or whole areas or part of the routes or part of the areas, and if the scheme operates partially, some transshipment would obviously be necessary, but coordination would still exist because where the State omnibuses come to a halt, the private omnibuses would take the passengers set down. In our opinion, these grounds have no validity, in view of the partial nationalisation of the routes involved in the State".

It is this very passage in the decision of the Supreme Court that was relied upon by the Chief Minister when he negatived the argument of incoordination and so, the petitioners cannot reasonably contend that there was no application of the mind of the Chief Minister to that feature of

the approved scheme on which they depended.

10. That being so, it is not necessary for us to consider the effect of the issue of the permit to the petitioner in Writ Petition No 1562/68 for the route between Killur and Mudabidri after the Chief Minister accorded his approval to the Scheme. Nor is it necessary for us to consider the submission made on behalf of the Corporation by Mr. Special Government Pleader that on that route the Corporation itself is also operating a direct service which precludes an argument based on the necessity for transshipment.

11. It was next maintained that the approved scheme could not work economically and that the conclusion reached by the Chief Minister that it could, was entirely unsupportable if not impossible. The only argument advanced in support of this submission was that what influenced the Chief Minister was the impact of the scheme on the travelling public and that the Chief Minister did not take into consideration the fact that the higher rates which the Corporation was charging was detrimental to public interest. It is explained to us that whereas the private operators charge the passengers a fare calculated at a rate varying between 4 and 5 paise a mile, the rates fixed by the Corporation varied between 6.25 paise and 7 paise a mile.

12. It is not correct for the petitioners to contend that that aspect of the matter was not considered by the Chief Minister. Moreover, the approved scheme did not fix the rates which could be charged by the Corporation. That scheme only stated that the rates would be fixed under Section 43 (1) (i) of the Motor Vehicles Act.

13. Paragraph 5 of the order did make a reference to that contention although there was no detailed discussion thereof. It is however obvious that the Chief Minister was not impressed by the criticism that the scheme should not be approved merely for the reason that the Corporation rates are higher than those of the private operators. That was a sphere in which the Chief Minister had to reach his own conclusion so long as that conclusion was not reached on the basis of an approach which was not judicial. If the criticism was considered in the light of the purpose to be accomplished by the scheme and was turned down, the fact that some one else would have found it possible to reach a different conclusion is surely not a ground which can support the impeachment of the approved scheme.

14. The question whether a transport service is economical from the point of view of the passengers who travel in it

can be looked at from two points of view and the fare charged by the operator is not a decisive factor. A transport service which charges a higher fare but affords better service and enables the passenger to reach his destination safely and without delay may, in the circumstance, be more economical from the point of view of the passenger travelling in it than a transport service which charges a lower rate but is undependable or is not sufficiently comfortable. Although the Chief Minister does not say so in so many words, it is obvious that he did bestow his thought to the argument whether he could refuse approval to the proposed scheme on the ground that the Corporation rates were higher and that he reached the conclusion that he should not. In that situation, there can be no force in the argument advanced before us.

15. That the Chief Minister did not bestow reflection over the question whether the Corporation would operate its services with efficiency was the next submission. In support of this argument, our attention was invited to the way in which the Corporation operated its transport service in another area in which an approved scheme was in force. That scheme to which we shall refer as the Hassan Scheme specified that the Corporation would operate a minimum number of 174 motor vehicles. It was alleged that although the Corporation did commence with the operation of 230 vehicles on the notified routes in that area, that number was reduced to a hundred and that such diminution more than abundantly established lack of efficiency on the part of the Corporation. It is true that in the petitioner's affidavit and in the statement of objections produced by some of the petitioners, there is an allusion to the diminution in the number of stage carriages which the Corporation operated under the Hassan Scheme, and it is also true that the Chief Minister does not refer to that feature of the Corporation's performance under the Hassan Scheme. But, it is clear that the Chief Minister did not think much of the criticism levelled against the Corporation. Moreover, it is difficult to understand how the petitioners could contend that what the Corporation did under the approved scheme could have any materiality in judging the question whether the Mangalore Scheme would be an efficient scheme with respect to the notified routes to which it refers.

16. This is also what we would say with respect to the submission made to us by Messrs. Narayana Rao and Puttaswamy who participated in the argument as interveners, that the Corporation was keeping a large number of motor vehicles without putting them on the road. It was alleged that whereas the Corpora-

tion owned 1988 vehicles, only 1352 vehicles have been put on the road and 636 are remaining idle. These statistics have been made available to us for the first time by Mr. Shetty appearing for the petitioner and by the Advocates appearing for the interveners and the Chief Minister did not have those materials before him. It is clear from his order that in respect of operational details and in respect of the claim made by the Corporation that it could manage its services with the required efficiency, the Corporation produced relevant statistics whereas those who made representations against the scheme did not. With respect to that matter, the Chief Minister observed:

"Regarding the general question of efficiency, while the objectors contended that the Corporation was being managed inefficiently at present, the representative of the Corporation submitted citing statistics that from the point of view of operational efficiency which is judged on the basis of operating ratio, the Corporation is being efficiently managed. On the other hand the objectors apart from making a bald statement that the scheme did not provide for an efficient system of Road Transport Service, have not been able to place operational statistics pertaining to their operations, nor did they challenge the statistics quoted by the Corporation."

This part of the Chief Minister's order is, in our opinion, a sufficient answer to the criticism that the question whether the Corporation would or would not be able to operate its services with the required efficiency was not considered by the Chief Minister or that even if he had considered it, the conclusion reached by him was an impossible conclusion.

17. What we have said so far in the context of the argument concerning the question of efficient operation also disposes of the submissions made to us on the adequacy of the arrangements made by it for exclusive operation on the notified routes.

18. So, we proceed to consider the next submission made that the approval accorded under Section 68-D rested on a wrong basis. It was stated that since the draft scheme was prepared in the year 1964 and was not approved until the year 1967 and in the meanwhile there had been an increase in the volume of traffic by as much as 35 per cent so the proposals contained in the draft scheme could have no validity in the situation obtaining in the year 1967, it was not possible for the Chief Minister to say in the year 1967 that a scheme prepared in 1964 was acceptable. But, this argument overlooked the fact that when the Chief Minister accorded his approval, he heard all the persons who made representations

and invited them to produce statistics in the same way in which the Corporation was also invited, but, those who objected to the draft scheme did not produce any such statistics as stated by the Chief Minister and did not contest the truth of the statistics produced by the Corporation. The Chief Minister had the power when he gave his approval under Section 68-D to make possible for the petitioners who objected to the draft scheme to seek such modifications as had become necessary by reason of subsequent events. This they could have done by the production of statistics upon which they now depend in support of their argument, but, they did not, and it is therefore now too late for them to make any criticism of the approved scheme on a ground which they did not urge before the Chief Minister.

19. The impeachment of the scheme on the ground of bias is contained in paragraph 12 of the affidavit of the petitioner in writ petition No. 1562/68 and that was the basis on which the argument was advanced even in the other cases. That paragraph did not in so many words impute any particular bias to the Chief Minister. What is stated in that paragraph is:

"I submit that it is evident from the order of the Chief Minister that it is pursuant to a general predetermined policy of nationalisation that the scheme has been approved and influenced the decision of the Chief Minister, rather than the merits of the proposed scheme as one satisfying the condition required under Section 68-C of the M. V. Act." This part of the affidavit makes it clear that according to the petitioners the bias on which they depend is displayed by the order which according to them demonstrates a general predetermined policy of nationalisation. It was submitted by Mr. Shetty that notwithstanding an allegation of bias which the petitioner made in his affidavit, no affidavit was produced before the Chief Minister in repudiation of the truth of that allegation. But, it is obvious that the allegations made in paragraph 12 of the petitioner's affidavit did not call for any such repudiation in that form. The petitioner depended upon an order made by the Chief Minister as the basis of the allegation of bias. No other allegation was made except that his order demonstrates that the Chief Minister was guided more by the "general predetermined policy of nationalisation" than by the merits of the case.

20. The mere fact that the State Government or the Chief Minister had determined to implement the policy of nationalisation in the sphere of transport services does not amount to any bias on the part of Government or on the part

of the Chief Minister who may accord approval to the scheme under S. 68-D. That there is a desire or duty on the part of Government to implement the policy of nationalisation does not mean that they would accord approval under Section 68-D, whatever may be the nature of the draft scheme prepared under Section 68-C. If the policy of Government is that there should be nationalisation, there can be no approved scheme in pursuance of such policy of nationalisation unless the scheme proposed under Section 68-C measures up to the standards prescribed by it; what is plain is that Government would accord their approval to the scheme only when they are satisfied that the scheme would result in an efficient, adequate, economical and properly co-ordinated transport service such as the one to which Section 68-C refers. That indeed was the approach made by the Chief Minister in the present case.

21. As explained by the Supreme Court in *Capital Multipurpose Co-operative Societies v. State of Madhya Pradesh*, AIR 1967 SC 1815 there is a presumption that the grant of approval which is made under Section 68-D is preceded by a consideration of all the relevant aspects of the matter. But, the case before us does not merely depend upon any such presumption since there was a clear and comprehensive discussion of the objections to the scheme. So, the order of the Chief Minister far from displaying bias portrays the judicial approach on which Section 68-D insists.

22. A complaint was made at one stage that the opportunity which was made available under Section 68-D to make a representation or for hearing was not full. It was urged that when the Chief Minister took up the matter as late as in the year 1967 for final disposal, he could not make available to the petitioners a further opportunity to make further representation since under the provisions of Section 68-C representations should be made only within thirty days from the date of publication of the draft scheme. It was urged that since the Chief Minister could not allow any further representations to be made after the expiry of the period of limitation prescribed by Section 68-C and that since even otherwise no such opportunity was made available, the petitioners were precluded from urging before the Chief Minister grounds on which they could depend in the context of subsequent events. In condemnation of the draft scheme.

23. We have already observed that the Chief Minister did take into consideration all the relevant materials which were produced before him and the petitioners did not seek at that stage any

further opportunity to make any further representations, and, that that is so is what precludes the complaint that the opportunity for hearing was inadequate.

24. On behalf of 14 interveners for whom Mr. U. L. Narayana Rao appeared and on behalf of some others for whom Mr. K. Puttaswamy appeared, it was maintained that if the view taken by the Chief Minister was not one which a reasonable person could have taken on the materials before him, the approved scheme has to be struck down. In support of that submission, dependence was placed on the decision of the Supreme Court in *Barium Chemicals Ltd. v. Company Law Board*, AIR 1967 SC 295 in which it is explained that an act of an executive authority who is invested with power which he could exercise, can be quashed if it rests on a view which no reasonable person could have taken on the materials before him.

25. There are two reasons why this enunciation can be of no assistance to the petitioners. The first is that we do not find it possible to say that the view taken by the Chief Minister was not reasonable. The second is that with respect to an adjudication under S. 68-D, the enunciation made in AIR 1960 SC 1073 is more apposite.

26. On behalf of the interveners many pieces of statistical information were produced before us with respect to many matters in support of the complaint that public interest has seriously suffered by the exclusive operation by the Corporation. Mr. Narayana Rao asks us to accept the affidavits of the 14 Chairmen of different village Panchayats who knew the needs of the general public better than any one else about the many serious shortcomings in the Corporation operations. But, we cannot look into these materials in these writ petitions in which we are concerned only with the short question whether the approved scheme which came into being under Section 68-D can be struck down as a scheme which was not possible under its provisions. The interveners, if they so desired, should have made representations at the appropriate stage and they cannot at this stage ask us to examine the approved scheme in the context of the materials now produced by them. That surely is not what we can do.

27. What we have said so far disposes of all the submissions made before us and so, we dismiss these ten writ petitions.

28. But, in Writ Petition No. 2053/68, we think that we should make a clarification which flows from the enunciation made by the Supreme Court in *Ram Nath Verma v. State of Rajasthan*,

AIR 1967 SC 603. That clarification which we should make is that in the case of inter-State permits of private operators, all that is forbidden is that a private operator cannot pick up a passenger and set him down at any point between the two termini of the notified route. But, the private operator is at liberty to pick up passengers at points beyond the notified routes and set them down even at a point on the notified route. Similarly, they are at liberty to pick up a passenger at a point on the notified route provided he is carried to a point beyond it. This clarification we make in respect of the inter-State permits covered by the Mangalore Scheme.

29. No costs,
GDR/D.V.C.

Petitions dismissed.

AIR 1969 MYSORE 221 (V. 56 C 45)

M. SADASIVAYYA, J.

Subbamma and another, Accused, Petitioners v. V. Kannappachari now deceased by V. Muthuswamy Complainant, Respondent.

Criminal Revn. Petn. No. 362 of 1967, D/- 12-7-1968, against order of First Class Magistrate, Raichur, D/- 11-9-1967.

Criminal P. C. (1898), Ss. 247 and 259 — Non-cognizable offence — Death of complainant — Magistrate has discretion to substitute fit and willing complainant.

The death of the complainant in a case of non-cognizable offence does not abate the prosecution. It is within the discretion of the trying Magistrate in a proper case to allow the complaint to continue by a proper and fit complainant if the latter is willing, AIR 1926 Bom 178, Foll. (Para 3)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 983 (V 54) =

1967 Cri LJ 943, Aswinbhai Nanu Vyas v. State of Maharashtra 2

(1926) AIR 1926 Bom 178 (V 13) =
27 Cri LJ 491, Mohamed Azam v. Emperor 3

(1916) AIR 1916 Pat 152 (V 3) =
18 Cri LJ 151, Jitan Dusadh v. Damoo Sahoo 3

(1915) AIR 1915 Cal 263 (V 2) =
15 Cri LJ 726, Madho Choudhry v. Turab Mian 3

(1915) AIR 1915 Cal 708 (V 2) = 16
Cri LJ 322, Puran Chandra v. Dengar Chandra 3

(1889) ILR 13 Bom 600, In re, Ganesh Narayan Sathe 3

Appa Rao, for Petitioners; Smt. G. S. Anasuya, for Respondent.

ORDER: The petitioners were the accused in Criminal Case No. 181/3 of 1967 in the Court of the First Class Magis-

LL/BM/F875/68

trate, Raichur. The offence which had been complained of against them was one punishable under Section 7 (1) of the Suppression of Immoral Traffic in Women and Girls Act. Process had been issued against the accused and they appeared in response to the summons and were represented by Advocate. In the meanwhile the complainant having died, an application was made on behalf of her brother's son praying for permission to continue the prosecution. On behalf of the accused a contention had been raised to the effect that on the death of the complainant, the complaint had abated and that the accused had to be acquitted. In support of this contention, reliance appears to have been placed on the provisions of Section 247 of the Code of Criminal Procedure. The Magistrate rejected the contention which had been raised on behalf of the accused and he permitted the brother's son of the deceased complainant to lead the evidence in support of the complaint. It is against that order of the Magistrate that the present revision petition has been preferred by the accused persons.

2. I have heard Sri Apparao learned Advocate for the respondent. As pointed out by the Supreme Court in para 3 at page 984 of AIR 1967 SC 983, Ashwin Nanubhai Vyas v. State of Maharashtra:

"The Code of Criminal Procedure provides only for the death of an accused or an appellant but does not expressly provide for the death of a complainant. The Code also does not provide for the abatement of inquiries and trials although it provides for the abatement of appeals on the death of the accused in appeals under sections 411-A (2) and 417 and on the death of an appellant in all appeals except an appeal from a sentence of fine. Therefore, what happens on the death of a complainant, in a case started on a complaint has to be inferred generally from the provisions of the Code."

3. No uniform view appears to have been taken by the High Courts in India, on the question as to whether on the death of a complainant, the complaint abates and on that ground the accused must necessarily be acquitted. The view taken by Madgavkar, J. in AIR 1926 Bom 178 is that even in case of non-cognizable offence instituted upon a complaint, it would be within the discretion of the trying Magistrate in proper cases to allow the complaint to continue by a proper and fit complainant, if the latter is willing. The learned Judge took the view that Section 247 of the Code was applicable primarily to the case of a complainant who was alive but did not appear; it was doubted whether it applied to the case of a complainant that was not alive. While pointing out that the courts would

always be on their guard against needless harassment of an accused by substituting a complainant, who is not a fit person, the learned Judge stated that the trying Magistrate had the discretion in proper cases to allow the complaint to continue by a proper and fit complainant if the latter was willing. This is what has been stated at page 179 of AIR 1926 Bom 178, Mohamed Azam v. Emperor:

"But even in the case of non-cognizable offences, such as for instance bribery, as is pointed out by this Court in Re: Ganesh Narayan Sathe (1889) ILR 13 Bom 600 the Code does not intend to confine prosecutions to the persons directly injured On the whole we agree with the view of Chamier C. J., in Jitan Dusadh v. Damoo Sahu AIR 1916 Pat 152, after considering Madho Chowdhry v. Turab Mian, AIR 1915 Cal 263 and Puran Chandra v. Dengar Chandra, AIR 1915 Cal 708 that "it is open to doubt whether S 247 of the Code was intended to apply to such a case as this. It seems to apply primarily to the case of a complainant who is alive but does not appear We are of opinion, therefore that in the present case of a non-cognizable offence instituted upon a complaint, the axiom of *actio personalis moritur cum persona*, in civil law confined to torts, does not apply and that the trying Magistrate has discretion in proper cases to allow the complaint to continue by a proper and fit complainant, if the latter is willing. The Courts would always be on their guard against needless harassment of an accused by substituting a complainant who is not a fit person."

Having regard to the fact that there is no specific provision to the effect that on the death of the complainant the complaint abates, it seems to me that the view taken in AIR 1926 Bom 178 should be accepted as it is supported by sound reasons, if I may say so with great respect.

4. Thus, the view taken by the learned Magistrate in the present case is sustainable and I find no good ground to interfere with the same in revision. This revision petition is dismissed.

CWM/D.V.C.

Revision dismissed.

AIR 1969 MYSORE 222 (V 56 C 46)

A. R. SOMNATH IYER

AND AHMED ALI KHAN, JJ.

S Adappa, Petitioner v. The Transport Commissioner in Mysore and another, Respondents.

Writ Petn. No. 1576 of 1966, D/- 21-5-1968.

LL/LI/F671/68

(A) Constitution of India, Art. 226 — Finding as to service of notice before making the best judgment assessment under S. 6 of the Mysore Motor Vehicles (Taxation on Passengers and Goods) Act, 1961 is a finding on question of fact—Finding cannot be canvassed in High Court under Art. 226—Civil P. C. (1908) S. 100.—Mysore Motor Vehicles (Taxation on Passengers and Goods) Act (10 of 1961), S. 4.

(Para 4)

(B) Mysore Motor Vehicles (Taxation on Passengers and Goods) Act (10 of 1961), S. 6—Best judgment assessment — Mode of — Tax Officer must have some material before him — Determination of tax on basis of erroneous presumption that public carrier had carried its full complement of goods cannot be sustained — (Income Tax Act (1961) S. 144).

Section 6 of the Act confers power on the Tax Officer to make a best judgment determination of tax in a case where no return has been submitted by the operator, after giving him a reasonable opportunity for making his representation if any. That determination should not emanate from a desire to punish the defaulting operator and must rest upon the consideration of some material which should be gathered and collected by the Tax Officer. So the Tax Officer cannot make a best judgment determination without regard to any material, and if no material is available he should proceed to collect some material on the basis of which a fair and honest estimate can be made. The proviso to S. 6 only fixes the upper limit of the tax which the defaulting operator can be called upon to pay but this prescription of maximum should not be taken as the inflexible basis for determination. The Tax Officer would, therefore, be wrong in proceeding to determine the tax on the assumption that the public carrier had carried its full complement of goods. Any determination on such erroneous basis without any material cannot be sustained. AIR 1937 PC 133, Rel. on. (Para 9)

Cases Referred: Chronological Paras (1937) AIR 1937 PC 133 (V 24) = 1937-5 ITR 170, Commr. of Income Tax v. Lakshminarayan Badridas 8

M. Rangaswamy, for Petitioner; Shan-
tha Raj for E. S. Venkataramiah High
Court Special Govt. Pleader, for Respon-
dents.

SOMNATH IYER, J.: This writ petition concerns a best judgment determination of the tax which the petitioner was called upon to pay under the provisions of the Mysore Motor Vehicles (Taxation on Passengers and Goods) Act, 1961. From the order of the tax officer who made that determination there was an appeal to the Commissioner of Transport who

dismissed it. The petitioner asks us to quash the orders made against him.

2. It is undisputed that the motor vehicle with which we are concerned in this writ petition is a tractor trailer in respect of which the petitioner obtained a public carrier permit. A public carrier vehicle, according to the definition contained in S. 2 (9) of the Act, means a motor vehicle carrying or adapted to carry goods for hire or reward. During the proceedings before the Tax Officer for the determination of the tax payable by him on the hypothesis that the tractor-trailer was used by him for carrying goods, notices were taken out to the petitioner twice and those notices were served on him personally. But when he did not appear, the Tax Officer rightly proceeded to make a determination of the tax to the best of his judgment under the proviso to Section 6 of the Act. The relevant portion of that Section reads.

6. Procedure where no returns are submitted, etc. — In the following cases, that is to say,—

(a) where no returns have been submitted by the operator in respect of any stage carriage or public carrier thereof, or

(b) where the returns submitted by the operator in respect of any stage carriage or public carriage vehicle for any month or portion thereof appear to the Tax Officer to be incorrect or incomplete, the Tax Officer shall, after giving the operator a reasonable opportunity in case (a) of making his representation, if any and in case (b) of establishing the correctness and completeness of the returns submitted by him, determine the sum payable to the State Government by the operator by way of tax during such month or portion thereof;

3. Section 4 directs every operator of a public carrier vehicle to produce periodically returns in the prescribed form, and, it is common ground that the petitioner produced no such returns. It is explained by Mr. Rangaswamy, the learned Advocate for the petitioner, that no such returns was produced since the tractor-trailer owned by the petitioner was not a public carrier and was not used as such. It was submitted that a public carrier permit was obtained by the petitioner under some mistaken supposition.

4. However that may be, what is clear from the provisions of Section 3 is that, if the vehicle owned by the petitioner is a public carrier vehicle and goods are transported in that vehicle, the tax charged by that section becomes payable. When the petitioner was served with a notice on the second occasion he was intimated that if he failed to appear

on the date of hearing, the determination of the tax payable by him would be made in his absence. But he did not appear before the Tax Officer, who, therefore, rightly proceeded to make the determination to the best of his judgment. The Transport Commissioner in appeal did not accept the story of the petitioner that that notice was not served on him, and, that finding which is a finding on a question of fact is not open to discussion in this Court.

5. But we are of the opinion that the determination made by the Tax Officer suffers from a fundamental defect. Section 6 of the Act confers power on the Tax Officer to make a best judgment determination in a case where no return has been submitted by the operator, after giving him a reasonable opportunity for making his representation if any. Although that opportunity was made available to the petitioner and that opportunity was not utilised by him for making any representation. It is clear that the Tax Officer did not make any best judgment determination. His order discloses that there was an incorrect comprehension by him of the nature of the best judgment determination which he had to make. He appears to have thought that in a case where a best judgment determination has to be made, the basis for such determination in every case should be the assumption that the operator had carried the full complement of goods during the relevant period.

6. That, that was the process by which he made his determination is clear from that part of his order which reads.

"As per his request a date of hearing was adjourned to 26-6-64 and the same was informed under this office letter No 1310/TPG/RFR/64, dated 10-6-1964 which was served on him on 18-6-1964. But he failed to attend the hearing on due date. According to provision of Section 6 of the Act it is therefore necessary to determine the tax on the basis that the public carrier had covered its full complement during the period."

7. It is plain that that is not how the determination could be made under S. 6. That determination, although Section 6 does not say so in so many words, is what may be described as the best judgment determination. That determination should not emanate from a desire to punish the defaulting operator and must rest upon the consideration of some material which should be gathered and collected by the Tax Officer.

8. What was said by the Privy Council in *C. I. T. v. Lakshminarayan Badridas*, 1937 ITR 170 with respect to a best judgment assessment under the Income-

tax Act, is, we think, equally applicable to a best judgment determination under Section 6 of the Mysore Motor Vehicles (Taxation on Passengers and Goods) Act, 1961. What the Privy Council observed in that case reads—

"The Officer is to make an assessment to the best of his judgment against a person who is in default as regards supply of information. He must not act dishonestly or vindictively or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by assessment of the assessee and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be a guess-work in the matter it must be honest guess-work. In that sense too, the assessment must be to some extent arbitrary."

9. So the Tax Officer could not make a best judgment determination without regard to any material, and if no material was available he should have proceeded to collect some material on the basis of which a fair and honest estimate could be made. It is clear that the Tax Officer did not think that it was any part of his duty to make an estimate in that way. The view that he took was that section 6 incorporated an inflexible basis for determination, and that that basis was the presumption that the public carrier vehicle had carried its full complement of goods. It is obvious that that erroneous assumption on which he depended was the product of his imperfect understanding of the proviso to S. 6 which only fixed the upper limit of the tax which the defaulting operator could be called upon to pay. The prescription of the maximum in that way was mistaken by the Tax Officer for a basis, which obviously it is not. The Transport Commissioner overlooked this basic infirmity in the order made by the Tax Officer.

10. So we set aside the orders made by the Tax Officer and the Transport Commissioner.

11. But we make no direction in regard to costs.

KSB

Order set aside.

Misra for repayment of the mortgage dues, and that Mayadhar taking advantage of the minority of respondent No. 1 and the helplessness and ignorance of respondent No. 2 purchased the property from United Bank to deprive them of their title. The sale in favour of Mayadhar was collusive. They accordingly prayed that delivery of possession of the property should not be given to Mayadhar. The executing Court overruled this objection holding that it had no merit. The lower appellate Court has held that respondents 1 and 2 established their case and that the application for delivery of possession by Mayadhar was not maintainable. Against the reversing appellate decree this Misc. Appeal has been filed by Mayadhar.

2. Mr. Sinha raised two contentions—

(i) The delivery of possession of the property purchased by the Cuttack Bank in auction sale in execution of the decree has nothing to do with the execution, discharge or satisfaction of the decree and hence the objection under Section 47 is not entertainable.

(ii) The learned lower appellate Court acted contrary to law in holding that respondents 1 and 2 established their objection on merits.

3. The explanation to Section 47, Civil P. C. lays down that for the purposes of that section a purchaser at a sale in execution of the decree is a party to the suit. The question raised by respondents 1 and 2 would thus be one between them as judgment-debtors and Mayadhar as the transferee from the auction purchaser who is to be deemed as a party to the suit by virtue of the explanation, and not on the basis of the theory that he is the judgment-debtor or the representative of the judgment-debtor. On this ground the application cannot be said to be non-maintainable.

4. The next question for consideration is whether the objection to the delivery of possession after the confirmation of the sale relates to execution, discharge or satisfaction of the decree. On this point there is conflict of authority. So far as this Court is concerned, the consistent view is that this is not such a question and does not come within the purview of Section 47. In AIR 1931 Pat 241 (FB), Tribeni Prasad Singh v. Ramasray Prasad Choudhari, a Full Bench of Patna High Court held that where the property was purchased in execution of a decree for sale under a mortgage or a simple money decree, the application for delivery of possession does not relate to execution, discharge or satisfaction of the decree. The theory is that after confirmation of the sale the decree becomes satisfied and the property sold is no longer available to be pursued for execution, discharge or satisfaction of the decree. The rival view as prevalent in Madras and Calcutta was critically examined and was not accepted.

The aforesaid principle has, however, no application to applications for recovery of possession in execution where the decree itself directs delivery of possession. In such a case delivery of possession constitutes an integral part of the decree. In ILR 1963 Cut 393, Dinabandhu v. Somnath, the aforesaid distinction was pointed out and the Full Bench decision was accepted as correct. In AIR 1965 Orissa 2, Sadhucharan v. Sudarshan, the aforesaid Full Bench decision was followed and his Lordship observed that in a case where the decree does not direct delivery of possession, any application for recovery of possession does not pertain to execution, discharge or satisfaction of the decree.

In paragraph 7 of that judgment there is slight inaccuracy in the observation that the auction purchaser is a representative of the judgment-debtor. That was the old view, but no longer stands good, in view of the amendment of the explanation to Section 47, Civil P. C. in 1956 whereby the auction purchaser was included to be deemed as a party to the suit for the purpose of that section. His Lordship was aware of this position in paragraph 6 but possibly inadvertently made a contrary observation in paragraph 7. That has however no bearing on the question under discussion.

5. In this case admittedly the sale was confirmed on 12-7-61. The application for delivery of possession was made by Mayadhar about 1½ years after. The objection raised by respondents 1 and 2 under Section 47, Civil P. C. does not relate to execution, discharge or satisfaction of the decree, and does not come within the scope of Section 47. The learned lower appellate Court should have overruled this objection. It is open to respondents 1 and 2 to file a separate suit to establish their claim, if so advised.

6. On another ground also this appeal is to be allowed. As has already been stated, the objection does not come within the purview of Section 47. The order of the executing Court must be taken to have been passed under Section 151, Civil P. C. Respondents 1 and 2 were adversely affected by that order and should have come up in revision. No appeal lay against that order.

7. In the result, the judgment of the lower appellate Court is set aside and that of the trial Court restored. The Misc. Appeal is allowed. In the circumstances parties to bear their own costs throughout.

TVN/D.V.C.

Appeal allowed.

AIR 1969 ORISSA 146 (V 50 C 50)

S. ACHARYA, J.

Biro Swain and others, Petitioners v. State of Orissa and another, Opposite parties

Criminal Revn. No 599 of 1966, D/- 15-10-1968, from order of S J Ganjam-Boudh, Berhampur, D/- 12-9-1966.

Criminal P. C. (1898), Section 35 — Word 'may' — It not only confers a power but also imposes a duty of putting it in use — Passing of cumulative sentence — Duty of Court.

The word 'may' in section 35 of the Code of Criminal Procedure, not only confers a power but also imposes a duty of putting it in use. Passing of a cumulative sentence, instead of separate sentences, upon an accused person convicted at one trial of two or more offences, is not the order, but is an exception only under certain circumstances enumerated under Section 71, I P C. The courts in passing sentences should be careful enough in setting out the order so as not to leave any ambiguity in the same which might give rise to complications in enforcing the sentence and in dealing with the matter in appeal or in revision.

(Para 11)

P V B Rao, for Petitioners, R. K. Patra, for Standing Counsel, for Opp Parties.

ORDER: This is a revision by ten petitioners whose conviction and sentence under Section 294, I P. C., as passed by Sri D. Naik, Magistrate, 1st Class (Judicial), Aska has been upheld by the learned Sessions Judge, Ganjam by his judgment dated 12-9-1966 passed in Criminal Appeal No. 10 of 1966 (G).

2. The prosecution case in short is that the complainant on the date of occurrence had another criminal case before the First Class Magistrate, Aska against the accused persons, and after the adjournment of the said case to another date he came away from the Court and was taking rest under a banian tree near the Gran Gola of Aska. It is alleged that the accused persons while returning by that way, abused the complainant in filthy language and threatened to assault him, when they saw him sitting under the banian tree. Some persons who were passing on the road nearby intervened and saved the complainant from being assaulted by the accused persons.

3. The petitioners in their defence stated that the complainant has fouted this false case against them due to previous enmity.

4. The learned trial court convicted the petitioners under Sections 294 and 352, I. P. C. read with Section 34 I.P.C. The trial court in passing the sentence against the petitioners ordered as follows.

"They are sentenced to pay a fine of Rs 51 (fifty one), in default of payment of

the fine to undergo rigorous imprisonment for one month each under each count of the offences proved against them."

5. The appellate court found that the charge under Section 352/34, I. P. C. was not proved beyond all reasonable doubt against any of the appellants (the petitioners in this Court) and as such set aside the conviction and sentence passed against them on this count. The said court on a finding that the offence under Section 294, I. P. C. was proved against all the petitioners confirmed the order of conviction and sentence of the trial court on this count.

6. Mr. P. V. B Rao appearing for the petitioners contended, amongst other things that the ingredients constituting the offence under Section 294, I. P. C. have not been established, and that there was no finding that the offensive words were uttered at or near a public place. It was also urged that the P. Ws supporting the complainant's case were highly interested, and as the appellate court did not place any reliance on their evidence regarding the offence under Sections 352/34, I. P. C., he should not have placed any reliance on them in respect of other minor allegations against the petitioners. It was also urged by Mr. Rao that it is highly improbable that all the ten petitioners would have uttered exactly the same alleged offensive words and that the alleged offensive words cannot be considered as obscene words considering the status of the parties involved in the incident.

7-9. There was strained feeling between the parties and the appellate court disbelieved the major part of the prosecution case by holding that the prosecution evidence did not inspire confidence. This being so one has to be cautious in scrutinizing and scanning the evidence in order to examine the correctness or otherwise of the conviction under Section 294, I. P. C. upheld against the petitioners.

[After considering evidence His Lordship proceeded.]

10. In view of all that has been stated above, it is difficult for me to come to a definite finding that the offence under Section 294, I. P. C. has been proved against the petitioners beyond all reasonable doubts. I would, therefore, on giving the petitioners the benefit of doubt, set aside their conviction under Section 294, I. P. C. and they are hereby acquitted. The fine if realised from the petitioners be forthwith refunded to them.

11. I would, however, like to observe in this case that the trial court while holding the petitioners guilty under Sections 294 and 352, I. P. C. read with Section 34, I. P. C. acted in a negligent manner in passing the sentence as follows—

"They are sentenced to pay a fine of Rs. 51 (fifty-one), in default of payment

of the fine to undergo rigorous imprisonment for one month each under each count of the offences proved against them." From a reading of the above sentence it would appear that the petitioners were conjointly ordered to pay a fine of Rs. 51 only for their above conviction on two heads, but in default of payment of this fine each of them was to undergo rigorous imprisonment for one month under each count. Moreover, it is generally the proper course where an accused person is convicted in one trial for more than one offence, that a separate sentence should be passed in respect of each such conviction regard being had to the provisions of Section 35, Cr. P. C. so that if the conviction in respect of offence is set aside, as in this case, the sentence imposed in respect of that offence only would go. The word "may" in Section 35 of the Code of Criminal Procedure, not only confers a power but also imposes a duty of putting it in use. Passing of a cumulative sentence, instead of separate sentences, upon an accused person convicted at one trial of two or more offences, is not the order, but is an exception only under certain circumstances enumerated under Section 71, I.P.C. The courts in passing sentences should be careful enough in setting out the order so as not to leave any ambiguity in the same which might give rise to complications in enforcing the sentence and in dealing with the matter in appeal or in revision.

12. The revision is allowed.

RSK/D.V.C.

Revision allowed.

AIR 1969 ORISSA 147 (V 56 C 51)

G. K. MISRA J.

G. Pannalal Sowcar, Appellant v. Appalabhukatala Sanyasayya Achary, Respondent.

Misc. Appeal No. 64 of 1966, D/-11-9-1968, against order of Sub. J., Jeypore, D/-14-12-1965.

(A) Civil P. C. (1908), S. 41 — Mere communication of information without a formal order is not non-satisfaction certificate.

The act of sending a certificate under Section 41, Civil P. C. is something in the nature of a judicial act and a formal order of the transferee Court to that effect would be necessary to satisfy the requirements of Section 41. Where there is no order of the transferee Court directing that a certificate should be issued under Section 41 and where it did not appear from the order sheet that any such certificate was in fact prepared and signed by the transferee Court and sent to the transferor Court, but the entry in the suit register indicated that an information was sent to the transferor Court relating to the dismissal of the execution

case, there is no non-satisfaction certificate as required by law. Therefore, a mere communication of closure of an Execution Petition, held, could not be construed as constituting a non-satisfaction certificate. AIR 1961 Pat 149, Rel. on. (Para 3)

(B) Limitation Act (1908), Art. 182, Cl. (5) — 'Step in aid of execution' — Transferee Court wrongly dismissing execution petition as being not maintainable — Order amounts to step in aid of execution — (Civil P. C. (1908), Ss. 41 and 48).

The transferee Court dismissed the execution petition on the ground of non-maintainability. The reason given was that it had issued a non-satisfaction certificate under Section 41 of Civil P. C., which was, however, found to be not in accordance with law.

Held, that notwithstanding the misapprehension on the part of the transferee Court, its order dismissing the execution petition was a step in aid of execution. AIR 1932 Pat 286, Foll. (Paras 4 and 6)

(C) Civil P. C. (1908), Sections 11 and 41 — Res judicata — Application of principle in execution proceedings.

It is well settled that an objection which ought to and might have been taken at an earlier stage of the execution constitutes res judicata at a later stage. In a case where the decree-holder did not challenge the order of the executing Court holding that a non-satisfaction certificate was sent to the transferor Court, he was precluded from canvassing the correctness of the decision at a subsequent stage of the proceedings, despite the real position it had not been sent. (Para 5)

(D) Civil P. C. (1908), Sections 39 (1) (c), 41, 42 — Power of transferee Court after despatch of non-satisfaction certificate.

Law is well settled that despite the non-despatch of a non-satisfaction certificate by the transferee Court to the transferor Court the transferor Court retains jurisdiction to execute the decree in respect of all matters other than those which have been transferred to the transferee Court. AIR 1964 Orissa 170, Foll. (Para 5)

Cases Referred: Chronological Paras
(1964) AIR 1964 Orissa 170 (V 51)=

ILR (1964) Cut 556, Giridhari Lal v. Thakursidas 5

(1961) AIR 1961 Pat 149 (V 48)=
1961 BLJR 75, Prahlad Prasad v. Thakur Prasad 3

(1932) AIR 1932 Pat 286 (V 19)=
ILR 11 Pat 513, Sheshaiyar v. Madanmohan 4

P. V. B. Rao, for Appellant; N. V. Ramdas and N. B. K. Murty, for Respondent

JUDGMENT: The decree-holder obtained a money decree in the Court of the Munsif, Vizianagaram on 4-10-52. It was confirmed in appeal on 31-8-53. On 20-4-54, E. P. No. 480 of 1954 was filed in the

Court of the Munsif, Vizianagram. On 28-8-54 a non-satisfaction certificate was issued by the Munsif, Vizianagram to the Munsif, Jeypore, through the District Judge. On 23-9-54, E P No. 147 of 1954 was filed before the Munsif, Jeypore. On 17-4-58 the execution proceeding was closed on part satisfaction. This result was communicated to the Munsif, Vizianagram on 25-4-1958. On 17-10-60, E P No 105 of 1960 was filed in the Munsif's Court, Jeypore. On 11-11-60 the execution proceeding was dismissed as not maintainable. On 18-7-1963, E P No 1179 of 1963 was filed in the Munsif's Court, Vizianagram. That Court sent a non-satisfaction certificate to the Munsif, Jeypore on 3-1-1964. The certificate was received on 8-1-64. E P. No 74/94 of 1964/65 was filed on 8-7-64. Two objections were raised by the judgment-debtor that the decretal dues had been completely paid and that the execution was barred by limitation. The executing Court overruled both the objections. Before the appellate Court the judgment-debtor abandoned the plea of payment. The appellate Court however, held that the execution proceeding was barred by limitation. Against the reversing order of the appellate Court this Miscellaneous Appeal has been filed by the decree-holder.

2. The following questions arise for consideration:

(1) Whether the order dated 25-4-58 communicating the result that the execution proceeding was closed on part satisfaction is a non-satisfaction certificate under Section 41, Civil P. C.

(2) Whether E. P. No. 105 of 1960 pending in the Court of the Munsif, Jeypore, from 17-10-60 to 11-11-60 constitutes a step in aid of execution.

(3) Whether the failure on the part of the decree-holder to object to the dismissal of E. P. No 105 of 1960 as not maintainable constitutes *res judicata* in respect of an objection that a non-satisfaction certificate was despatched by the transferee Court to the transferor Court.

(4) Whether E. P. No. 1179 of 1963 in the Vizianagram Court was not in a proper Court as no non-satisfaction certificate had been sent by the Jeypore Court to the Vizianagram Court.

3. It is to be noted that E. P No 147 of 1954 in the Court of the Munsif, Jeypore was closed on 17-4-58 and this result was communicated to the Vizianagram Court on 25-4-58. The question is whether mere communication of the order constitutes a non-satisfaction certificate under Section 41, Civil P. C. which runs thus—

"The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure".

There is some conflict of authority on this point. The matter is fully discussed in AIR 1961 Pat 149, Prahlad Prasad v. Thakur Prasad. Their Lordships observed that the act of sending a certificate under Section 41 is something in the nature of a judicial act and a formal order of the transferee Court to that effect would be necessary to satisfy the requirements of Section 41. Where there is no order of the transferee Court directing that a certificate should be issued under Section 41 and where it did not appear from the order sheet that any such certificate was in fact prepared and signed by the transferee Court and sent to the transferor Court, but the entry in the suit register indicated that an information was sent to the transferor Court relating to the dismissal of the execution case, there is no non-satisfaction certificate as required by law. With respect I am inclined to accept the view as laying down the correct law. The communication made on 25-4-58 cannot be construed as constituting a non-satisfaction certificate.

4. If a non-satisfaction certificate was not despatched by the transferee Court to the transferor Court, as has already been held, E. P. No 105 of 1960 was properly filed before the Munsif, Jeypore. It had complete jurisdiction over the matter. Unfortunately the Munsif, Jeypore dismissed E. P. No 105 of 1960 as not maintainable on the erroneous view that the communication made on 25-4-58 constituted a non-satisfaction certificate. The decree-holder became satisfied with the order passed on 11-11-60. The discussion would therefore, proceed on the assumption that the order was correct, though it was contrary to law. The question, therefore, arises whether this execution would constitute a step in aid so, as to save limitation. On identical facts it was held in AIR 1932 Pat 286, Sheshaiyar v. Madanmohan, that it would constitute a step in aid. Their Lordships said that if the Court to which a decree is sent for execution while retaining jurisdiction to execute the decree returns an application for execution which was properly made to it under a misapprehension, that will not prevent the making of the application from being tantamount at least to a step in aid of execution.

5. The further question for consideration is whether the order of the executing Court on 11-11-60 that a non-satisfaction certificate had been sent to the Vizianagram Court and as such the execution before the Munsif, Jeypore was not maintainable constitutes constructive *res judicata*. It is well settled that an objection which ought to and might have been taken at an earlier stage of the execution constitutes *res judicata* at a later stage. That principle would have full application to this case and accordingly the decree-holder is precluded from raising the objection that a non-satisfaction

certificate was not sent to the Vizianagram Court, despite the real position it had not been sent.

If *res judicata* operates, the assumption would be that a non-satisfaction certificate was sent to the Vizianagram Court. Law is well settled that despite the despatch (Non-despatch?) of a non-satisfaction certificate by the transferor (transferee?) Court to the transferee (transferor?) Court the transferee (transferor?) Court retains jurisdiction to execute the decree in respect of all matters other than those which have been transferred to the transferee Court. This has been fully discussed in AIR 1964 Orissa 170, *Giridhari Lal v. Thakursidas*. The question, however, becomes academic in this case as it has to be assumed that a non-satisfaction certificate had been despatched to the Vizianagram Court and accordingly the Vizianagram Court had jurisdiction to entertain E. P. No. 1179 of 1963 even though the relief might have covered properties situated within the jurisdiction of the Munsif, Jeypore. In this view of the matter the fourth question raised by Mr. Ramdas does not arise for consideration.

6. In view of the aforesaid conclusions, the execution application is within limitation and the judgment-debtor's objection must be overruled. The order of the lower appellate Court is set aside and the Misc. Appeal is allowed. In the circumstances parties to bear their own costs throughout.
TVN/D.V.C. Appeal allowed.

AIR 1969 ORISSA 149 (V 56 C 52)

B. K. PATRA, J.

Lakshman Jena, Petitioner v. Sudhakar Paltasingh, Opposite Party.

Criminal Revn. No. 396 of 1966, D/- 21-8-1968, from order of Addl. Dist. Magistrate Puri, D/- 11-6-1966.

Criminal P. C. (1898), Sections 200, 202, 203, 156, 169, 173, 190(1)(b), 4, 537—Final report by police — Protest petition with request to call upon police to submit charge sheet and to take action against opposite party — Dismissal of petition without examining petitioner on oath and without proceeding in accordance with provisions of Chapter 16, held contrary to law — Though the Magistrate had no power to call for a charge-sheet it does not mean that petitioner should be disentitled to get relief provided by law — Protest petition was to be treated as petition of complaint.

The Police after an investigation on an information lodged by the petitioner submitted a final report. The petitioner thereupon filed a protest petition in the court of S. D. M. for rejecting the final report and to call upon the police to submit a charge-

sheet. He had also alleged in the petition that the opposite party had taken away the crop which he had kept on his land and requested the Magistrate to take action against the opposite party. The S. D. M. without examining the petitioner on oath and without proceeding in accordance with the provisions laid down in Chapter 16, Cr. P. C. relying merely on the police report rejected the petition.

Held, that the procedure followed by the S. D. M. was not only unjustified but also contrary to law and the order dismissing the complaint petition under Section 203 could not be sustained. Case law discussed. (Para 7)

The materials on which the Magistrate has to act in disposing of a complaint petition under Section 203 Cr. P. C. are expressly limited by the section itself to (i) statement on oath, if any, of the complainant and the witnesses produced by him, and (ii) the result of the investigation or inquiry under Section 202. The investigation by the police had not been ordered by the Magistrate under Section 202, Cr. P. C. and as such the statements made by witnesses before the police during such inquiry or the result of the inquiry embodied by the police in the final report cannot be looked into by the Magistrate in dealing with the complaint under Section 203, Cr. P. C. (Para 7)

Doubtless, as held in AIR 1968 SC 117 the Magistrate had no power to call for a charge sheet as prayed for by the petitioner, but that did not mean that he should on that account be disentitled to get such relief as was provided by law. Merely because the prayer made by the petitioner was not in accordance with law he could not be denied such relief as was provided under law and that provision was to treat the protest petition as a petition of complaint to be dealt with in accordance with the provisions of Chapters XVI and XVII of the Code. (Para 4)

The provision of Section 200 is mandatory. The omission to examine the complainant on oath under Section 200 was an irregularity, and if by reason thereof the complainant was prejudiced, he was entitled to an order that the subsequent proceedings were invalid. Prejudice in fact had been caused to the complainant because he had been deprived of an opportunity to explain his case to the Magistrate which he could have got had the Magistrate examined him on oath. Case law discussed.

(Para 6)

| Cases Referred: | Chronological | Paras |
|--|---------------|-------|
| (1968) AIR 1968 SC 117 (V 55) = | | |
| 1968 Cri LJ 97, Abhinandan Jha v. Dinesh Mishra | | 8 |
| (1963) AIR 1963 SC 1430 (V 50) = | | |
| 1963 (2) Cri LJ 397, Chandra Deo Singh v. Prakash Chandra Bose | | 7 |

(1953) AIR 1958 Mad 523 (V 45) =
 1958 Cri LJ 1323, In re, Rajangam
 (1958) AIR 1958 Orissa 11 (V 45) =
 1958 Cri LJ 63, Mahabir Prasad
 Agarwala v. State
 (1957) 1957 Cri LJ 673 = (1957) 1
 Mad LJ 157, Ramaswami Nadar
 v. Viswanathan
 (1951) AIR 1953 Orissa 83 (V 40) =
 1953 Cri LJ 655, Api Samal v.
 Bisi Mallik
 (1929) AIR 1929 Pat 473 (V 16) =
 30 Cri LJ 1056 (FB), Bharat
 Kishore Lal Singh v. Judhistr
 Modak

R. N. Misra and R. C. Patnaik, for Petitioner; R. C. Ram, for Opposite Party.

ORDER. This is an application in revision directed against an order dated 23-3-66 passed by the S. D. M., Khurda, and confirmed in revision by the A. D. M. (J), Puri in the following circumstances.

2. The petitioner lodged information at the Bolagarh P. S. that he was a bhagchasi in respect of plot Nos. 231 and 228 in Khata No. 63 in mouza Shyamsundarpur under the landlord Paramananda Mahapatra and that he raised crops in the land during the disputed year and *in due course* cut and kept the same in the field for subsequently making them into sheaves and that thereafter the opposite party and these two brothers along with a number of labourers trespassed into the land and removed the crops therefrom. The Police after investigation submitted a final report on the ground of mistake of law. The petitioner thereupon filed a protest petition in the court of the S. D. M., Khurda, with a prayer for rejecting the final report submitted by the police and to call upon the latter to submit charge-sheet. The S. D. M. without examining the petitioner on oath and without proceeding in accordance with the provisions laid down in Chapter XVI of the Code of Criminal Procedure rejected the petition on the ground that the local police had visited the spot and had examined boundary witnesses, who affirmed the possession of the opposite party as bhagchasi of the land and that the petitioner's case was supported by only the landlord Paramananda Mahapatra. Against this order the petitioner filed a revision petition before the A. D. M. (J), Puri who rejected it on the ground that the dispute appeared to him to be of civil nature. It is the procedure followed by the Magistrate and the correctness of the orders passed by him and the A. D. M., (J) that are now challenged before me.

8. It is now settled by the decision of the Supreme Court reported in Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117 that

"There is no power, expressly or impliedly conferred, under the Code on a

Magistrate to call upon the police to submit a charge-sheet, when they have sent a report under section 169 of the Code, that there is no case made out for sending up an accused for trial."

Their Lordships indicated that where such a final report is received from the police, the Magistrate may either accept it and close the proceeding or the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation and may give directions to the police under Section 158 (3) to make a further investigation. The Police, after such further investigation, may submit a charge-sheet, or, again submit a final report, depending upon the further investigation made by them. If ultimately, the Magistrate forms the opinion that the facts, set out in the final report, constitute an offence, he can take cognizance of the offence, under section 190 (1) (b), notwithstanding the contrary opinion of the police, expressed in the final report.

4. It is not clear from the records whether the S. D. M. had accepted the final report submitted by the police before the petitioner filed the protest petition before him. Even if he did so, that would not stand in the way of his entertaining a complaint filed by the petitioner and if he is satisfied after examining the petitioner and the witnesses produced by him that there is a *prima facie* case, he may summon the accused under Section 204, Cr. P. C. In this case, as stated before a protest petition was filed by the petitioner no doubt with the prayer that the Magistrate should call for a charge-sheet. Doubtless as held in the Supreme Court decision referred to above, the Magistrate had no power to call for a charge-sheet as prayed for by the petitioner, but this does not mean that he should on that account be disentitled to get such relief as is provided by law. "Complaint" as defined in Section 4, Cr. P. C. is an allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence.

The protest petition which is on record contains the allegation that the opposite party had taken away the crop which the petitioner had kept on his land and requested the Magistrate to take action against the opposite party in a manner which the petitioner then thought was sanctioned by law but which, as now transpires, was not within the power of the Magistrate. Merely because the prayer made by the petitioner was not in accordance with law he cannot be denied such relief as is provided under law and that provision is to treat the protest petition as a petition of complaint to be dealt with in accordance with the provisions of Chapters XVI and XVII of the

Code. Section 200, Cr. P. C. enjoins that when a complaint petition is presented before the Magistrate he shall at once examine the complainant and the witnesses present if any, upon oath, and record the substance of such examination.

Thereafter he should follow one of the three following courses:

(1) to bring the accused to trial;
 (2) under Section 202, Cr. P. C. either inquire into the case himself or direct an enquiry to be made either by a subordinate Magistrate, or a police officer or such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint; or

(3) to dismiss the complaint under Section 203, Cr. P. C.

In this case after the protest petition was filed before the Magistrate he did not examine the complainant on oath, but called for the F. I. R., final report, case diary from the police and after perusing the same dismissed the protest petition on the grounds already stated. The question for consideration is whether the procedure followed by the Magistrate is legal and whether the order passed by him can be upheld.

5. It is contended on behalf of the petitioner that the illegality of the procedure followed by the Magistrate consisted in (i) not examining the complainant on oath, and (ii) in relying on the investigation report made by the police.

6. So far as the first point is concerned, Section 200, Cr. P. C. appears to be mandatory that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present on oath. A decision of the Madras High Court reported in (1957) 1 Mad LJ 157 = (1957) Cri LJ 673 on which the petitioner relies says that the Magistrate could apply Section 203 only if after examining the complainant and the witnesses who are present in court he finds sufficient ground for proceeding with the case and that a dismissal of complaint under Section 203, Cr. P. C. without adopting the procedure under Section 200 is not valid. It is contended by the opposite party that non-examination of the complainant as required under Section 200, Cr. P. C. is not illegal, but only irregular and in support of this proposition reliance is placed on a Full Bench decision of the Patna High Court reported in *Bharat Kishore Lal Singh v. Judhistir Modak*, AIR 1929 Pat 473 and on two decisions of this Court reported in *Api Samal v. Bisi Mallik*, AIR 1953 Orissa 88 and *Mahavir Prasad Agarwalla v. State*, AIR 1958 Orissa 11.

In the Patna case one Judhistir Modak filed a petition before the Deputy Commissioner of Manbhum who is also the District Magistrate complaining against the high-handedness of one Bharat Kishore Lal Singh Deo and sought for protection. The

Deputy Commissioner sent it to the police for report. The police report was received in due course and on the basis thereof the District Magistrate directed the prosecution of Bharat Kishore. Against that order Bharat Kishore came up in revision and one of the contentions advanced on his behalf was that as the petition filed by Judhistir Modak was in the nature of a complaint petition he ought to have been examined by the Deputy Commissioner and that as the Deputy Commissioner had not done so, the subsequent proceedings were illegal. In the peculiar circumstances of the case, the learned Judges held that the petition filed by Judhistir Modak before the Deputy Commissioner was not a complaint as defined in Section 4 of the Code but was a petition addressed to the Deputy Commissioner, in his executive capacity seeking protection. In this view of the matter it was not necessary for the learned Judges to decide the further question whether non-examination of the complainant was illegal or merely irregular. But since that specific point had been raised before their Lordships they held that the omission to examine the complainant on oath is not an illegality but is merely an irregularity, but that the appellant was not entitled to any relief on that score because by reason of the irregularity he did not suffer any injustice.

It may be noticed that in the Patna case the objection regarding non-examination of the complainant was taken by the opposite party and not by the complainant. In the case reported in AIR 1953 Orissa 88 the facts were these. On a petition of complaint the Magistrate without examining the complainant on oath forwarded the same to a Police Officer of enquiry and report under Section 202, Cr. P. C. On receipt of the police report, the Sub-Divisional Magistrate directed that cognizance should be taken under Section 190 (1) (b), Cr. P. C. The accused were convicted at the trial. In revision the accused contended that the Magistrate having taken cognizance under Section 190 (1) (b) was not justified in ignoring the police report which contained statements of complainant and his witnesses at variance with those given at the trial. The learned Judge held relying on the Full Bench decision of the Patna High Court referred to above that in the circumstances of the case the Magistrate must be deemed to have taken cognizance under Section 190 (1) (a) and his omission to examine the complainant on oath was only an irregularity not vitiating the trial.

Here again it may be noticed that the objection regarding non-examination of the complainant was taken on behalf of the accused. A similar view was also taken in the subsequent decision of this Court reported in AIR 1958 Orissa 11. But that again was a case where the objection was taken not by the complainant, but by the

accused. The correct position therefore appears to be that the omission to examine the complainant on oath under Sec 200, Cr P. C. is an irregularity, and if by reason thereof the complainant is prejudiced he is entitled to an order that the subsequent proceedings are invalid. So far as the present case is concerned, prejudice in fact had been caused to the complainant because he had been deprived of an opportunity to explain his case to the Magistrate which he could have got had the Magistrate examined him on oath.

7. The second point however appears to be more substantial. The petitioner approached the Magistrate with the specific allegation that he was not satisfied with the way the police conducted the investigation and that he had reason to believe that the police sided the opposite party and submitted the final report. In these circumstances, the action of the Magistrate in relying merely on the police report and dismissing the protest petition filed by the complainant appears to be not only unjustified but also contrary to law. The materials on which the Magistrate has to act in disposing of a complaint petition under Section 203, Cr P. C. are expressly limited by the Section itself to (i) statement on oath if any, of the complainant and the witnesses produced by him, and (ii) the result of the investigation or inquiry under Section 202. The use of any other material besides the above appears to be absolutely unwarranted. What has happened in this case is that the Magistrate had utilised the statements made by the witnesses before the police during the police investigation. That investigation by the police had not been ordered by the Magistrate under Section 202, Cr. P. C. and as such the statements made by witnesses before the police during such inquiry or the result of the inquiry embodied by the police in the final report cannot be looked into by the Magistrate in dealing with the complaint under Section 203, Cr. P. C.

In the case reported in *In re, Rajangam*, AIR 1958 Mad 523, the accused was alleged to have committed an offence under Section 493, I P. C. The complainant first moved the police for action. After making some inquiry the police refused to take any action whereupon he filed the complaint petition before the Magistrate. After some witnesses were examined for the complainant the case was posted to a particular date for examination of the accused, but as on that date the complainant was absent, the complaint petition was dismissed under Section 259, Cr. P. C. The complainant thereafter filed a second complaint on the same facts before the Magistrate. The Magistrate relying on the evidence already recorded on the prior complaint and taking into consideration certain facts appearing in the police case diary dismissed the complaint

under Section 203, Cr. P. C. The District Magistrate who was moved in revision being of the view that the procedure adopted by the Magistrate was illegal, ordered further inquiry by the Magistrate. The accused approached the High Court in revision and the learned Judge Ramaswami, J. while dismissing it held that where the Magistrate in dismissing the complaint under S. 203, Cr. P. C. looks into materials, into which he cannot look, for example, he makes use of the evidence already taken on the prior complaint and the police case diary, the whole procedure is unwarranted by law.

The very same question came up for consideration before the Supreme Court in a case reported in *Chandra Deo Singh v. Prokash Chandra Bose alias Chabi Bose*, AIR 1963 SC 1430 and their Lordships held that—

“Where the Magistrate has ordered an enquiry under Section 202 by another Magistrate it is not open to him to consider the statements recorded during investigation by the police or the evidence adduced before him during the enquiry arising out of another complaint. If the Magistrate has based his decision in dismissing the complaint on such extraneous matter the proceedings would be vitiated.”

It is therefore manifest that the procedure followed by the learned Magistrate in the trial court is not in accordance with law and the order dismissing the complaint petition under Section 203, Cr. P. C. cannot be sustained.

8. The learned A. D. M. (J), Puri before whom a revision was filed noticed the infirmity in the case that the complainant was not examined on oath and that the Magistrate relied fully on the police report, but he did not appreciate the consequences thereof. He contended himself by saying that the police was justified in submitting the final report in this case and that the dispute of the parties being of a civil nature, no further action need be taken on the criminal side. He was thus wrong in the view taken by him.

9. In the result, I would allow this application, set aside the order passed by the courts below and direct that a further inquiry should be made by the S. D. M., Khurda according to law and in the light of the observations made above.

LGC/D.V.C.

Application allowed.

AIR 1969 ORISSA 152 (V 56 C 53)

S BARMAN, C. J. AND S. ACHARYA, J.
Md. Serajuddin, Appellant v. State of Orissa, Respondent.

First Appeal No 33 of 1967, D/- 24-1-1969, from order of Third Addl Sub J. Cuttack, D/- 24-12-1968.

CM/CM/A960/69

(A) Contract Act (1872), Section 2 (e) — Mining lease — Supply of land and electricity not term of the lease — Lessee requesting for help and assistance of Government to get them — Replies by Government — Not an agreement.

Where a mining lease did not provide as a term of lease that the State Government should help and assist the lessee for getting land and electricity for the proposed plant of the lessee and the lessee by letters requests the Government for help, assistance, support and/or intervention of the Government to get land and electricity for the Plant, the expectations, wishes and longings of the lessee expressed in the letters and suitably replied to by the Government, could not have the sanctity of a term of an agreement so as to be enforceable in law. (Para 10)

To help and assist a particular person in performing his obligations may be considered as duties of imperfect obligations, enforcement of which is not sanctioned in law. (Para 10)

Held further that as no binding promise under-taking or understanding of an imperative nature between the parties, regarding land or electricity to be made available by the State Government was obvious or patent from the letters, it could not be read as an implied term of the lease. (Para 16)

(B) Constitution of India, Article 299 (1) — Object of — Requires a formal written deed — Oral contract or contract by correspondence not within the Article.

The words 'expressed to be made and executed' in Article 299 require a deed or formal written contract, so that an oral contract or a contract by correspondence or other informal medium will not fulfil the requirement of the said article which is provided to safeguard Government against unauthorised contract. (Para 19)

(C) Constitution of India, Art. 299 — Provision is mandatory — Principle underlying it stated — Essentials of the contract under Art. 299.

Provisions of Article 299 of the Constitution are mandatory and are based on the wholesome principle that the State should not be saddled with any liability without specifically mentioning the same in express words in the deed itself which would enable the various agencies, and the competent authorities to apply their mind consciously to the terms and conditions expressed in the contract itself, before they lend their seals and signatures to the same. (Para 19)

Further, the contract under Art. 299 must show on its face all the conditions and terms on which the State is made to part with its right and is obliged to act in a particular manner, and that it was made on behalf of the State. AIR 1967 SC 203 Rel. on. (Para 19)

(D) Constitution of India, Art. 299 (1) — Contract under — Implications arising out of the contract — Nature of.

In a valid contract as envisaged under Article 299 (1), there may be implications arising out of such a contract. The expression 'implications arising out of the contract' will however, cover only such terms and conditions which are intimately entwined, involved and entangled with the express terms in the contract in such a manner that they could be spelled out on a mere reading of the said express terms. These words cannot go to mean that certain new things could be imported into it from extraneous matter, and be implied into the contract as its terms only because by the performance of these implied terms the performance of the contract would be facilitated or expedited. AIR 1967 SC 203 Rel. on. (Para 19)

(E) Constitution of India, Art. 299 (1) — Mines and Minerals (Regulation and Development) Act (1957), S. 5 — Mining lease — Court cannot import implied terms.

The grant and execution of a mining lease being circumscribed by various limitations and being subjected to and regulated by special provisions in law and the Constitution, the Courts should be loath to read into its express provisions any implied terms, such as, an under-taking by the Government of making available any land or electricity for the lessee's proposed plant. (Paras 21, 22)

(F) Contract Act (1872), S. 56 — Contract becoming impossible — Force majeure — Meaning — Force majeure clause — Rule of ejusdem generis applies — (Words and phrases — Force majeure).

The expression "force majeure" is not a mere French version of the Latin expression "vis major", and strikes, breakdown of machinery and such things which, though normally not included in "vis major", are included in "force majeure". Where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything of the nature stated above or over which he has no control. (1920) 2 KB 714, Ref. to. (Para 31)

Further, the "force majeure" clause should be construed with a close attention to words which precede or follow it, and with due regard to the nature and the general terms of the contract. Therefore the words "any other happening" in such a clause must be given ejusdem generis construction so as to engulf within its fold only such happenings and eventualities which are of the nature and type illustrated in the same clause with close attention to the nature and terms of the contract and would not reasonably be within the power and control of the party. (Para 31)

(G) Mines and Minerals (Regulation and Development) Act (1957), S. 5 — Government Grants Act (1895), Ss. 2, 3 — Transfer of Property Act (1882), Ss. 111 (g), 114 — Government grants — Construction of — Mineral leases — Being Government grants Ss. 111 (g) and 111 T. P. Act do not apply to it — (Deed — Construction).

Grants by the Government are usually construed most favourably for the Government, and that appears to be the reason why application of some laws such as Transfer of Property Act, 1882, are generally excepted in such cases.

(Para 33)

Though a mineral lease under the Mines and Minerals (Regulation and Development) Act 1957, may not be a grant of land in perpetuity, it is certainly a grant by transfer of interest in land, and as such, the grant is completely covered by the provisions of the Government Grants Act. It is therefore outside the operation of the Transfer of Property Act, 1882. Sections 111 (g) and 114, T. P. Act do not, therefore, apply to mining leases AIR 1927 Pat 319, Rel. on. Case Law Referred.

(Para 33)

It follows that all the provisions, restrictions, conditions and limitations contained in the lease shall be followed and take effect according to their tenor, notwithstanding any rule of law, statute or enactment of the Legislature to the contrary, as provided for under Section 3 of the Government Grants Act. AIR 1921 Mad 409 and AIR 1938 Cal 229 and AIR 1939 All 263, Rel. on.

(Para 34)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 203 (V 54) =
 (1966) 3 SCR 919, K. P. Chaudhary v State of M. P. 18
 (1962) AIR 1962 SC 113 (V 49) =
 (1962) 2 SCR 880, Bhikraj v. Union of India 19
 (1961) AIR 1961 SC 1285 (V 48) =
 (1961) 3 SCR 1020, Dhanraj Mal Gobindram v. Shamji Kalidas & Co 31
 (1958) AIR 1958 SC 512 (V 45) =
 1959 SCR 213, Keshavlal Lalubhai Patel v Lalbhai Trikumlal Mills Ltd. 23
 (1951) AIR 1951 Cal 361 (V 38) =
 55 Cal WN 171, Manindra Nath Binda v. Amiya Pal 33
 (1946) AIR 1946 Mad 180 (V 33) =
 58 Mad LW 573, V. Pedda Rangaswami Shresthi v. Sri Vishnu Nimbakar 33
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 (1939) AIR 1939 All 263 (V 26) =
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 (1927) AIR 1927 Pat 319 (V 14) =
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 (1918) 1 KB 592 = 87 LKB 724,
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 (1915) 1 KB 681 = 84 LKB 967,
 Matsoukis v. Priestman & Co. 31

R. Chowdhury, R. N. Misra, R. K. Mohanty, S. Patnaik and Sidhartha Roy, for Appellant, Advocate General and S. Misra (2), for Respondent.

ACHARYA, J:— This is a defendant's appeal against the judgment and decree passed by the Additional Subordinate Judge, Cuttack in T. S. No 55 of 1964 decreeing the plaintiff's suit for evicting the defendant from the suit mines, directing him to deliver possession of the same to the plaintiff, and restraining the defendant by a permanent injunction from operating the suit mines in any manner.

2. The plaintiff who is the State of Orissa filed the suit on the following facts.

3. The suit mines belonging to the plaintiff having a rich deposit of Chromite ore were leased out to the defendant by Government orders dated 10-10-1958 (lease executed on 26-3-1959), on his application dated 9-4-1953 representing that he would set up a plant for the manufacture of Ferro Chrome and Ferro Silicon, and that he had obtained necessary licence for import of machineries, furnace and other equipments for setting up such a Plant. The aforesaid mining lease was granted in favour of the defendant after prolonged correspondence, deliberation and discussion between the two parties regarding the terms of the lease, and on obtaining prior approval of the Central Government as required under the Mines and Minerals Act, 1957. The Government of India while conveying their approval to the grant of the said lease in favour of the defendant (Ext. 18), with a view to ensure supply of mineral to the Ferro Chrome Plant, stated therein that a condition be incorporated in the lease deed to the effect that if M/s Seraajuddin & Co., of which the defendant was the Managing Partner, failed to set up the Plant, the State Government would be entitled to cancel the mining lease without any compensation. On receiving the approval of the Central Government with the above stipulation, the plaintiff intimated the defendant by their letter Ext. 17 dated

30-9-1958 and order Ext. 16 and letter Ext. 15 both dated 10-10-1958 that the plaintiff had proposed/ordered to grant the mining lease to the defendant in respect of the suit mines subject to the acceptance by the defendant of all the usual conditions in mining lease, and the conditions already agreed upon, and also the further condition as laid down by the Central Government that the defendant should set up a Ferro Chrome Plant within five years from the date of order dated 10-10-1958, and that if the defendant failed to erect the Plant within that period the plaintiff would have the option to cancel the lease without compensation. The defendant was asked (by Ext. 15) to intimate his acceptance of the above terms in writing through the Collector, Cuttack. The defendant by his letter (Ext. 12) dated 16-1-1959 intimated his unqualified acceptance of the above terms and conditions.

4. The plaintiff's case was that the mining lease was granted with the purpose and intention of encouraging the defendant to set up the Plant after having been ensured about the supply of raw materials to feed the Plant. Although the said lease was for a period of 20 years, it was specifically stipulated in Clause 10 of the Part IX that the lessee should set up a Ferro Chrome Plant within five years from 10-10-1958, failing which the State Government would have the option to cancel the lease without compensation. As the Industrial Licence, granted by the Central Government on 8-5-1958 for setting up a Ferro Chrome Plant, was in favour of M/s. Serajuddin & Co., while the mining lease was executed in favour of the defendant Mohammad Serajuddin, the Managing Partner of M/s. Serajuddin & Co., the Government of India advised the plaintiff to ask the defendant to transfer the said mining lease in favour of M/s. Serajuddin & Co. The plaintiff on the above advice of the Central Government asked the defendant by their letter dated 7th January, 1960 (Ext. 9) to get the aforesaid lease transferred in the name of M/s. Serajuddin & Co., or to arrange transfer of the Industrial Licence in the name of the defendant. The defendant, in fact, as per Ext. D-55 dated 22-1-1962, gave his consent in writing to the transfer of the mining lease in favour of M/s. Serajuddin & Co. as suggested in the above letter.

The defendant in spite of repeated extension of time by the Government of India did not take effective steps to set up the Plant, and as such the Industrial Licence was ultimately revoked on 13-12-1962 (Ext. H-38). As the defendant did not set up the Ferro Chrome Plant within the period of five years from 10-10-1958, as expressly agreed upon by him in Clause 10 of Part IX of the mining lease, and as it was

the only consideration on which the lease was granted, and the Government of India was induced to accord their approval to the grant of the mining lease, the plaintiff by their letter dated 5-12-1963 determined the said lease in exercise of the power reserved to them under the conditions of the said lease. The determination order was communicated to the defendant and he was directed to stop all operations on the suit mines, and to quit and deliver possession of the same to the plaintiff through the Collector, Cuttack. As the defendant did not quit the suit mines, and continued in possession of the same as a trespasser, and illegally continued mining operations over the suit property, the plaintiff filed the suit.

5. The defendant contested the suit admitting that he was the Managing Partner of the registered partnership Firm M/s. Serajuddin & Co., and that in March 1953 he applied for the mining lease, but denied having undertaken to set up a Ferro Chrome Plant. The defendant contended that by about 1955 negotiation started between him and the plaintiff (the State Government) for mining Chromite, and setting up a Ferro Chrome Industry, and that he was able to obtain in the name of M/s. Serajuddin & Co. an Industrial Licence (Ext. H-46) dated 8-5-58 for setting up a Ferro Chrome Plant in the State of Orissa. It was expressly and impliedly agreed upon and understood between him and the State Government that the latter would ensure adequate supply of raw materials by granting a mining lease for Chromite, and to acquire land for setting up the aforesaid Plant and its township, and also assured supply of electric energy for the proposed Plant to the extent of 20,000 K. W. at the first instance and 40,000 K. W. in subsequent stages, and that the State Government would also render adequate financial assistance for the project. The defendant, acting on these promises, understanding and assurance of the State Government undertook the mining lease for Chromite as per the duly registered indenture of lease (Ext. H-47) dated 26-3-1959.

Thereafter the defendant entered into a provisional agreement (Ext. F-5 dated 30-12-1960) with M/s. Demag-Elektrometallurgie GMBH of West Germany (hereinafter to be referred as M/s. Demag) for the manufacture, supply and installation of the proposed Ferro Chrome Plant, and obtained a project report from them at a huge cost. The defendant admitted the acceptance of the terms of the lease deed as per Ext. 12 dated 16-1-1959, but contended that the said acceptance was void being in contravention of Article 299 of the Constitution. As the Industrial Licence (Ext. H-46) was ultimately

revoked by the Central Government on 13-12-1962 (Ext. H-38) after some extension of time, it became absolutely impossible for the defendant to set up the Ferro Chrome Plant. The determination of the above mining lease by the State Government by Ext. C-86 dated 5-12-1963 is illegal, void, mala fide, wrongful and has no effect.

It was further contended that Clause 10 of Part IX of the lease deed being in conflict with Clause 4 of the said part, it was unlawful for the State Government to determine the lease without taking action under Clause 4, and that there was no breach of any of the conditions or default on the part of the defendant at any stage, and that the said Clause 10 being absolutely vague the defendant had no liability or obligation to set up the Plant, and that the Deputy Secretary who signed the said determination order (Ext. C-61) had no power or authority to sign the same on behalf of the State Government, and also that the said order is illegal and inoperative being based on wrong assumptions of fact. It was not possible for the defendant to set up the Plant as the State Government refused to render financial assistance, did not give adequate area to the defendant to obtain Chromite for the Plant, did not acquire land for the Plant site and its township, and did not take any step regarding supply of electric energy. On the above grounds the defendant urged that the suit be dismissed with costs.

6. At the outset Mr. Roy, the learned counsel for the appellant, seriously contended that on the facts of this case the obligation of the defendant to set up a Plant would not arise at all until and unless the State Government provided the requisite electricity therefor, and also made arrangements for the land upon which the Plant was to be built, such terms being essentially implied in the lease. In this connection it was contended that the State Government without performing their part of the reciprocal promises impliedly made for the supply of electricity, land and raw materials, could not have enforced performance of Clause 10 of Part IX of the lease; and that in view of the nature of the obligation undertaken, supply of electricity and arrangements for land by the State Government should have been considered as obvious and something which came in as a matter of course and essential to be imported to give business efficacy to the lease.

7. In order to elucidate his above points Mr Roy drew our attention to various correspondence between the defendant and the plaintiff beginning from 11-1-1956 upto the cancellation of the lease in the year 1963. The documents relied upon by him may be divided

into two categories — namely (1) the documents which are prior to the date of the order of the State Government granting lease of the mining area on 10-10-1958, or even the actual execution of the deed on 26-3-1959, and (2) all those documents which followed after the said two dates.

8. The documents relied upon in support of his above contention regarding supply of electricity prior to 10-10-1958 are mainly these, Ext. B-2 dated 28-11-1957, Ext. D-5 dated 16-6-1958, Ext. C-11 dated 9-9-1958. A reading of Ext. B-2 would show that there was a meeting attended by the Chief Secretary, the defendant, and his technical consultant, where amongst other things the requirement of electricity to the extent of 20,000 K W for the Plant was discussed and the Chief Secretary indicated then that such power could not be made available at that time, and could be met if and when the Planning Commission approved of the installation of a Thermal Station in the State. There is no indication in Ext. B-2 of assurance by the Chief Secretary to supply power of the required amount; and expression of wishes and hopes in Ext. B-2, dependent on uncertain eventualities, and future decisions could not, in our view, amount to an agreement or promise enforceable in law.

By Ext. D-5 the probable date of requirement of full supply of power was stated to be "within two years from the date on which the order of the Plant and machineries is placed with the suppliers". It was requested therein to assure the quantity of power which could be supplied to the defendant on various dates, without which it would not be possible for him to order supply of machineries. By Ext. D-6 the Chief Secretary was requested to appraise the defendant about the quantity of power and their respective dates of supply at Jaipur Road. Ext. D-7 dated 19-8-58 is a letter from the Chief Engineer, Electricity to the defendant asking him to furnish information on different items regarding the Plant and the electric power required for the same. Ext. C-11 indicates the intention of the State Government to generally offer facilities for early establishment of Industries in the State. It also states that Government were agreeable to make available 20,000 K. W. of power for the Plant but the same would depend on the result of future discussion of the State Government with the Planning Commission. Supply of electricity thus being dependent on the uncertain result of the discussion of the State Government with the Planning Commission, there could not have been an assurance to that effect in the said meeting; and such a thing would not be implied as a term of the lease. On

a reading of the aforesaid letters we are satisfied that there was nothing in any of these letters from which a binding contract between the plaintiff and the defendant could be spelled out.

9. Some of the other exhibits in this context would show that the defendant, in express terms, sought the help of the State Government to establish this Plant, and hoped that the State Government would extend necessary facilities to the defendant in the procurement of cheap power, metallurgical coke, transport etc. (Ext. A-3 dated 6-2-1967). In reply to the above expression of hope for help the Additional Secretary to Government replied in Ext. A-4 dated 16-3-1956 that they would be glad to offer every possible encouragement to the establishment of various Industries in the State in order to put into use the power, mineral and other natural resources of the State. By Ext. B-2 it was indicated that supply of electricity upto defendant's expectation could not be assured, and that Government in future would consider bulk supply as desired by the defendant in case they would be able to set up further generating Plants. Most of these letters are couched in a language indicating desires and wishes of the State Government which might be fulfilled in future to help, assist and extend facilities to the defendant.

10. Regarding the alleged promises or assurance to make available land prior to 10-10-1958, the learned counsel for the appellant relied mostly on Ext. B-2 dated 28-11-1957, Ext. B-9 dated 7/1-1958, Ext. B-13 dated 24-4-1958 Ext. B-19 dated 25-6-1958 and Ext. B-22 dated 22-7-1958. Ext. B-2 shows that the Chief Secretary was told about the requirement of 40 to 50 acres of land for the Plant and the township. Ext. B-9 is a letter from the Secretary to Government to M/s. Serajuddin & Co. asking the latter to contact the District Collector for their requirement of land. Ext. B-13 is an application by the defendant to the Collector for allowing them to conduct contour survey of the area in connection with the acquisition of land. Ext. B-19 is a letter seeking clarification as to why land was required near Jaipur Road Railway Station instead of at Bhadrak. These documents only indicate that the appellant entreated for help, assistance, support and/or intervention of the Government to get land and electricity for the Plant. The expectations, wishes and longings of the defendant expressed in these letters, and suitably replied to by the Government, could not have the sanctity of a term of an agreement so as to be enforceable in law. To help and assist a particular person in performing his obligations may be considered as duties of imperfect obligations, enforcement of which is not sanctioned

in law. After prolonged correspondence and detailed discussion on the terms of the lease, it ultimately came to be executed on 26-3-1959. If supply of land and electricity would have been the agreed understanding between the parties that would have definitely found place in some form or other in the aforesaid lease Ext. H-47 dated 26-3-1959. Absence of even a feeble mention regarding these matters obliterates the possibility of any such assurance, much less an agreement on these matters.

11. The appellant knew that under Section 5 (2) of the Mines and Minerals (Regulation and Development) Act, 1957, no mining lease could be granted without the previous approval of the Central Government. The terms of the mining lease and specially Clause 10 of Part IX thereto had to be inserted on the specific direction of the Central Government, and, as such, the lease got the approval only on the inclusion of the aforesaid term. If supply of electricity and making available vast areas of the land for setting up of the Plant and township, involving various complex and complicated considerations, are to be construed as implied terms of the lease executed later, then in our opinion the provisions of Section 5 (2) of the Mines and Minerals Act, 1957 would be rendered absolutely nugatory.

12. Under these circumstances, we are of opinion that the defendant while settling the terms of the lease did not consider making the availability of land and electricity to be an obligation of the Government, and did not actually execute the agreement with that understanding and/or intention, and the defendant acted at his risk in entering into such discussion and correspondence on these matters with the individual concerned with the Government.

13. The documents after the aforesaid Government Order dated 10-10-1958 on which reliance was placed by Mr. Roy for the supply of electricity are Exts. D-16 dated 1-2-1959, D. O. dated 9-1-1961 attached to H-21, H-21, dated 18-2-1961, B-41 dated 24/25-5-1961, D-41 dated 25-1-1962, D-42 dated 16-2-1962 and D/43 dated 19-3-1962. The three points in Ext. D-16 which were alleged to have been discussed and agreed upon between the Minister and the defendant were not proved to have been confirmed. D. O. letter No. 36-GM dated 9-1-1961 attached to Ext. H-21 shows that final selection of site, supply of power, and the question of rate etc. were under consideration, and as such had not been finally decided till then. This would indicate that the minutes of the discussion as alleged in Ext. D-16 were either not correct and/or were not accepted. By Ext. H-21 the State Government expressed their inabi-

lity to supply power at Jaipur Road to the extent of 20,000 K. W. as required by the appellant then, because there was no surplus power available nor was there any transmission line upto Jaipur Road. It was also mentioned therein that electricity as required could only be supplied early in the year 1965. This clearly suggests that there was no promise, assurance or undertaking between the parties to supply the required amount of electricity to the appellant for the setting up of the Plant within five years as expressly provided in Clause 10 of Part IX of the lease. Ext. B-41 indicates that the proposal for the supply of power on concessional basis for the proposed Ferro Chrome Plant was under examination till 25-5-61. Ext. D-41, Ext. D-42 and Ext. D-43 are regarding details of production costs of Ferro Chrome for fixing the rate of power, and are not indicative of anything positive.

14. We do not find anything from the above-mentioned documents that there was any assurance or promise or undertaking, much less an agreement between the parties, that electricity would be made available to the defendant for the setting up of the Ferro Chrome Plant, nor can it be said that it was the intention of the parties that the setting up of the Plant would depend on the supply of electricity by the plaintiff to the defendant.

15. The documents which came into existence after the order of the State Government granting the lease on 10-10-1958, on which reliance was placed by the learned counsel for the appellant in support of his case for land, are mainly these, Ext. B-24 dated 22-11-1958, Ext. H-21 dated 9-1-1961, Ext. G-12 dated 15-12-1961, Ext. G-15 D/- 5-3-1962, Ext. G/16 dated 10-5-1962 and Ext. G-18 dated 14-6-1962. It is seen from Ext. B-24 that till 22.11.1958 no concrete proposal was received by the Government regarding acquisition of land for the Plant. The defendant was advised in the said letter to move the District Collector and the Chief Engineer, Electricity indicating his requirement of land and electric power for the Plant. From Ext. H-21 it is seen that final selection of site, supply of power and rates etc. were still under consideration of the parties, and such matters could not be decided till February 1962 because of the delay in receipt of the project report from M/s. Demag, the technical consultant of the appellant. By Ext. G-12 defendant was informed that Government land could not be acquired under the Land Acquisition Act and it was for the appellant to move the subdivisional Officer, Jaipur for doing the needful. Ext. G-15 shows that till 5.3.1962 grant of lease of land in favour of the appellant was still under consideration of the Government, thus obviating all possi-

bilities of any previous agreement and/or decision in the matter. Ext. G-16 is not indicative of anything positive. Ext. G-18 is again a humble request made by appellant to the respondent for taking immediate steps for settlement of land in favour of the appellant.

16. From a reading of these letters it is not so obvious or patent that there was a binding promise, undertaking or understanding of an imperative nature between the parties, regarding land to be made available by the State Government to the appellant for setting up of the Ferro Chrome Plant, and as such the same cannot be read as an implied term of the lease.

17. The learned Advocate General, appearing for the plaintiff-respondent, contended that no promise or assurance regarding land or electricity was ever given to the defendant by the plaintiff, and that no such terms as alleged on behalf of the defendant-appellant, could be implied in favour of the defendant because of the provisions of Article 299 of the Constitution of India.

18. We have examined in the foregoing paragraphs that there was no promise or imperative assurance or undertaking for land or electricity given by the plaintiff to the defendant. As this lease deed came to be executed after prolonged discussions, suggestions, counter suggestions, deliberations and correspondence between the plaintiff and the defendant for about six years and only after the defendant conveyed in writing his acceptance of all the terms contained in the lease, we do not understand why the defendant did not insist on the incorporation in the lease deed of express terms regarding availability of land and electricity, if the defendant was indispensably dependent on the Government for the supply of the same.

19. The words 'expressed to be made, and executed' which occur in Article 299 of the Constitution, require a deed or formal written contract, so that an oral contract or a contract by correspondence or other informal medium will not fulfil the requirement of the said Article which is provided to safeguard Government against unauthorised contract. Moreover such document must show on its face that it was executed on behalf of the State by the person duly authorised to that effect. Their Lordships of the Supreme Court in *Bhikraj v. Union of India*, AIR 1952 SC 113 held that —

"Government contracts are sometimes made in disregard of the forms prescribed, but that would not be a ground for holding that departure from a provision which is mandatory and at the same time salutary may be permitted."

Provisions of Article 299 of the Constitu-

tion are mandatory and are based on the wholesome principle that the State should not be saddled with any liability without specifically mentioning the same in express words in the deed itself which would enable the various agencies, and the competent authorities to apply their mind consciously to the terms and conditions expressed in the contract itself, before they lend their seals and signatures to the same. The said Article has been incorporated with the object that the contract must show on its face all the conditions and terms on which the State is made to part with its right and is obliged to act in a particular manner, and that it was made on behalf of the State. Our above views get support from the decision of their Lordships of the Supreme Court in *K. P. Chowdhury v. State of Madhya Pradesh*, AIR 1967 SC 203 wherein their Lordships in accordance with the Court's previous decision, held as follows:

"In view of Article 299(1) (of the Constitution) there can be no implied contract between the Government and any other person, the reason being that if such an implied contract between Government and any other person were allowed, that would in effect make Article 299(1) useless, for then a person who had a contract with Government which was not executed at all in the manner provided in Article 299(1) could get away by saying that an implied contract may be inferred by the facts and circumstances of a particular case."

Further it is held that --

"If the contract between the Government and another person is not in full compliance with Article 299(1), it would be no contract at all and could not be enforced either by the Government or by the other person as a contract."

Their Lordships while expressing the above view also expressed the view that they do not say "that if there is a valid contract as envisaged under Article 299(1), there may not be implications arising out of such a contract." In our opinion, the words "implications arising out of such a contract" would mean only such terms and conditions which are intimately entwined, involved and entangled with the express terms in the contract in such a manner that they could be spelled out on a mere reading of the said express terms. These above words cannot go to mean that certain new things could be imported into it from extraneous matter and be implied into the contract as its terms only because by the performance of these implied terms the performance of the contract would be facilitated or expedited.

20. Moreover, in *Reigate v. Union Manufacturing Company (Ramsbottom)*

Ltd. and Elton Cop. Dyeing Co. Ltd., (1918) 1 KB 592 at p. 605 it was held that one has at first to see what the parties have expressed in the contract, and an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. Lord Wright in *Luxor (Eastbourne) Ltd. v. Cooper*, 1941 AC 108 held,

"But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying", some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended."

Their Lordships further held:

"This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties."

21. In the present case it cannot be confidently said that the alleged implied terms, as contended, are too clear to be construed or that such implied terms exist as being something so obvious that they "go without saying". We do not find anything from which it can be said that such implications do necessarily and inevitably arise in this case to give effect to the intention of the parties. The suggested implied terms are not inherent in the mining lease and as such are not to be construed to be within the intention of the parties. There was no promise or binding assurance regarding land and electricity given by the plaintiff to the defendant. According to the Mines and Minerals Act the State Government cannot grant such a mining lease in favour of any person without getting previous express approval of the Central Government on the terms of the lease. The grant and execution of such a lease being circumscribed by various limitations and being subjected to and regulated by special provision in law and our Constitution, the Courts should be loath to read into its express provisions such implied terms as suggested by the learned counsel for the appellant.

22. In this view of the matter both in fact and in law, we are of the view that the above contention of the learned counsel for the appellant regarding the alleged implied terms is fallacious and unacceptable.

23. It was next contended on behalf of the appellant that in any event by the issue of letter No. I-HI-12/61-2628/I (Ext. H-21) dated 18-2-1961 the State Government expressly or impliedly extended the

time for the performance of Clause 10 of Part IX upto at least 1965, and as such the lease was not liable to be terminated. The decision of the Supreme Court in *Keshavlal Lallubhai Patel v. Lal-bhai Trikumal Mills Ltd.*, AIR 1958 SC 512 was cited in support of the above contention. This is a case of contract between two private parties, and as such in terms it does not apply to a case of this nature where one of the parties is the State Government and the grant and the execution of such a contract is subjected to and regulated by various special provisions in law. This is a case in which the State Government even if they wished could not have, by their unilateral action, changed, varied modified or altered the terms of the lease even with the express agreement of the other party. The above mentioned Ext. H-21 is a solicitous letter recommending location of the Plant at Jaipur Road instead of at Bhadrak and also the fact that it was not possible for the Government to supply electric power (20,000 K. W) required by the appellant for the Plant, as there was no surplus power under the Hirakud Grid and there was no high voltage transmission line upto the area. State Government hoped that the required power could only be supplied early in the year 1965, by which time they expected the Talcher Thermal Station to be commissioned. Much was made of the word "assurance" in the last sentence of the first paragraph of this letter. The learned Advocate General contended that Mr. Biswal had no authority to write this letter and that there was no basis for such a letter. To us, on the contents and language in this letter, the word "assurance" would not and cannot import within its scope the intention of the State Government, of an imperative nature, to extend the time till 1965. No such intention can be spelled out as both the change of the location of the Plant as also the supply of power as expressed in the said letter, were contingent upon uncertain factors and the wishes of other agencies, not within the power and control of the State Government. By this letter Government of India was requested "to grant appropriate time for taking effective steps" for establishing the Plant. For taking 'effective steps' as defined in Section 2 of the Registration and Licensing of Industrial Undertaking Rules, 1952, it was not necessary to wait for the full bulk supply of electric power, and as such extension of time till 1965 could not have been contemplated and/or intended. This being so, it cannot be said that the State Government by writing the aforesaid letter expressly or impliedly extended the time, which they were not empowered to do unilaterally. Moreover, for reasons discussed above such implied extension would not strictly

conform to the provisions of Article 299 of the Constitution. We, therefore, do not accept the above contention advanced on behalf of the appellant.

24. In view of our findings that there was no implied term for the supply of electricity and land to the appellant the other contentions raised by the appellant namely that the implied terms and reciprocal promises having not been performed by the Government, it could not enforce performance by Serajuddin of Clause 10 of Part IX of the lease; and that Government could not be in a better position by not performing its implied obligations and duties and call upon Serajuddin to set up the Plant, and that Government could not have taken advantage of its own wrongs, would not arise.

25. On behalf of the State Government it was contended that Serajuddin, the appellant, had no intention of setting up the Plant, and was only committing fraud by indulging in various correspondence with the Government. It was urged that his reading of the implied terms was all a hoax and was utilised as smoke screen to his sham intention not to set up the Plant. In support of the above contention our attention was drawn to various Exhibits some of which are discussed below.

26. In Ext. A-1 dated 29-12-1955 the defendant expressed his intention to erect a Ferro Chrome Industry in Orissa and sought for the co-operation of the State Government in that direction. It was also stated therein that he had worked out the detailed costing, production technicality, and had ascertained the quality and suitability for export etc. In Ext. A-16 dated 4th June, 1956 the defendant stated as follows:

"From the state you would observe, the scheme is intended to serve a dual purpose of conservation of mineral resources and at the same time putting them to the best use for the benefit of the State and Country as a whole. The scheme also contemplates the use of low-grade ores which are not marketable and considered waste at present, in the manufacture of Ferro Chrome, thus ensuring the conservation of the deposits of high grade minerals."

27. By Ext. H-2 dated 26-2-1957, the Under Secretary to the Government of India made inquiries from M/s Serajuddin & Co. whether the latter was assured of supply of electric power for the Plant by the State Government, and if power shortage was anticipated what steps they proposed to take to meet that contingency. In reply M/s. Serajuddin & Co. wrote Ext. H-3 dated 27-3-1957 stating that they were assured of every co-operation by the State Government in that direction and in case of shortage of

power at any time, they (M/s. Serajuddin & Co.) were prepared to put up their own generators to fill up the gap, and in case of necessity, they would import additional equipment for generating power of their own. They were only waiting for the finalisation and issue of the licence.

28. Ext. D-5 is relevant for two things — (i) that the project report was not finalised till the 16th of June, 1958, and (ii) that full supply of power would be required within two years of placing orders for the supply of machineries. By Ext. D-12 dated the 18th November, 1958, the defendant informed the Chief Engineer, Electricity, that production could not be commenced unless 20,000 K. W. power was given to them as demanded. This is contrary to the contents of the above letters Exts. D-5 and H-3. By Ext. H-11 dated 29-4-1959 M/s. Serajuddin & Co. prayed for extension of time from the Government of India for taking effective steps for the establishment of the Plant, and requested therein for a change of the site from Bhadrak to Jaipur Road mostly because that place could be the most suitable for the Plant, and also because M/s. Demag were of the opinion that the deposits at Sukinda area were most suited for the Ferro Chrome Plant. Though the Industrial Licence was granted on 8-5-1958 and the mining lease was granted on 26-3-1959, we find from Ext. F-5 dated 30-12-1960 that for the first time an agreement between M/s. Serajuddin & Co. and M/s. Demag of West Germany was signed on 16-6-1961 to prepare a final and complete project Report for setting up a Ferro Chrome Plant at a suitable site in the State of Orissa. Then the defendant by his letter Ext. 6 dated the 11th January, 1961, mentioned about his practical difficulty to transfer the lease in the name of M/s. Serajuddin & Co. From this letter we find that at long last in January, 1961, the defendant found from expert's opinion that the ores extracted from the area leased out to him were absolutely unfit for feeding the Ferro Chrome Plant, whereas in Ext. H-11 dated 29-4-1959 it was stated that M/s. Demag, the technical consultant of the defendant was of the opinion that the Chrome deposits in the leased out area were most suited for the Ferro Chrome Plant. Amongst other things in Ext. 6, it was also stated that defendant's assumptions were belied, and the area proved a losing concern for him, and M/s. Serajuddin & Co. were reluctant to take over the area, and that they were still getting samples of ore further analysed with a view to find out its possible utility and suitability for the Ferro Chrome Plant, and that they were expecting expert's advice in the matter within five to six months. The Industrial Licence being of

8-5-1958, the mining lease being of 10-10-1958/26-3-1959, and the previous expert's opinion regarding the suitability of the ore being of April 1959, this letter coming as late as 1961, smacks of a vacillating tendency on the part of the defendant to evade his obligations under the mining lease which were expressly agreed upon to be worked out as specified therein, and which only prompted the Central Government to approve and the State Government to grant the lease in favour of the defendant. On going through the letter Ext. 6, Ext. H-11, and the letters discussed above, we are of the opinion that the defendant wanted to back out of his commitments under the lease on various pretexts set forth in these letters, and that the defendant was not serious about setting up of the Plant after taking the mining lease.

29. It was urged on behalf of the defendant-appellant that Clause 10 of Part IX of the lease having become impossible of performance, Clause 5 of the same Part excused the defendant from any alleged breach of Clause 10. In support of this our attention was drawn to paragraph 7 of the defendant's deposition wherein he referred to his personal discussion with the then Chief Minister of Orissa, and all that both of them 'told' each other there in connection with the "force majeure" clause. The subject matter of a duly executed lease by the State Government in favour of the other, embodying various clauses which were expressly agreed upon after thorough discussions, deliberations and correspondence could not be explained away by saying that the defendant understood in a different manner the implications of the various terms of the lease because of his alleged talk with the then Chief Minister.

30. In view of our above findings that the defendant did not have the intention of setting up the Plant, and that there could not be any implied terms indicating obligation on the part of the Government to provide land and electricity as a condition precedent to the setting up of the Plant, the contention that Clause 10 of Part IX of the lease became impossible of performance is wholly untenable.

31. Moreover, the defendant-appellant cannot seek shelter under Clause 5 of Part IX of the lease on the ground that the setting up of the Plant was beyond his control. Under the said clause the State Government was constituted the sole Judge to decide if the failure to fulfil any of the terms and conditions of the lease arose from "force-majeure". Therefore the performance of the express terms of the lease by the lessee would not be excused until and unless the Government did not construe the visiting circumstances as "force-majeure". Mr. Justice McCordie in *Lebeaupin v. Crispin*, (1920) 2 KB 714

gave an account of what is meant by "force-majeure". Their Lordships of the Supreme Court in *M/s. Dhanrajmal Gubindram v M/s. Shamji Kalidas and Co.*, AIR 1961 SC 1285 have been pleased to refer with approval to Mr. Justice McCordie's account of what is meant by "force-majeure". We find therefrom that the expression "force-majeure" is not a mere French version of the Latin expression "vis major", and that strikes breakdown of machinery and such things which, though normally not included in "vis-major", are included in "force-majeure". Mr Justice Bailache in *Mat-soukiss v Priestman & Co.*, 1915-1 KB 681 preferred to give a restricted meaning to "force-majeure". In his opinion "force-majeure" could include strikes, breakdown of machineries, but not bad weather, foot-ball match or funerals.

The rulings and literature on the subject show that where reference is made to "force-majeure", the intention is to save the performing party from the consequences of anything of the nature stated above or over which he has no control. In the present case, the words "force-majeure" do not stand alone, but the clause in which it occurs in the lease contains examples of what was intended to be conveyed by this expression. The intention with which this term "force-majeure" is used in Clause 5 of Part IX has been explained therein as follows:—

"In this clause the expression 'Force-majeure' means act of God, War, Insurrection, Riot, Civil Commotion, Strike, Earthquake, Tide, Storm, Tidal Wave, Flood, Lightning, Explosion, Fire and any other happening which the lessee could not reasonably prevent or control."

It would, therefore, mean that all such things as mentioned above on which the lessee could not have any control would come within this clause. The words "any other happening which the lessee could not reasonably prevent or control" are to be read and understood ejusdem generis with the words preceding this expression. According to Mr Justice McCordie the "Force Majeure" clause should be construed with a close attention to words which precede or follow it, and with due regard to the nature and the general terms of the contract. Therefore the words "any other happening" must be given Ejusdem generis construction so as to engulf within its fold only such happenings and eventualities which are of the nature and type illustrated above in the same clause with close attention to the nature and terms of the lease, and would not reasonably be within the power and control of the lessee. In this view of the matter, non-availability of land and electric power and the grounds on which the defendant pleaded inability to set up the Plant, in our view, are not such

happenings which would come within Clause 5 of Part IX of the lease, and as such the defendant could not take shelter under this clause, and avoid performance of setting up of the Plant, as expressly specified and agreed upon in Clause 10 of Part IX of the lease.

32. It was next argued on behalf of the appellant that since Clause 10 of Part IX of the lease contains no provision reserving for the plaintiff a right of re-entry on its breach, there can be no forfeiture of the lease under Section 111(g) of the Transfer of Property Act. It was also contended that without a notice under Section 114 of the Transfer of Property Act, the lease could not be terminated, and that the Government Grants Act has no application to such a case. In reply it was emphatically contended on behalf of the respondent that this lease granted by the State Government is completely covered by the provisions of the Government Grants Act (Act XV of 1895), and as such the aforesaid provisions of the Transfer of Property Act would not apply to this case. It was also urged that there is an implied clause for re-entry in the lease and that the requirement of Section 111(g) has been provided for in Clauses 5 and 6 of Part IX of the lease.

33. Grants by the Government are usually construed most favourably for the Government, and that appears to be the reason why application of some laws are generally excepted in such cases. Under Section 2 of the Government Grants Act, application of the provisions of the Transfer of Property Act has been excepted specifically as follows:—

"Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Government to, or in favour of any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed."

Thus being so, in our opinion, the provisions of Section 111(g) and Section 114 of the Transfer of Property Act have no application to a grant of this nature, because though this may not be a grant of land in perpetuity, it is certainly a grant by transfer of interest in land and as such, the impugned grant is completely covered by the provisions of the Government Grants Act. In *Secy of State for India v Nistarini Annie Mitter*, AIR 1927 Pat 319 it has been held that—

"Leases granted by the Crown are outside the operation of the Transfer of Property Act. There is no distinction between grants by virtue of the prerogative rights of the Crown and grants made as a mercantile transaction for profit."

This decision was followed with approval in *V. Pedda Rangaswami Shreshti v. Sri Vishnu Nimbakar*, AIR 1946 Mad 180 and this view finds support from the decisions in *Gaya Prasad v. Secy. of State* AIR 1939 All 263, *Rupan Singh v. Akhaj Singh*, AIR 1931 Pat 268 and *Manindra Nath Binda v. Amiya Pal*, AIR 1951 Cal 361.

34. As we hold this lease to be covered by the provisions of the Government Grants Act of 1895, all the provisions, restrictions, conditions and limitations contained in the said lease shall be followed and take effect according to their tenor, notwithstanding any rule of law, statute or enactment of the Legislature to the contrary, as provided for under Section 3 of the said Act. The decisions in *Ullattuthedi Choyi v. Secy. of State for India*, 41 Mad LJ 494 : (AIR 1921 Mad 409), *Suraj Kanta Roy Chowdhury v. Secy. of State*, AIR 1938 Cal 229 and AIR 1939 All 263 reiterate this view. This being so, the contention raised by the learned counsel for the appellant regarding the applicability of the several provisions of the Transfer of Property Act is of no avail, as they would not apply in view of the provisions of the Government Grants Act.

35. It was next contended by the appellant that the order of determination dated 5-12-1963 (Exts. 3 and C-66) could not be passed by the State Government, and was a nullity in view of the order of stay passed on 2-6-1962 by the Central Government (Ext. H-44), which was in force at that time. On an application under Rule 54 of the Mineral Concession Rules, 1960, filed by the defendant before the Central Government, regarding arrears of royalty outstanding against the defendant and its realisation, the Central Government by their order dated 2nd June, 1962 (Ext. H-44) directed the State Government not to interfere with the possession and working of the mining property, provided the petitioner (defendant) complied with the various conditions stipulated in the said letter. In paragraph 3 of the said letter it was expressly mentioned that the aforesaid orders were irrespective of any action taken till then by the State Government or the petitioner, and/or without any prejudice to the rights or obligations of the State Government or the Petitioner. This letter (Ext. H-44) was clarified by a subsequent Government letter dated 28th August, 1964 (Ext. H-40). In this letter the Central Government directed that all proceedings pursuant to the non-payment of arrears of royalty should be stayed and the lessee would not be dispossessed in their working of the lease until further orders. These two letters would show that the above-mentioned letters, containing the stay orders, were in connection

with the recovery of arrears of royalty, and the State Government was directed not to interfere with the possession of the lessee for the non-payment and recovery of arrears of royalty. Moreover, Ext. H-64 is specific to the effect that the above order was without any prejudice to the rights and obligations of the State Government. The right of the State Government to determine the lease arose independently of the above proceedings before the Central Government, because of the non-compliance of the express terms of the lease, specifically agreed to between the parties, and the said rights did not in any way relate to and were not concerned with the above proceedings before the Central Government in which the stay orders were passed. In our view, therefore, the stay orders could not in any way affect the rights of the State Government to determine the lease by passing the aforesaid orders, Exts. 3 and C-66.

36. For the reasons stated above, we do not find any merit in this appeal which must fail, and is accordingly dismissed with costs.

37. **BARMAN, C. J. :—** I agree.

D.R.R.

Appeal dismissed.

AIR 1969 ORISSA 163 (V 56 C 54)

S. BARMAN, C. J. AND

B. K. PATRA, J.

Sree Narayan Company, Petitioner v. State of Orissa and others. Opp. Parties.
O. J. C. No. 589 of 1968, D/- 14-1-1969.

Constitution of India, Arts. 226, 227 — Mineral Concession Rules (1960), Rr. 24(3), 55 — Order of Central Government under R. 55 setting aside deemed refusal of lease and directing State Government to grant lease — State Government is bound to carry it out — On failure writ under Arts. 226, 227 for direction to carry out the order is maintainable.

Where the petitioner made an application to the Central Government for revision against deemed refusal of the lease under Rule 54 of Mineral Concession Rules and the Central Government allowed the revision application in exercise of the power under Rule 55 and directed the State Government to grant a lease:

Held, that the order of the Central Government in the revision application under R. 54 of the Mineral Concession Rules was in substance a judicial determination on the question of grant of lease in favour of the petitioner which the State Government was bound to carry out, and, on failure to comply with it by the State Government an application

under Articles 226 and 227 of the Constitution for a direction to the State Government commanding it to carry out the order of the Central Government and directing it to grant the lease, was maintainable AIR 1965 Madh Pra 159, Rel. on. (Para 5)

Held further, that the lease deed was ultimately to be executed in Form K or in a form as near thereto as the circumstances of each case might require, as provided in Rule 31 and the mining lease executed in such prescribed form was sufficient compliance with the provisions of Art. 299 of the Constitution. Hence, it was not open to State Government to plead that there was no contract executed on behalf of the Governor in the prescribed manner as required by Art. 299.

(Para 6)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 203 (V 54) =

(1966) 3 SCR 919, K. P. Chaudhary
v State of M. P. 4

(1965) AIR 1965 Madh Pra 159
(V 52) = 1964 Jab LJ 625, Narsingh-
das Jankadas Mohta v. State of
M. P. 5

S R. Mohanty and R K. Kar, for Petition-
ers; Advocate General and Govt.
Advocate, for Opp Parties

BARMAN, C. J.— In this writ petition, the petitioner prays for the issue of a writ of mandamus directing the State of Orissa to grant in his favour a mining lease for iron and manganese ore over an area of 186 454 hectares near village Dumirta in Khesra forest, Taluk Barbil, District Keonjhar, in compliance with the order of the Central Government dated July 12/14, 1967 in exercise of their revisional powers under Rule 55 of the Mineral Concession Rules, 1960, directing the State Government to grant the said mining lease in favour of the petitioner.

2 On June 19/21, 1966 the petitioner applied for mining lease of 292 274 hectares in respect of iron and manganese ore. By January, 1967 the petitioner is stated to have complied with all the requisitions made by the concerned authorities in connection with the aforesaid application for mining lease. On January 7, 1967 the petitioner wrote to the opposite parties that as seven months had passed since his application and that unless the application is disposed of within nine months from the date of its receipt, Government must be deemed to have rejected the petition under Rule 24 (3) of the Mineral Concession Rules, yet the application for lease was not disposed of by the State Government. Thereafter on April 8, 1967 the petitioner made an application to the Central Government for revision against deemed refusal of the lease under Rule 54. On May 25, 1967 the Central Government communicated that the State Government propos-

ed to grant lease of the available area of 186 454 hectares and the petitioner was called upon to send his acceptance within 15 days. Accordingly, on May 30, 1967 the petitioner duly accepted the proposal of the State Government for grant of lease over the said area.

3 On July 12/14, 1967 the Central Government directed the State Government to grant a mining lease for iron and manganese ore over 186 454 acres and allowed the revision application of the petitioner in exercise of the power under Rule 55 of the Mineral Concession Rules. On July 22, 1967 the petitioner forwarded a copy of the aforesaid order of the Central Government passed on his revision application, to the State Government for early action. Thereafter, the State Government not having complied with the directions of the Central Government the petitioner filed this writ petition on June 18, 1968 for issue of a writ of mandamus on the State Government for compliance by it of the directions of the Central Government as aforesaid.

4 In the course of hearing the learned Advocate General appearing for the State Government conceded that by virtue of Articles 256 and 257 of the Constitution the State Government was bound to carry out the directions of the Central Government. While making this concession it was however contended on behalf of the State Government that they are not in a position to comply with the direction of the Central Government contained in their communication because the contract made in exercise of the executive power of the State has to be executed on behalf of the Governor in the prescribed manner as required by Article 299 of the Constitution.

The point of the State Government is that in the absence of such a contract on behalf of the Governor, or by a person in such manner as the Governor may direct or authorise, the State Government is not in a position to comply with the direction of the Central Government to execute a mining lease. In support of this contention, the State Government relied on the decision of the Supreme Court in *K. P. Chowdhury v. State of Madhya Pradesh*, AIR 1967 SC 203 where it was held that if the contract between Government and another person is not in full compliance with Article 299 of the Constitution it will be no contract at all and could not be enforced either by Government or by the other person to the contract, that in view of the mandatory terms of Article 299(1) no implied contract could be spelled out between the Government and the other party (the appellant) in that case.

5. The question is: What is the nature and effect of an order passed by the

Central Government on the revision application filed by the petitioner? Where the Central Government, in revision, under Rule 54 of the Mineral Concession Rules, 1960 sets aside the State Government's decision refusing to grant the lease (in the present case it was a case of deemed refusal) and directs the State Government to grant the lease, the State Government has no other alternative but to grant the lease in accordance with the orders passed by the Central Government. Indeed, factually and finally the order is of the Central Government and a duty is cast on the State Government under the rules to carry out such an order. In disposing of the application for revision under Rule 54 the Central Government acts as a quasi-judicial authority; therefore, the State Government as an inferior authority is bound to carry out the direction of the Central Government contained in the order disposing of the revision petition.

The order of the Central Government in the revision application under Rule 54 of the Mineral Concession Rules was in substance a judicial determination on the question of grant of lease in favour of the petitioner which the State Government was bound to carry out. If the order of the Central Government has not been complied with by the State Government, an application will lie under Articles 226 and 227 of the Constitution for a direction to the State Government commanding it to carry out the order of the Central Government and directing it to grant the lease. This view is supported by the decision of the Madhya Pradesh High Court in Narsinghadas Jankidas Mohita v. State of Madhya Pradesh, AIR 1965 Madh Pra 159.

6. That apart, the lease deed is ultimately to be executed in Form K or in a form as near thereto as the circumstances of each case may require, as provided in Rule 31. The material portion of the Model Form of Mining Lease in Form K is set out as follows:

"This Indenture made this day of 19 between the Governor of ... the President of India (hereinafter referred to as "The State Government" which expression shall where the context so admits be deemed to include the successors and assigns) of the one part and

..... (Name of person with address and occupation) (hereinafter referred to as the "lessee" which expression shall where the context so admits be deemed to include his heirs, executors, administrators, representatives and permitted assigns)

* * * * *

Witnesseth that in consideration of the rents and royalties, covenants and agreements by and in these presents and the

Schedule hereunder written, reserved and contained, and on the part of the lessee/lessees to be paid, observed and performed, the State Government (with the approval of the Central Government) hereby grants and demises unto lessee/lessees. All those mines *

* * * * *

The mining lease executed in such prescribed form is sufficient compliance with the provisions of Article 299 of the Constitution.

7. In the view that we have taken on the concession made on behalf of the State Government and on the facts of this case, the State Government must comply with the direction of the Central Government dated July 12/14, 1967 to execute the mining lease in favour of the petitioner.

8. The writ petition is accordingly allowed with costs. Hearing fee Rs. 200/- (rupees two hundred only).

9. PATRA, J. :— I agree.

GDR/D.V.C.

Petition allowed.

AIR 1969 ORISSA 165 (V 56 C 55)

S. BARMAN, C. J. AND S. K. RAY, J.

M/s. Nandram Hunatram, Petitioner v. State of Orissa, Opposite Party.

O. J. C. No. 22 of 1964 with O. S. No. 1 of 1965, D/- 14-1-1969.

Mines and Minerals (Regulation and Development) Act (1957), S. 23 — Mineral Concession Rules (1960), Rr. 54, 55 — Order passed by Central Government in revision — State Government is bound to carry out direction of Central Government — Mining lease to be executed will be in sufficient compliance with Art. 299 of Constitution — (Constitution of India, Arts. 256, 257, 299, 226, 227).

Under Rules 54 and 55 of the Mineral Concessions Rules, 1960 made under Section 23 of the Mines and Minerals (Regulation and Development) Act, 1957 the State Government is bound to carry out the order passed by the Central Government on the applications for revision filed by the petitioner under the said Rules directing the State Government to execute a mining lease with the petitioner for certain mineral over certain area. By virtue of Articles 256 and 257 of the Constitution the State Government is bound to carry out the direction of the Central Government. (Paras 1, 3)

As there was a formal contract made on behalf of the Governor the mining lease to be executed in Form K or in a form as near thereto as provided in R. 31 would be in sufficient compliance with the provisions of Article 299 of the Constitution. (Para 5)

In disposing of the application for revision

CM/CM/A964/69

sion under Rule 54 the Central Government acts as a quasi-judicial authority; therefore, the State Government as an inferior authority is bound to carry out the direction of the Central Government contained in the order disposing of the revision petition. If the order of the Central Government has not been complied with by the State Government an application will lie under Articles 226 and 227 of the Constitution for a direction to the State Government commanding it to carry out the order of the Central Government and directing it to grant the lease (Para 6)

Cases Referred. Chronological Paras
(1967) AIR 1967 SC 203 (V 54)=
(1966) 3 SCR 919. K. P. Chaudhary
v. State of M. P. 3

(1965) AIR 1965 Madh Pra 159
(V 52)=1964 Jab LJ 625, Narsingh
Das Janki Das Mohita v State of
M. P. 6

(In O J C No 22 of 1964)

M. Mohanty and C. K. Duphtary, for
Petitioner; Advocate General and Govt.
Advocate, for Opposite Parties.

(In O S No. 1 of 1965)

S Mohanty and N V Ramdas, for
Plaintiff M. Mohanty and C. K. Duphtary,
for Defendant.

BARMAN C. J. :- In these matters — the writ petition filed by the petitioner Messrs Nandram Hunatram and the suit filed by the State of Orissa against the petitioner which on transfer was heard along with the writ petition the point involved is whether under Rules 54 and 55 of the Mineral Concessions Rules, 1950 made under Section 28 of the Mines and Minerals (Regulation and Development) Act, 1957 the State of Orissa is bound to carry out the order dated July 20, 1963 passed by the Central Government on the applications for revision filed by the petitioner under the said Rules directing the State Government to execute a mining lease with the petitioner for iron ore over an area of 1245 acres in Tomka area in the district of Cuttack incorporating the various conditions which the State Government had stipulated and were accepted by the petitioner after getting the area demarcated by the Official Surveyor.

2. The Impugned order of the State Government dated January 20, 1964 as communicated to the petitioner so far as material reads as follows:

"I am directed to say that the area of 1245 acres in Tomka in Cuttack district forms a part of the area of 9575 sq. miles in Cuttack district covering the Daltari-Tomka region which has been reserved by the State Government for exploitation in the public sector. The State Government do not, therefore, propose to grant any mining lease, which has not so far been executed, for any rea-

son. As the State Government have decided as a matter of policy to work this entire area including the 1245 acres Tomka area which you are now unauthorisedly working without any valid mining lease, in the public sector in the public interest, the State Government are not in a position to comply with the direction of the Central Government contained in their communication referred to above to execute the mining lease with you over the Tomka area of 1245 acres, for iron ore. I am therefore to ask you to vacate the area immediately and hand over possession of it to the Collector, Cuttack within 15 days from the date of receipt of this letter failing which further necessary action will be taken by the State Government to evict you from the area."

3. In the course of hearing, the learned Advocate General appearing for the State Government conceded that by virtue of Articles 256 and 257 of the Constitution the State Government was bound to carry out the direction of the Central Government. While making this concession, it was however, contended on behalf of the State Government that they are not in a position to comply with the direction of the Central Government contained in their communication, because the contract made in exercise of the executive power of the State is to be executed on behalf of the Governor in the prescribed manner as required by Article 299 of the Constitution. The point of the State Government is that in the absence of such a contract on behalf of the Governor or by a person in such manner as the Government may direct or authorise, the State Government is not in a position to comply with the direction of the Central Government to execute a mining lease with the petitioner. In support of this contention the State Government relied on the decision of the Supreme Court in K. P. Chowdhury v. State of Madhya Pradesh, AIR 1937 SC 203 where it was held that if the contract between Government and another person is not in full compliance with Article 299 (1) of the Constitution, it will be no contract at all and could not be enforced either by Government or by the other person to the contract; that in view of the mandatory terms of Article 299(1) no implied contract could be spelled out between the Government and the other party (the appellant) in that case.

4. In our opinion, assuming that Article 299 has application, even so in the present case the requirements of Article 299 have been complied with in that, here, there is a formal contract made on behalf of the Governor dated August 31, 1961.

the material portion of which reads as follows:

"Whereas M/s. Nandram Hunatram has/ have applied to the State Government in accordance with the Mineral Concession Rules, 1949 for grant of a mining lease by his/their application read above.

Whereas the mineral in the land in respect of which the mining lease has been applied for belongs to Government and the land is at their disposal;

Whereas the applicant holds a valid certificate of approval from the State Government.

Whereas the applicant being a partnership firm is an Indian national;

Whereas the applicant by himself or with any person joint in interest with him does not, in respect of iron or related group of minerals, hold such area in the State as with the area over which the mining lease has now been asked for will exceed ten square miles in the aggregate;

And whereas the Government do not consider it expedient to reserve these areas for exploitation by the State, the State Government are hereby pleased to order that a mining lease in respect of the land applied for be granted to Messrs. Nandram Hunatram provided that the conditions which the State Government propose to incorporate in the lease deed and of which the applicant will be apprised are accepted by him.

By order of the Governor
D. L. Purakayastha
Secretary to Government."

5. That apart, the lease deed is ultimately to be executed in Form K or in a form as near thereto as the circumstances of each case may require, as provided in Rule 31. The material portion of the Model Form of Mining Lease in Form K is set out as follows:

"This Indenture made this day of19 between the Governor of/the President of India (hereinafter referred to as "the State Government" which expression shall where the context so admits be deemed to include the successors and assigns) of the one part and

.....(name of preson with address and occupation) (hereinafter referred to as "the lessee" which expression shall where the context so admits be deemed to include his heirs, executors, administrators, representatives and permitted assigns)

* * * * *

Witnesseth that in consideration of the rents and royalties, covenants and agreements by and in these presents and the Schedule hereunder written, reserved and contained, and on the part of the lessee/lessees to be paid, observed and performed, the State Government (with the ap-

proval of the Central Government) hereby grants and demises unto lessee/lessees to be All those mines *

* * * * *

The mining lease executed in such prescribed form is sufficient compliance with the provisions of Article 299 of the Constitution.

6. There is also one other aspect of the matter which requires consideration, namely what is the nature and effect of an order passed by the Central Government on the revision applications filed by the petitioner. In disposing of the application for revision under Rule 54 the Central Government acts as a quasi-judicial authority; therefore, the State Government as an inferior authority is bound to carry out the direction of the Central Government contained in the order disposing of the revision petition. If the order of the Central Government has not been complied with by the State Government, an application will lie under Articles 226 and 227 of the Constitution for a direction to the State Government commanding it to carry out the order of the Central Government and directing it to grant the lease. This view is supported by the decision of the Madhya Pradesh High Court in Naras Singh Das Janki Das Mohta v. State of Madhya Pradesh, AIR 1965 Madhya Pradesh 159.

7. In the view that we have taken, on the concession made on behalf of State Government and on the facts of this case, the impugned order of the State Government dated January 20, 1964 is quashed; the State Government shall comply with the direction of the Central Government to execute the mining lease with the petitioner. The State Government is not entitled to get any relief in the Original Suit No. 1 of 1965 filed by the State Government for eviction of the petitioner and for a mandatory injunction against the petitioner directing him to remove structures, machinery, equipment and other fixtures from the suit land.

8. In the result, O. S. No. 1 of 1965 filed by the State against the petitioner is dismissed without costs; and the writ petition of the petitioner is allowed with costs; hearing fee Rs. 200.00 (Rupees two hundred only).

9. RAY, J. :- I agree.
SSG/D.V.C. Order accordingly.

AIR 1969-ORISSA 167 (V 56 C 56)
A. MISRA, J.

Hari Maharana and others, Appellants v. Pranabandhu Maharana and others, Respondents.

First Appeal No. 3 of 1968, D/- 14-1-1969.

CM/CM/A968/69

Court Fees and Suits Valuations—Court Fees Act (1870), Sch. II, Art. 17A (Orissa) — Interpretation of Cols. 1 and 3 — Suit for partition — Appeal — Jurisdictional value should be same as that of plaint and same court-fee is payable.

Column 3 of Article 17-A (Orissa amendment) cannot be read disjunctively from column 1. Column 3 only provides the amount of fixed court-fee payable in respect of different jurisdictional value. It does not contemplate that the jurisdictional value referred to in column 3 will be something different from what is indicated in column 1. Therefore, in a partition suit governed by Article 17-A, the memorandum of appeal is chargeable with the same court-fee as that on the plaint, the jurisdictional value being the same as in the suit AIR 1952 Orissa 113, Foll. F. A. No 104 of 1966 (Orissa) Dist.

(Para 4)

Cases Referred—Chronological Paras (1966) F A No 104 of 1966 (Orissa)

1, 2, 3
(1952) AIR 1952 Orissa 113 (V 39) =

ILR (1951) Cut 111, Chaitan Senapati v. Mani Bewa 4

H G Panda, for Appellants, Govt. Advocate, for State.

ORDER.— On a reference by the Taxing Officer, this court-fee matter has come up before me as the Taxing Judge. Defendants Nos 2, 5 and 15 in the partition suit O S No 24/66 are the appellants. In the trial Court, the suit was valued at Rs. 7,434 00 for purposes of jurisdiction and the fixed court-fee of Rs. 150-00 was paid. The appellants here have valued the appeal at Rs. 3,800 00 for purposes of jurisdiction and paid the fixed court-fee of Rs. 22 50. The Stamp Reporter raised the objection that in partition suits governed by Article 17-A of Schedule II (Orissa amendment) of the Court-fees Act the amount of court-fee will depend on the jurisdictional value in the suit and it is not open to appellants to reduce the jurisdictional value and pay the lower fixed court-fee. The Taxing Officer has agreed with the view of the Stamp Reporter, but as in another F. A. No 104 of 1966 (Orissa), the finding of the Registrar that in such a partition suit it is permissible in appeal to alter the valuation for purposes of jurisdiction, he has made this reference.

2. Mr. H G Panda, learned counsel appearing for the appellants contends that in the original suit 1062 acres formed the subject-matter and the same was valued at Rs. 7,434 00. In appeal, his clients are limiting their challenge to the findings of the trial court only in respect of 510 acres of lands, and as such, the value of the appeal for purposes of jurisdiction has been limited to Rs. 3,800.00 in proportion to the ex-

tent of property in respect of which the findings of the trial court are challenged. Firstly, he contends that he is entitled to alter the valuation in appeal in view of the Division Bench decision in F. A. No. 104 of 1966 (Orissa). Secondly, he contends that on a proper interpretation of Article 17-A of Schedule II (Orissa amendment) it is open to appellants to value the appeal for purposes of jurisdiction separately in the appellate Court.

3. I am unable to agree with either of these contentions. No doubt, in F. A. No. 104 of 1966 (Orissa) the Division Bench accepted the finding of the Registrar that appellant is entitled to alter the valuation in appeal for purposes of jurisdiction in that case, however, the point was not specifically urged nor a decision arrived at on interpretation of Article 17-A. That decision also was not on the basis of a reference u/s 5 of the Court-fees Act. Therefore, acceptance of the finding of the Registrar by the Bench in that appeal in my opinion, cannot stand in the way of determining the present question on merits, particularly when this is a reference to the Taxing Judge u/s 5 of the Court-fees Act.

4. Coming to the main point, it is not disputed by Mr. Panda that the proper provision which will govern the present case is Article 17-A of Schedule II as amended in Orissa. Referring to the original Article and comparing it with the language adopted in Article 17-A (Orissa amendment), Mr. Panda urges that the language adopted in the Orissa amendment in column 3 contemplates distinct valuation for purposes of jurisdiction in the appellate Court. According to him, while the language in Column 1 refers to "plaint or memorandum of appeal in every suit," the same is not repeated in Column 3. In other words, according to him, the words "value for purposes of jurisdiction in column 3" would mean the value given in the appellate Court, where the question of court-fee relates to memorandum of appeal. While conceding that the decision of this Court reported in ILR (1951) Cut 111 = (AIR 1952 Orissa 113), Chaitan Senapati v. Mani Bewa, obviously is against the interpretation now sought to be put by Mr. Panda, he contends that the aforesaid aspect was not urged or considered in that decision. I am unable to agree with this ingenious distinction sought to be made. Column 3 of Article 17-A (Orissa Amendment) cannot be read disjunctively from column 1. Column 3 only provides the amount of fixed court-fee payable in respect of different jurisdictional value. It does not contemplate that the jurisdictional value referred to in Column 3 will be something different from what is indicated in column 1. Therefore, as has been held in ILR 1951 Cut 111 = (AIR 1952 Orissa 113) in a parti-

tion suit governed by Article 17-A, the memorandum of appeal is chargeable with the same court-fee as that on the plaint, the jurisdictional value being the same as in the suit.

5. Accordingly, I reject the contentions advanced for appellants and direct that the valuation be amended and deficit court-fee paid, as pointed out by the Stamp Reporter.

KSB

Reference accepted.

AIR 1969 ORISSA 169 (V 56 C 57)

S. BARMAN C. J. AND A. MISRA, J.

Soubhagya Chandra Patnaik, Petitioner v. Union of India (Represented by Chief of Army Staff, Indian Army, 56 A. P. O., Opposite Party).

O. J. C. No. 415 of 1967, D/- 16-9-1968.

(A) Army Act (1950), S. 152 —Proceedings before Court-Martial — Procedure to be followed — Rules of natural justice should be observed.

It is apparent from the scheme of the Act that Court-Martial as a Court is to follow the procedure adopted by Courts of law at the trial before it, in giving findings and awarding sentences on persons charged with having committed offences under the Act as in a judicial proceeding; this implies that rules of natural justice should also be observed. (Para 7)

(B) Army Act (1950), Ss. 71, 73 — Punishment of dismissal can be combined with sentence of imprisonment.

(Para 10)

R. N. Misra, P. K. Sengupta, S. K. Mohanty, M. N. Sahu, B. Harichandan, R. C. Patnaik, R. K. Mohanty, S. Misra (2), K. C. Lenka and B. Naik, for Petitioner; Govt. Advocate, for Opp. Party.

BARMAN C. J.: The petitioner — a Jawan cadet in the 54 A. D. Battery, 19 Air Defence Regiment of the Indian Army at present in Cuttack Jail — challenges the order dated August 8, 1967 of the Lt. Colonel Commanding 19 Air Force Regiment, by which the petitioner was awarded six months' rigorous imprisonment and was also dismissed from service, stated to have been passed after trial by a Summary Court-Martial in the said Unit, on a charge of having committed the offence of, without sufficient cause, overstaying the leave granted to him, under Section 39 (b) of the Indian Army Act, 1950 (Central Act 46 of 1950).

2. On March 2, 1967 the petitioner was granted leave for two months with effect from that date and was permitted to proceed to his village to avail of the leave. While on leave, the petitioner is

said to have fallen ill from April 29, 1967 and is stated to have been in a delirious condition until May 3, 1967. He got a medical certificate from the Government Hospital at Delang in the district of Puri and on July, 25, 1967 the petitioner reported to duty. Soon thereafter, he was put in custody by the military authorities. The petitioner's illness relapsed and he was under medical treatment in the military hospital while in custody. The disease, which was found to have relapsed, was found to be chronic.

3. On August 3, 1967 the petitioner was charged under Section 39 (b) of the Indian Army Act with the offence of having, without sufficient cause, overstayed the leave granted to him, in that the petitioner, having been granted leave of absence from March 2, 1967 to May 2, 1967 to proceed to his home, failed to rejoin duty on the expiry of the said leave without sufficient cause till he voluntarily joined, on July 25, 1967. He was charged by the Officer Commanding 19th Air Defence Regiment; in the charge-sheet it was also stated that he was to be tried by Summary Court-Martial.

4. Within five days thereafter, by an award of punishment by Summary Court-Martial the petitioner was sentenced to six months' rigorous imprisonment and also dismissed from service with effect from August 7, 1967. This writ petition was filed on November 30, 1967 against the Union of India represented by the Chief of Indian Army Staff 56 A. P. O. A counter affidavit was filed by Station Staff Officer, Station Head Quarters, Cuttack on behalf of the Union of India in support of the award of punishment to the petitioner by the Summary Court-Martial.

5. The grounds on which the petitioner challenges the impugned order of imprisonment and dismissal are, in substance, these: The entire proceedings of the Summary Court-Martial were conducted in violation of the procedure laid down in the Army Act and the Rules made thereunder; the charges which were in English were not explained to him in Oriya the language he understands; that the entire proceedings were conducted in English and he had no opportunity to defend himself or adduce evidence in rebuttal. It was further contended that the award of two punishments for one offence, namely imprisonment for six months and dismissal from service was illegal in that Section 39 of the Act provides that any person subject to the Act who commits any of the offences, including the offence of, without sufficient cause, overstaying leave granted to him, shall, on conviction by a Court-Martial, be liable to suffer imprisonment for a term

which may extend to three years or such less punishment as mentioned in the Act; that section does not provide for dismissal from service as a punishment.

6 The scheme of the Army Act shows that the Courts-Martial were intended to be quasi-judicial bodies required to follow the principles of natural justice. Chapter X of the Act (containing Sections 103 to 127) deals in some detail about the functioning of Courts-Martial on the same lines as a Court of law. Chapter XI (covering Sections 128 to 152) deals with the procedure of Courts-Martial. Section 130 (quoted below) provides to the effect that at all trials by Courts-Martial, the accused shall be asked whether he objects to being tried by any officer sitting on the Court and lays down the procedure if the accused objects to any such officer. Section 130 reads as follows:

"130 (1) At all trials by general, district or summary general court-martial, as soon as the Court is assembled, the names of the presiding officer and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the Court.

(2) If the accused objects to any such officer, his objection, and also the reply thereto of the officer objected to, shall be heard and recorded, and the remaining officers of the court shall, in the absence of the challenged officer decide on the objection.

(3) If the objection is allowed by one-half or more of the votes of the officers entitled to vote, the objection shall be allowed, and the member objected to shall retire, and his vacancy may be filled in the prescribed manner by another officer subject to the same right of the accused to object.

(4) When no challenge is made, or when challenge has been made and disallowed, or the place of every officer successfully challenged has been filled by another officer to whom no objection is made or allowed, the court shall proceed with the trial."

Section 152 is that any trial by a Court-Martial shall be deemed to be a judicial proceeding and the Court-Martial shall be deemed to be court as provided therein. Chapter XV (covering Sections 191 to 194) of the Act gives the Central Government power to make rules and regulations for the purpose of carrying into effect the provisions of the Act and rules have been made accordingly. In exercise of the power conferred by Section 191 and in supersession of the previous rules, the Central Government, by S. R. O. dated November 27, 1954, made rules

called Army Rules, 1954. Under these rules, the accused is given an opportunity to be represented by any officer who shall be called "the defending officer" or assisted by any person whose services the accused may be able to procure and who shall be called "the friend of the accused." Rule 107 of the Army Rules, 1954 provides that when any evidence is given in a language which the court or the accused does not understand, that evidence shall be interpreted to the court or officer attending the proceedings in a language which it or he does understand, the Court-Martial shall, for this purpose, either appoint an interpreter, or shall itself take the oath or affirmation prescribed for an interpreter at a Summary Court-Martial.

7. It is apparent from the scheme of the Army Act that a Court-Martial as a court is to follow the procedure adopted by courts of law at the trial before it, in giving findings and awarding sentences on persons charged with having committed offences under the Act as in a judicial proceeding; this implies that rules of natural justice should also be observed.

8. The question is: Did the Summary Court-Martial while dealing with the petitioner in the proceeding against him follow the procedure laid down under the Act and the Rules made thereunder or the principles of natural justice? The Station Staff Officer, Station Head Quarters, Cuttack, in his counter-affidavit made it clear how the proceedings of the Summary Court-Martial were conducted. He stated that the petitioner was charge-sheeted by the Lt. Col. Commanding 19 Air Defence Regiment under Section 39 (b) of the Act for unauthorised absence from duty for a period of 84 days. Before the Summary Court-Martial the petitioner was assisted by an officer as "the friend of the accused" and also by another officer who acted as interpreter. It was further stated that since the petitioner pleaded not guilty, three witnesses were examined during the proceeding on behalf of the prosecution and the accused-petitioner declined to cross-examine any of these witnesses. Thereafter, the accused petitioner was called upon for his defence. He declined to cite any witness in defence, to examine himself; he produced certain medical certificates in support of his version; the certificates were exhibited in the case.

9. We are satisfied that the Summary Court-Martial duly followed the procedure under the Army Act, the Army Rules and the rules of natural justice and awarded the punishment after considering the entire evidence on record

including the statement of the accused and the materials produced by him in support of his case, all as explained in the counter-affidavit filed by the Station Staff Officer on behalf of the Union of India. Therefore, the contention that the petitioner was not given an opportunity to defend himself at the trial before the Summary Court-Martial is not tenable.

10. There is also no substance in the argument on behalf of the petitioner that the punishment of his dismissal from service was illegal. The petitioner's point is that Section 39 of the Act under which he was charged provides that on conviction he shall be liable to suffer imprisonment and there is no provision in that section providing for dismissal from service on conviction under that section. This argument, however, overlooks Sections 71 and 73 of the Act. Section 71 provides that punishment may be inflicted in respect of offences committed by persons subject to the Army Act and convicted by a Summary Court-Martial according to the scale as mentioned therein including dismissal from the service. Section 73 provides for combination of punishments—dismissal along with imprisonment as in the present case—which a Court-Martial may award as a punishment in addition. Thus, under Section 71 read with Section 73 of the Act, punishment of dismissal can be combined with the sentence of imprisonment that a Court-Martial may award. The impugned order of dismissal combined with imprisonment is not therefore illegal.

11. In the view that we have taken of the case on merits as discussed above, we consider it unnecessary to express any opinion on the point raised on behalf of the Union of India on the question of the jurisdiction of this Court to enquire into the validity of the proceedings before the Summary Court-Martial.

12. In the result, therefore, the writ petition is dismissed. But there will be no order as to costs.

13. A. MISRA, J. :— I agree.
BNP/D.V.C. Petition dismissed.

AIR 1969 ORISSA 171 (V 56 C 58)

A. MISRA, J.

Durga Prasad Sharma, Appellant v. Sadasib Biswal, Respondent.

Second Appeal No. 475 of 1964, D/- 3-9-1968, from decision of Addl. Sub. J., Sambalpur, D/- 20-4-1964.

(A) Civil P. C. (1908), O. 8, R. 6 — Applicability — Plea of adjustment — Rule

LL/LL/F721/68

applies if adjustment has not been effected prior to institution of suit.

The plea of adjustment to which O. 8, R. 6 will not be applicable can be raised only where prior to the date of suit an adjustment had already been effected.

Thus, where in a suit for arrears of salary the defendant pleads payment by adjustment of the usufruct of his lands appropriated by the plaintiff but it is not made out that prior to the institution of the suit there was any adjustment between the parties of the usufruct alleged to have been received by the plaintiff, the Court would be justified in not considering the same if the defendant has not paid any court-fee thereon, AIR 1955 Hyd 176 & AIR 1955 Pat 320, Rel. on.

(Para 6)

(B) Civil P. C. (1908), S. 11 — Plea of res judicata — Ingredients stated — Onus is on defendant to establish — Pleading and proof — Evidence in support.

In order that Section 11 C. P. C. may apply to any particular case, it is necessary that the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; that the former suit must have been between the same parties; that the parties must have been litigating under the same title in the former suit and the matter in issue in the subsequent suit must have been heard and finally decided in the earlier one. The question whether a matter was raised, heard and finally decided is one of fact to be determined on the circumstances of each particular case and the burden of establishing the plea of res judicata is always on the party who sets it up.

(Para 8)

The plaintiff was an employee of the defendant. There was a settlement between the parties at which it was ascertained that the defendant was to pay in all Rs. 2482 towards arrears of salary. This liability was acknowledged by the defendant who paid Rs. 610 in cash and for the balance it was agreed that defendant would execute a sale deed and transfer his lands to the plaintiff. Due to some differences between the parties defendant filed suit for declaration of his right, title and interest in the said land which was later decreed in his favour. Subsequently, when the plaintiff filed suit for recovery of arrears a plea of res judicata was raised by the defendant on the ground that in the previous suit the alternative claim of the plaintiff for refund of arrears was not allowed.

Held, that the decision on the plaintiff's right to refund or recover the balance amount was not directly or substantially in issue in the earlier suit nor was a decision on that issue necessary for grant

of relief in the earlier suit. Since there was no material on record to show that in the previous suit plaintiff's right to recover the amount was heard or decided the plea of res judicata was not open to the defendant.

Held further that the onus being on the defendant who had set up the plea of res judicata, he should have filed the plaint as well as the judgment of the earlier suit instead of remaining content only by filing a copy of the written statement and decree. For, in the absence of proof of the pleadings and judgment in the previous suit, the plea of res judicata could not be accepted. AIR 1955 Orissa 28, Rel. on, AIR 1964 Pat 174 (FB) & AIR 1965 SC 1150, Dist. (Para 8)

(C) Contract Act (1872), Ss. 70, 65 — Plaintiff agreeing to adjustment of amount due to him from defendant — Defendant to convey title in lands to him after conversion into raiyati — Contract is not void ab initio — Plaintiff is entitled for refund under S. 65 as well as under S. 70.

Though a contingent contract to do or not to do anything is not enforceable in law unless and until the event happens, such a contract is not void ab initio but becomes void only where happening of the event subsequently becomes impossible. (Para 11)

Where the plaintiff agreed to the adjustment of the amount acknowledged to be due to him from the defendant for obtaining a sale of the defendant's lands in future, if by legislation or otherwise they were converted into raiyati, and sale became permissible under law, the contract was not to the knowledge of the parties void ab initio and the plaintiff, therefore, was entitled to restoration of the benefit enjoyed by the defendant and refund of the amount under Section 65 of the Contract Act.

Since a contract was not unlawful and the plaintiff did not allow adjustment of the amount due to him and accept satisfaction of the liability by the defendant gratuitously and since the defendant had enjoyed the benefit of the plaintiff agreeing to such adjustment of his dues, all the ingredients necessary to attract section 70 of the Contract Act were fully satisfied and consequently the defendant was bound to make compensation or restore the benefit received by him under Section 70 also AIR 1962 SC 779, Followed. (Para 13)

Cases Referred: Chronological Paras
(1963) AIR 1965 SC 1150 (V 52) =
(1965) 1 SCR 686, Devilal v. Sales Tax Officer, Ratlam 8
(1964) AIR 1964 Pat 174 (V 51) =
1964 BLJR 167 (FB), Lalbahari v. Sheo Shankar Prasad B

(1962) AIR 1962 SC 779 (V 49) =
(1962) 2 SCA 375, State of W. B. v. B. K. Mondal & Sons 13
(1955) AIR 1955 Hyd 176 (V 42) =
ILR (1955) Hyd 313, Konda Pentiah v. Chenchu Rangia 6
(1955) AIR 1955 Orissa 28 (V 42) =
ILR (1954) Cut 706, Rupa v. Sriyabati 8
(1955) AIR 1955 Pat 320 (V 42) =
ILR 34 Pat 487, Sarangdhar v. Lakshmi Narayan 6

Murlidhar Patra and Damodar Mohanty, for Appellant; B. Mohapatra, for Respondent.

JUDGMENT:— This second appeal has been preferred by the defendant against a modifying judgment. The plaintiff-respondent was an employee of the defendant. On 19-6-59, there was a settlement between the parties at which it was ascertained that defendant was to pay in all Rs. 2,482 (Rs. 1,620/- towards arrears of salary plus Rs. 862/- alleged to have been spent by plaintiff in the management of defendant's properties). This liability was acknowledged by the defendant who paid Rs. 610/- in cash and for the balance of Rs. 1,872/-, it was agreed that defendant would execute a sale deed and transfer bhogra lands described in Sch. A of the plaint after abolition of gountiaship and conversion of bhogra into raiyati. The settlement was endorsed in writing in the note book marked Ex. 1. Plaintiff continued to serve defendant till Chaitra 1960 and for the subsequent period arrears of salary amounted to Rs. 300/-. Due to some differences between the parties, defendant filed T. S No 41/60 in the Court of Munsif, Bamra for declaration of his right, title and interest in the A schedule lands which was decreed in his favour. Therefore, plaintiff claims to be entitled to recover Rs. 1,872/- which had been agreed to be adjusted towards the sale plus Rs. 300 towards arrears of salary for the post-settlement period which comes to Rs. 2,172/-. He, however, filed the suit to recover Rs. 1,995/- relinquishing the balance. Defendant admits to have accepted the liability under the settlement dated 19-6-59 as alleged. He, however, states that he agreed to the plaintiff's proposal to possess the A Sch. Bhogra lands for few years in satisfaction of his claim on the understanding that if the bhogra lands would be converted into raiyati, plaintiff would purchase the same at the then market rate. Subsequently, however, plaintiff declined to take the lands and demanded payment of his dues amounting to Rs. 1,872/-. Therefore, defendant withdrew Rs. 2,000 in two instalments from his postal savings bank account on 4-7-59 and 7-7-59 and made full payment of the plaintiff's dues. Alternatively, he

has pleaded that even if the alleged payment of Rs. 1,872/- by him is not believed, plaintiff will not be entitled to get refund of the money as the contract for sale of bhogra lands was illegal and void ab initio. He asserts to have fully paid the salary of plaintiff for the period of his service subsequent to July, 1959. In addition, he also resists the claim on the ground of limitation as well as res judicata.

2. The trial court disallowed the entire claim so far it relates to the period prior to 19-6-59 and decreed the claim relating to the subsequent period in part for Rs. 300/- only on the following findings; (1) the settlement between the parties on 19-6-59 so far the claim related to the period prior to that date is final and conclusive and suit is not barred by limitation having brought within three years from the date of settlement where liability was acknowledged by defendant; (2) the payment of Rs. 1,872/- on 7-7-59 as alleged by defendant in satisfaction of plaintiff's claim is proved; (3) even if the alleged payment is not believed, plaintiff is not entitled to get refund of the consideration of the agreement dated 19-6-59 as the contract was void ab initio; (4) the claim for refund of Rs. 1,372/- is barred by principles of res judicata; (5) payment of Rs. 100 towards arrears of salary for the period subsequent to July, 1959 by the defendant to the plaintiff is proved and the balance of Rs. 200 only remained outstanding; (6) defendant having failed to pay court-fee towards his claim of usufruct of the A Sch. lands for the year 1959 alleged to have been appropriated by the plaintiff, no finding on it can be given.

3. Plaintiff preferred an appeal against the part of the judgment and decree disallowing a substantial portion of his claim, while defendant filed cross-objection so far the trial court decreed the suit in part against him for Rs. 200/-. The lower appellate court rejected the cross-objection in toto, reversed the other findings of the trial Court, except the finding that defendant had paid Rs. 100 to the plaintiff subsequent to July, 1959, allowed the appeal and decreed the suit for Rs. 1895/-. It held that the alleged payment by defendant to the plaintiff on 7-7-59 is not proved and that plaintiff is entitled to refund of the consideration as the contract dated 19-6-59 was not void ab initio.

4. Appellant challenges the judgment and decree of the lower appellate court on the following grounds; (1) the finding of the lower appellate court disbelieving the alleged payment of Rs. 1,872/- by defendant to plaintiff on 7-7-59 is erroneous; (2) the courts below have erred in disallowing adjustment of the usufruct

of the A Sch. bhogra lands appropriated by the plaintiff in the year 1959; (3) the suit is barred by limitation; (4) the suit is barred by principles of res judicata and (5) the claim for refund of consideration is not maintainable as the contract for sale of bhogra lands was void ab initio to the knowledge of the plaintiff.

5. Point No. 1 — The trial court accepted the plea of payment alleged by defendant in full satisfaction of the plaintiff's claim relying on the sole testimony of defendant and treating the withdrawal of Rs. 2,000 by him in two instalments on 4-7-59 and 7-7-59 from the postal savings Bank as providing corroboration. The lower appellate court on an assessment of the evidence and consideration of the circumstances and the conduct of the parties reversed the finding of the trial court and rejected the alleged plea of payment. This is clearly a finding of fact which is not assailable in second appeal. Apart from it, on merits, I entirely agree with the reasons which weighed with the lower appellate court in disbelieving this alleged payment by the defendant. Therefore, this contention has no merit.

6. Point No. 2:— It is contended for the appellant that the amount of usufruct received by the plaintiff from the bhogra lands during the year 1959 should have been allowed to be adjusted against the claim. This contention has been negated by both the courts below on the ground that the same has not been pleaded as a set-off or a counter claim and court-fee paid thereon. Learned counsel for appellant contends that a plea of adjustment is distinct from a plea of set off or a counter claim, and in the case of the former Order 8, Rule 6 C. P. C. is not applicable. In support of this contention, he has placed reliance on the decisions reported in AIR 1955 Hyd 176, Konda Pentiah v. Chenchu Rangia and AIR 1955 Pat 320, Sarangdhar v. Lakshmi Narayan. These two decisions do not support the contention advanced. The plea of adjustment to which Order 8, Rule 6 C. P. C. will not be applicable can be raised only where prior to the date of suit an adjustment had already been effected. The following observations in the Patna decision referred to above clearly negative the contention now advanced:

"Whether the claim of the appellants be considered to be a legal set-off or a counter claim, the appellants had to pay court-fees on their claim. This they did not do, and the courts below were right in not considering the appellants' claim when they did not pay the court-fees thereon."

It is neither in the pleading nor was it sought to be made out during trial that prior to the institution of the suit there

was any adjustment between the parties of the usufruct alleged to have been received by the plaintiff in the year 1959. Therefore, the Courts below have rightly negated this contention.

7. Point No 3. — Coming to the question of limitation, it is not disputed that plaintiff was an employee on a monthly salary and there were arrears outstanding against the defendant. These arrears were ascertained, the amount spent by plaintiff in the course of management of defendant's properties was added to it and the defendant in his own hand made the endorsement (Ex. 1) acknowledging his liability for the amount on 19-6-59. The suit was filed on 18-6-62 within three years of that date, and as such, the suit is clearly within time.

8. Point No 4 — It is contended that the present claim is barred by res judicata, because in T. S. No 41/60 the alternative claim of the present plaintiff who was defendant therein for refund of Rs. 1,872/- was not allowed. Therefore, it is argued that such a claim must be deemed to have been negated in the previous litigation and hence the present suit is barred by res judicata. In support of this contention, reliance has been placed on the decisions reported in AIR 1964 Pat 174 (FB), Lalbhai v. Sheo Shankar Prasad, AIR 1965 SC 1150, Devail v. Sales Tax Officer. Both these decisions are quite distinguishable. They relate to cases where on merits a decision had been taken in the previous litigation, though certain grounds had not been urged in the earlier proceeding. Therefore, it was held that a fresh challenge on different grounds will not be available being barred by principles of res judicata. In order that section 11 C. P. C. may apply to any particular case, it is necessary that the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; that the former suit must have been between the same parties; that the parties must have been litigating under the same title in the former suit and the matter in issue in the subsequent suit must have been heard and finally decided in the earlier one. The question whether a matter was raised, heard and finally decided is one of fact to be determined on the circumstances of each particular case and the burden of establishing the plea of res judicata is always on the party who sets it up. The trial court in Para 11 of its judgment by referring to Para 1 of the written statement (Ex. C) and the decree (Ex. D) filed in the previous suit which contain absolutely no reference to the said claim came to the conclusion that the claim was either not granted or it was not pressed. Learned counsel for appellant relying on Explanation 4 to Section 11 C. P. C. contends

that though Ex. D makes no reference to the court's finding or decision on any such claim, it should be deemed to have been a matter directly and substantially in issue in such suit and heard and finally decided therein. The onus being on the defendant who has set up the plea of res judicata, he should have filed the plea as well as the judgment of the earlier suit instead of remaining content only by filing a copy of the written statement and decree in the circumstances of the present case, in the absence of proof of the pleadings and judgment in the previous suit, the plea of res judicata cannot be accepted, vide AIR 1955 Orissa 28, Mst. Rupa v. Mst. Sriyabati. Apart from it, the claim in the previous suit (T. S. 41/60) by the defendant was for declaration of his title to and confirmation of possession of the A. Sch. Bhogra lands on the ground that the present plaintiff had not acquired any title therein. A decision on the plaintiffs' right to refund or recover the amount claimed now was not directly or substantially in issue in the earlier suit nor was a decision on such an issue necessary for grant of relief in the earlier suit. There is no material on record and Ex. D does not show that in the previous suit plaintiffs' right to recover the amount now claimed was heard or decided. Therefore, taking any view of the matter, the contention of appellant that the present claim is barred by res judicata is not tenable.

9. Point No 5 — The only other point which has been urged by learned counsel for appellant with some emphasis is that the contract for sale of bhogra lands being void ab initio to the knowledge of the parties, Section 65 of the Contract Act is not attracted, and as such, plaintiff will not be entitled to refund of the consideration. This contention found favour with the trial court, but was negated by the lower appellate Court. It is urged that Section 65 of the Contract Act will apply only where the contract was legal at the inception but became void due to happening of some subsequent event or where it is subsequently discovered that the contract is void. In the present case, when to the knowledge of both parties the contract was void ab initio, Section 65 will have no application.

10. The above contention is not sustainable on the pleading of the parties. The averments contained in para 4 of the plaint and para 7 of the written statement do not disclose that there was any agreement to sell bhogra lands as such. From the averments in the above two paragraphs, the common case of the parties appears to be that what was agreed to on 19-6-59 was not for sale of bhogra lands but for sale of the A. Sch. lands, if subsequently by legislation or otherwise they were converted into raf-

yati and sale became permissible under law. This being the contract as disclosed in the pleadings, it is not correct for appellant to contend that the agreement was for sale of bhogra lands, and as such, it was void ab initio to the knowledge of both parties. Therefore, as has been observed by the lower appellate Court, this contention of appellant is not tenable.

11. Next it is contended for appellant that even if it be held that the contract was not for sale of bhogra lands, still the agreement is void on grounds of uncertainty, because the performance of the contract depended on the contingency of happening of a future event, i. e. abolition of gountiaship and conversion of bhogra into raiyati. Such a contention appears to have been raised for the first time in second appeal. Further, though a contingent contract to do or not to do anything is not enforceable in law unless and until the event happens, such a contract is not void ab initio but becomes void only where happening of the event subsequently becomes impossible. Therefore, it is not correct to say that to the knowledge of the parties it was void ab initio, and as such, outside the scope of Section 65 of the Contract Act.

12. It is next argued that if it is treated as a contingent contract, an obligation on the part of defendant to perform his part of the agreement of effecting a sale will arise only on the happening of the event of conversion of bhogra into raiyati. No time limit for such performance has been prescribed. Therefore, when the possibility of the contingency happening in future cannot be eliminated, it is not open to plaintiff to claim refund of the consideration. Such a contention, in my opinion, is not sustainable on the facts and circumstances of the present case. In para 7 of the written statement, the specific case of defendant is that subsequent to the date of agreement plaintiff proposed to resile from it and demanded back his dues in cash. Defendant agreed to such a request. This, in short, according to defendant's own pleading, means that the agreement for sale of the bhogra lands on their conversion into raiyati was put an end to by the consent of both parties. Therefore, it is futile for him now to contend that the contingent contract still subsists. Again, it is an admitted fact that defendant filed T. S. No. 41/60 for declaration of title to and recovery of possession or confirmation of possession of the A Sch. lands and obtained a decree. The filing of the suit had the effect of resiling from the contract and amounted to a breach by the defendant. It is not open to him now to contend that the contract still subsists and defendant will be liable to perform his part only if and when the contingency of con-

version of bhogra takes place at some future date.

13. Apart from the merits of the contentions advanced for appellant which have been dealt with above, the question is whether plaintiff will be entitled to refund of the amount whether it be under Section 65 or other provision of the Contract Act. Section 70 of the Contract Act lays down as follows:—

"70. Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered."

The necessary ingredients to attract this provision are: firstly, a person lawfully doing anything for another or delivering anything to him; secondly, not intending to do so gratuitously and thirdly, the other person enjoying the benefit thereof. The provision contained in Section 70 of the Contract Act strictly speaking, is not based on contract, but it embodies equitable principles of restitution and prevention of unjust enrichment. In the decision reported in AIR 1962 SC 779, *State of West Bengal v. B. K. Mondal & Sons* it has been observed:

"What Section 70 prevents is unjust enrichment."

If the aforesaid conditions are satisfied, a person who has enjoyed the benefit is bound to make compensation or restore the benefit received. From the conduct of the parties as reflected in their pleadings and the circumstances proved, it is clear that the parties proceeded to enter into the agreement under the belief that gountia tenures were going to be abolished resulting in conversion of Bhogra into raiyati which will make the lands transferable. The contract in the present case, therefore, was a contingent one where the plaintiff agreed to the adjustment of the amount acknowledged to be due to him for obtaining a sale in future on the happening of the contingency. Such a contract is not unlawful. Secondly, it cannot be denied that plaintiff did not intend to allow adjustment of the amount due to him and accept satisfaction of the liability by the defendant gratuitously, because the admitted case is that in return for the amount defendant was to convey title in respect of the lands to him after conversion into raiyati. Defendant has undoubtedly enjoyed the benefit of the plaintiff agreeing to such adjustment of his dues. Thus, all the ingredients necessary to attract section 70 of the Contract Act are fully satisfied. Therefore, plaintiff is entitled to restoration of the benefit enjoyed by defendant and refund of the amount both under Sec-

tion 65 as well as under Sec. 70 of the Contract Act.

14. Thus, none of the contentions urged on behalf of appellant has any merit. In the result, the appeal fails and is dismissed with costs.
BNP/D.V.C. Appeal dismissed.

AIR 1969 ORISSA 176 (V 56 C 59)

B. K. PATRA J.

Manilal Sahu and others, Appellants v. State, Respondent

Criminal Appeal No 60 of 1966, D/- 19-11-1968, from order of S. J. Sambalpur-Sundergarh, D/- 25-3-1966

(A) Evidence Act (1872) Section 5 — Interested and partisan witnesses — Appreciation of evidence — Communal riot — Witness belonging to one community — Duty of Court — (Penal Code (1860), Section 147 — Evidence)

In cases of communal riots it would be unreasonable to contend that the evidence given by the witnesses should be discarded only on the ground that the persons who gave such evidence belong to one particular community and are as such partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would lead to failure of justice. When the evidence is of this nature, the courts have to very carefully weigh such evidence with a view to ensure that taking advantage of the situation innocent persons are not falsely implicated. (Para 5)

(B) Evidence Act (1872), Ss. 145 and 155 — Previous statements of prosecution witnesses reduced into writing — Right of accused to ask prosecution to make them available for his defence — Statement not in possession of prosecution but of third party — Accused should summon such person — (Criminal P. C. (1898), S. 256).

It is no doubt a legitimate right of the accused persons to defend themselves by proving, if they can, that the prosecution witnesses had made different statements on previous occasions. If the prosecution is in possession of these statements and does not make them available to the accused, this precious right is taken away from the accused and they are handicapped in their defence. It is immaterial for their purpose whether this unfortunate result accrues on account of any dishonest motive, or sheer negligence on the part of the prosecution. But such grievance can be made by the defence only if the statements in question are in possession of the prosecution. Where they are in possession of a third party it is for the accused to summon them from that person and if the statements are not secured, no

blame can be attached to the prosecution. (Para 6)

(C) Penal Code (1860), Ss. 34, 141, 142 and 149 — Being a member of unlawful assembly — Proof of overt act — Not essential in every case — Proof of sharing common object of assembly is necessary — Common object and common intention — Distinction.

No general proposition of law can be laid down that commission of an overt act by every person who is alleged to be a member of an unlawful assembly must in all cases be proved. AIR 1965 SC 202, Rel. on, AIR 1956 SC 181, Ref. to

(Para 7)

Inasmuch as the possibility of innocent persons out of sheer curiosity joining an unlawful assembly cannot be ruled out, every person found in such an assembly cannot ipso facto be treated as one sharing the object of the assembly. In order to constitute a person a member of the unlawful assembly it is not necessary that he should have done any overt act in pursuance of the common object. Every case has to be judged on its own merit. The only thing that is necessary to find out is whether the facts and circumstances of the case warrant a conclusion that the person concerned shared the common object of the unlawful assembly. In judging this it is well to remember that a common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the people get there. It is enough that each has the same object in view and that their number is five or more and that they act as an assembly to achieve that object. (Para 8)

Cases Referred: Chronological Paras

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| (1968) 1968 Cri LJ 1251=34 Cut LT | |
| 215, Harun Tirkey v. State | 7 |
| (1965) AIR 1965 SC 202 (V 52)= | |
| 1965(1) Cri LJ 226, Masalti v. State of U. P. | 7 |
| (1956) AIR 1956 SC 181 (V 43)= | |
| 1956 Cri LJ 345, Baladin v. State of U. P. | 7 |

L. Rath, for Appellants, A. B. Misra, for Govt. Advocate, for Respondent.

JUDGMENT :— The four appellants along with 23 others were prosecuted on charges under Sections 147, 302/149, 436/149 and 380/149 I. P. C. The other 23 accused persons were acquitted of all the charges. Appellants 1, 2 and 3 who were accused nos 9, 10 and 11 respectively in the trial court were convicted under Section 147 I. P. C. and sentenced to undergo R. I. for one year each. Appellant No 4 who was accused no 21 in the trial Court was convicted under Sections 147 and 436/149. For his conviction under Section 436/149 I. P. C. he was sentenced

The Lahore High Court also held in *Hafiz Mohammad Suleman v. Hari Ram*, AIR 1937 Lah 370 that Sec. 63 of Evidence Act is exhaustive of the meaning of 'secondary evidence'. Here if the drafts do not come under Section 63, they do not become admissible under any other provision of the Evidence Act in proof of the contents of the awards. Another case relied upon is a decision in *Public Prosecutor v. G. Sadagopan*, AIR 1953 Mad 785. In that case the copy of sanction for prosecution was lost. Original sanction order from the file was produced as secondary evidence. It was held that as a matter of fact the sanction order produced from the file which bore signature of the authority concerned was really original sanction order. Further it was not disputed in that case that the paper produced from the file was genuine original office copy of the relevant document.

Another decision relied upon is reported in AIR 1967 SC 526, *Hindustan Construction Co. Ltd. v. Union of India*. In that case a signed copy of the award was produced. It, however, showed that the person signing authenticated the accuracy or the correctness of the copy and under such circumstances the copy produced was treated as signed copy of the award. The document produced itself began with the words "Now I hereby reproduce true copy of the award which is as follows" and at the end the words were "certified as correct copy of the award dated 27th May, 1961". Therefore the document was treated as true or accurate and full reproduction of the original award bearing the signature of the umpire and as such it was held to be a signed copy of the award. Production of the signed copy of the award was sufficient compliance of the requirements of Section 14(2) of the Indian Arbitration Act to enable the Court to take action under section 17 of that Act. That is not the case here.

Learned counsel has also referred to certain English decisions: (1750) 27 ER (Chancery) 1097; (1875) 20 Eq Cas 238 and (1847) 60 ER 729 as also Halsbury's Laws of England II Edition volume XIII 596. But in view of the fact that we have our own codified Evidence Act, the admissibility or otherwise of any evidence has to be determined with reference to the provisions of that Act and not with reference to any law of England. In *Lakhraj v. Mahpal*, (1880) ILR 5 Cal 744 (PC). The Privy Council observed that a person willing to tender evidence must show that his documents are admissible under some provisions of the Indian Evidence Act. It is, therefore, needless to refer to the English decisions. These references, however, do not lay down that even without a proof that the contents are the same as in original document a piece of paper becomes admissible as secondary evidence simply

by calling it a draft. In Halsbury's Laws of England reference to draft being secondary evidence is based upon decision in *Waldy v. Gray*, (1875) 20 Eq Cas 238. In that case the drafts themselves bore endorsement that the deeds were engrossed from those identical drafts and that they were duly stamped and duly executed. In (1750) 27 ER 1097 the draft was strongly proved (it is not clear how it was proved).

In (1847) 60 ER 729 it is clear how the draft was proved

17. Here the drafts can be admitted in evidence only if it is shown by evidence on the record that they were compared with the original and the contents are the same. Such evidence is wanting in this particular case. The drafts have been proved by *Shri Mukteshwar Kuer* (P. W. 2). His statement is: "We consulted among ourselves and came to a conclusion. The decision of the Panches was unanimous. The awards were written. I prepared the drafts and they were faird out by *Shyam Narain Kuer*. The awards were read out to the parties and were delivered. They were signed by arbitrators. I made over awards and other papers including the order sheet and depositions and notices to the parties etc. to *Shyam Narayan Kuer* for filing in the Court. These drafts were written by me and bore my signature (marked exhibits 1 and 1/a)". So according to his evidence the original awards were written out by *Shyam Narain Kuer*. Of course though this witness says that the originals were faird out from the drafts, he does not say with reference to the contents of the same as in the original awards which were later signed by the arbitrators. That is to say, he does not vouchsafe that the contents of the original awards are accurately reproduced in the drafts. He does not say that the drafts were compared with the originals. No other witness has spoken anything in this connection. *Shyam Narain Kuer* (D. W. 2 in Title Suit No. 12 of 1949) has denied to have fair copied any award. Therefore, the drafts have not been proved to have accurately contained the contents of the original awards. They are not admissible as secondary evidence of the alleged awards. That being so, neither the original awards nor the secondary evidence of the contents thereof are on the record and hence no judgment and decree could follow on the basis of the alleged drafts, exhibits 1 and 1/a.

18. Next it has been contended by the learned counsel for the appellants that in Title Suit No. 35 of 1950 the agreement to refer to arbitration was bad, inasmuch as, no leave of the court was obtained by *Jagdish Lal* who was next friend of the minor plaintiffs *Gama, Lal and Mahesh Lal*, appellants nos. 22 and 23 respective-

tion 65 as well as under Sec. 70 of the Contract Act.

14. Thus, none of the contentions urged on behalf of appellant has any merit. In the result, the appeal fails and is dismissed with costs.

BNP/D.V.C. Appeal dismissed.

AIR 1963 ORISSA 176 (V 56 C 59)

B K. PATRA J.

Manilal Sahu and others, Appellants v. State, Respondent

Criminal Appeal No 60 of 1966, D/- 19-11-1968, from order of S J, Sambalpur-Sundergarh, D/- 25-3-1966.

(A) Evidence Act (1872) Section 5 — Interested and partisan witnesses — Appreciation of evidence — Communal riot — Witness belonging to one community — Duty of Court — (Penal Code (1860), Section 147 — Evidence).

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18. Next it has been contended by the learned counsel for the appellants that in Title Suit No. 35 of 1950 the agreement to refer to arbitration was bad, inasmuch as, no leave of the court was obtained by *Jagdish Lal* who was next friend of the minor plaintiffs *Gama Lal* and *Maresh Lal*, appellants nos. 22 and 23 respective-

ly in Miscellaneous Appeal No 8 of 1961, as required under Order 32, R 7 of the Code of Civil Procedure and as such the whole reference was illegal and consequently the award following is fit to be set aside. It has also been contended that in view of the very nature of the dispute in both the suits, the subject-matter and parties being so overlapping, there should not be two inconsistent decrees. They are inseparable and therefore if award in Title Suit No 35 of 1950 is set aside on the aforesaid ground the award in Title Suit No 12 of 1949 in which the aforesaid minors were not parties also has to be set aside.

19 The plaint of Title Suit No 35 of 1950 indicates that Gama Lal and Mahesh Lal were minors under the guardianship of Jagdish Lal. In order to ascertain the fact whether Gama Lal and Mahesh Lal were minors at the time the agreement to refer the dispute to arbitrators was filed was enquired into by the court below, as directed by this Court. As has been noted the decision of the Court below is that these two persons were minors at the time the agreement was filed. No attempt was made by the respondents to dislodge the findings of the court below on this point. Therefore, the fact remains that these two persons were minors and the agreement to refer the dispute to arbitration was not legal, so far these minors are concerned in absence of sanction of the court. If they were majors, the reference was bad inasmuch as they did not join in the reference and they were not represented.

Learned Counsel for the respondents conceded that whether they are minors or majors, in either case reference is bad, so far Gama Lal and Mahesh Lal are concerned and the award is not binding on them. His submission, however, has been that the award has to be upheld, so far other parties to the litigation are concerned and the suit will proceed so far the interest of these two persons are concerned.

20, Title Suit No 35 of 1950 was instituted by these appellants of Miscellaneous Appeal No 8 of 1961 for redemption of the Rehan deeds. In view of the pleadings of the parties the dispute involved a point as to on what terms, i.e. on payment of what amount the claim for redemption could be allowed. This was the common question in which all the appellants were equally interested. It cannot be said that the rehan deed will be redeemed by one person on payment of one amount and on payment of a different amount if the redemption is by another person having such a right of redemption. Interest of any of the appellants was not severable from that of the other. Under Section 21 of the Arbitration Act, the reference was to be made by all the

parties interested. The section runs as follows:

"Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

Therefore, according to this section the dispute had to be referred to by all the parties interested in it. The only exception to this section is as provided in section 24 of the Arbitration Act. That section runs as follows:

"Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, Section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application."

Here in view of the very nature of the dispute which arose on the pleadings of the parties, it cannot be said that the matters in difference between the parties joining in the reference to arbitration can be separated from the rest of the subject-matter of the suit. Any attempt to separate the subject-matter in dispute may lead to inconsistent decrees. Therefore the present case cannot be covered by Section 24 of the Arbitration Act. In that view of the matter the entire reference has to be treated as illegal and consequently the award, if at all, following has to be set aside.

In this connection reference may be made to a decision of this court in Deonarain Singh v. Siyabar Singh, AIR 1952 Pat 461. That was a case in which a suit for declaration of possession in respect of a piece of land was filed. Some of the plaintiffs were minors. One of the defendants also was minor. The minors were represented by natural guardians. The natural guardians entered into a compromise. They did not obtain the leave of the court for that purpose. It was therefore held that the reference to the arbitration on behalf of the minors was not valid. Having regard to the nature of the suit it was held that it was essential that all the parties to the suit should have joined in the reference and that leave of the Court should have been obtained by the natural guardians on behalf of the minors before valid refer-

ence could be made. That having not been done, the entire reference and the whole proceeding which followed thereafter were held to be illegal. It is true that the major persons who joined in the reference could not contend that the reference and the arbitration proceeding following were illegal and not binding on them on this ground. But it is well settled that on account of the non-compliance of the provisions of Order 32, Rule 7 of the Code of Civil Procedure the minors could avoid the award and that can be done by raising the question in appeal, even though no application to set aside the award on that ground was filed by the minors in the trial Court. The appeal has to be treated as continuation of the suit and the minors' right to challenge the award and the decree following continues and when the award is not binding on the minors, in view of the very nature of the dispute as has been noted above, the entire award has to be set aside. In this connection reference can be made to a decision in *Lilju Mandal v. Smt. Chandra Devi*, AIR 1964 Pat 498.

21. Therefore, in view of the above legal position, I hold that the award, if at all given in Title Suit No. 35 of 1950, is fit to be set aside as a whole.

22. If Title Suit No. 35 of 1950 is to be decreed in favour of the appellants, it will be decreed on the footing that Rs. 38050/- was already paid and redemption could be allowed on deposit of Rs. 23,104/15/6 only. This will be on the ground that Rs. 38050/- was already paid to the Dar-rehandars at the instance and with the consent of the Rehandars. In Title Suit No. 12 of 1949 which has been instituted by rehandars for declaration of right of redemption of the Dar-rehan bonds, the claim is that Rs. 10,000/- was already paid by the rehandars and the dar-rehandars were entitled to the balance of the dar-rehan money only. Therefore, the allegations in both the suits are contradictory. If Title Suit No. 35 of 1950 is decreed, that will mean that the entire dar-rehan money has been paid and dar-rehan bonds stand redeemed. If Title Suit No. 12 of 1949 is decreed, it will be on the footing that only Rs. 10,000/- of the dar-rehan is paid and the balance is still due and the claim for declaration could be decreed on condition of payment of such balance amount. Therefore, there is likelihood of two inconsistent decrees. Under such circumstances in view of the nature of the dispute and the properties involved the award, if at all delivered in Title Suit No. 12 of 1949 has also to go.

23. Next it has been submitted on behalf of the appellants that no award was signed and delivered by the arbitrators in these two suits and if at all there are such awards, they are fit to be set

aside on the ground that the arbitrators misconducted the proceeding. So much so, that there was no sitting and the arbitrators did not deliberate on the matter referred to them. This contention is refuted by the learned counsel for the respondents, according to whom the proceeding was conducted properly and the arbitrators came to a decision, signed the awards and delivered them before the parties to the litigation. (After going through the evidence, his Lordship continued). Therefore, there cannot be any doubt that there were some sittings of the arbitrators.

24. The most important thing to be seen is whether the arbitrators, as a matter of fact, gave their awards. In this connection it is to be noted that the original awards have not been produced. It is said that the original awards were handed over to Shyam Narain Kuer, one of the arbitrators, for filing them before the Court on 2-12-1955 but he withheld them and did not file them in the Court. Shri Mukteshwar Kuer who was the Sarpanch, has given evidence as P. W. 2. He has supported the case of the respondents by stating that the awards were written and then signed by the arbitrators. He has further said that the awards and other papers were handed over to Shyam Narain Kuer for filing in the Court. Shyam Narain Kuer has denied all these statements. He is being supported in this connection by the other arbitrator Ramkewal Singh.

Both Ramkewal Singh and Shyam Narain Kuer denied to have signed any award. They have denied delivery of any such award.

(After discussing evidence in Paras 24 to 27 his Lordship proceeded.)

28. In view of all these circumstances, it is not possible to believe that oral evidence adduced on behalf of the respondents which consists of the statements of the Sarpanch, a pleader and Ambika Thakur himself, who is a respondent. On a consideration of the entire fact and circumstances of the case, I hold that no award in either of these two cases was signed by the panches and delivered in presence of the parties. That being so the suit could not have been disposed of in terms of the awards. Order of the Court below is, therefore, fit to be set aside.

29. The result is that the appeals are allowed with costs. The order dated 23-12-1960 of the learned Additional Subordinate Judge is set aside. The appeals have been heard together and hence there will be one set of hearing fee and the appellants of each appeal will get half of that hearing fee. Other costs they will get separately. Costs in M. A. No. 7 of 1961 will be payable by respondents 1 to 4 only. In M. A. No. 8 of 1961 costs will be

payable by respondents 1, 2, 5 and 6 only. The trial Court is now directed to try the suits and dispose them of in accordance with law.

29 TARKESHWAR NATH, J. :— I agree
RGD Appeals allowed

AIR 1969 PATNA 228 (V 56 C 58)

A. B. N. SINHA AND M. P. VERMA, JJ.
Messrs Jharkhand Mines & Industries Ltd and another Appellants v Nand Kishore Prasad and others, Respondents

A. F. O. D. No 61 of 1962, D/- 14-7-1967, from decision of Sub-J, Hazaribagh, D/- 4-10-1961

(A) Civil P. C. (1908), S 11, O 1, R 10, O. 22, R 10 and O. 21, R 22 — Ex parte decree — Fraud practised — Ex parte decree is vitiated and must be set aside.

A, B and C were mining companies. On 14-8-1954 A sold one colliery to B. On 16-11-1954 B sold it to C. On 22-9-1954 A instituted title suit against P, Q, R and S for possession of colliery with mesne profits. On 27-7-1955 C was added as co-plaintiff in that suit. Next day A filed petition stating that it had no objection to addition or substitution of C. On that very day, suit was taken up for ex parte disposal and was decreed in full with costs. In execution, delivery of possession was effected in favour of C on 10-1-1956. On 8-12-1958 petition for ascertainment of mesne profits was filed. Q entered appearance in that proceeding on 5-12-1959, after having come to know about ex parte decree and execution proceeding only on 3-11-1959. After making enquiries to circumstances in which ex parte decree was passed, Q instituted suit for declaration that the ex parte decree was null and void and not binding on him. His case was that fraud was practised by A and C. In suit by Q, following facts were established: (1) that A knew correct address of Q and fraudulently and deliberately persisted in sending summons of the suit to an incorrect address and ultimately obtained an order for effecting substituted service on false allegations, (2) that A had no locus standi to institute title suit of 1954, (3) that application for substitution or addition of C as co-plaintiff was not maintainable, (4) that there was clearly a motive for suppressing summonses of title suit of 1954, (5) that after addition of C as co-plaintiff, Court did not direct notices to be issued to defendants in Title suit of 1954, and (6) that in execution case notice under O 21, R 22 was dispensed with.

Held that ex parte decree was vitiated and must be set aside (Paras 7, 10)

(B) Civil P. C. (1908), O 22, R 10, O. 6 R. 17 — Application under — Contents of — Amendment of plaint — Duty of Court.

In all applications purporting to be under the provisions of O 22, R 10 Civil P. C., it is incumbent upon the applicant to state the nature of the assignment or devolution and the party or parties from whom the assignment or devolution is claimed before leave of the court can be obtained by the applicant to continue the suit (Para 7)

It is incumbent on the court to see that the notice of the amended plaint is served on the defendants of the suit. The Code of Civil Procedure casts a duty on the court to see that the defendants are made aware of any amendment in the plaint, whether the amendment be in regard to the addition of parties or in regard to the contents thereof (Para 7)

(C) Civil P. C. (1908), O. 21, Rr. 22 and 10, S. 44A — Application for execution — Service of notice under O. 21, R 22 is imperative.

Notices under O 21, R 22 of Civil P. C. have to be issued, when an application for execution is made more than one year after the date of the decree or against the legal representatives of a party to the decree or where the application is made for execution of a decree under S 44A of Civil P. C., unless for reasons to be recorded in writing, the Court considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice (Para 8)

Madan Mohan Prasad, for Appellants, Lala Deekunandan Prasad and Lakshmi Narayan Mishra, for Respondents

A. B. N. SINHA, J.:— This appeal is by defendants 1 and 2. They alone contested the suit. The suit out of which this appeal arises was instituted by plaintiff-respondent no 1 for a declaration that the ex parte decree passed in Title Suit No. 46 of 1954, against him was null and void and was not binding on him.

2. The trial Court has decreed the suit subject to certain directions regarding payment of Court-fees and costs. The plaintiff-respondent, it may be mentioned, has complied with those directions.

3. Appellant No 1 Messrs Jharkhand Mines & Industries Ltd a company incorporated under the Indian Companies Act, 1913, having its registered office at 34, Grosvenor House, 21 Old Court House Street Calcutta, instituted Title Suit No 46 of 1954 in the court of the Subordinate Judge, Hazaribagh, impleading the present plaintiff-respondent No 1 as defendant No 2 and the pro forma defendants 2 to 5 (17) as defendants 1, 3 and 4 respectively. The case of appellant no 1 in that suit was that the plaintiff respondent and the pro forma defendant-respondent No 2 held Rauta Colliery, fully described in the

schedule of the plaint of that suit, unlawfully from the 2nd May, 1949 and had with the help of their nominees and men including pro forma respondents 3 and 4, worked the said colliery and had raised and sold coal and made illegal profits therefrom. On these allegations, a decree for khas possession of that colliery with mesne profits and/or compensation from the 1st July, 1951 upto the date of the filing of that suit, that is, up to the 22nd September, 1954, amounting to Rs. 15,000, or, such other sum or sums as may be found due, was prayed for. Appellant no. 2, Bokaro & Ramgarh Ltd., a joint stock company incorporated under the Indian Companies Act, 1882, having its registered office at no. 22, Chittaranjan Avenue, Calcutta, was added as a co-plaintiff in that suit on the 27th July, 1955. On the 28th July, 1955, appellant no. 1, the original plaintiff of that suit, filed a petition stating that it had no objection to the addition of appellant no. 2 as a co-plaintiff or to its substitution in its place.

On that very day, Title Suit No. 46 of 1954 was taken up for ex parte disposal and was decreed in full with costs. Thereafter, both the appellants took out delivery of possession through Court, but delivery of possession was purported to have been effected in favour of appellant No. 2 alone over the suit properties on the 10th January, 1956. On the 8th December, 1958, a petition for ascertainment of mesne profits from the date of the institution of the suit till the recovery of possession was filed. The plaintiff-respondent no. 1 entered appearance in that proceeding on the 5th of December, 1959; his case being that he had come to know about the ex parte decree and the execution proceedings which followed only on the 3rd November, 1959 and thereafter he had made enquiries about the circumstances in which the ex parte decree was passed. His case is that fraud was practised by the appellants in obtaining the ex parte decree against him. Giving the details of the fraud, it was stated in the plaint that the plaintiff-respondent was not in possession of Rauta colliery, as alleged, that he was quite in dark about the filing and the progress of Title Suit No. 46 of 1954 on account of the fraudulent suppression of processes and wrong address supplied by the appellants, that there was motive in suppressing the processes of the Court and in keeping the plaintiff-respondent in dark about that suit and that no notice or copy of the amended plaint, after appellant no. 2 was added as a co-plaintiff, was even attempted to be served on the plaintiff-respondent. According to the plaintiff-respondent, the processes of the execution proceedings were also likewise fraudulently suppressed and wrong address was given. On these allegations and some others, the

plaintiff-respondent instituted Title Suit No. 19 of 1960 on the 31st May, 1960 for the relief, mentioned above.

4. Pro forma defendants 4 and 5 filed a written statement supporting the plaintiff-respondent's case. They also cross-examined the witnesses examined on behalf of the contesting defendant-appellants. No step, however, was taken on behalf of pro forma defendant no. 3. The suit was resisted as mentioned already, by the defendant-appellants 1 and 2. Their case was that no fraud had been committed as alleged in the plaint in obtaining the decree in Title Suit No. 46 of 1954, that the plaintiff respondent and the other defendants of that suit were served with the summonses of the suit at their correct addresses and the said suit had been filed with true allegations that the ex parte decree was passed without suppressing any fact from the Court or without suppressing any summonses or processes of the Court from the defendants of that suit including the plaintiff-respondent of the instant case and that the summonses of the suit as also the notices issued in the execution proceedings must be taken to have been properly and legally served on all the defendants of that suit including the plaintiff-respondent, because steps had been duly taken to get the substituted service effected at both the stages in accordance with the provisions of Rule 20 of Order 5 of the Code of Civil Procedure.

It was further their case that appellant no. 1 had transferred all the suit properties and its claims along with all accrued rights and interest and claims in all those properties, namely, in Rauta Colliery by a registered sale deed dated the 14th August, 1954 to one Messrs. Kuju Jarangdih Coal Company Ltd., and, soon thereafter, namely, on the 16th November 1954, appellant no. 2 had purchased all those rights, title and interest in the said properties which were the subject-matter of Title Suit No. 46 of 1954 from Messrs. Kuju Jarangdih Coal Company Ltd. It was stated that in those circumstances appellant no. 2 was added as a co-plaintiff in Title Suit No. 46 of 1954 by order dated 27-7-1955. The appellants, however, claimed to have obtained actual possession after ousting the plaintiff-respondent and his men. On these allegations, it was claimed that the suit was fit to be dismissed with costs.

5. The issues, originally framed on the 22nd September, 1961 were recast by the trial Court on the 26th September, 1961. Of those issues, issue no. 2 related to the sufficiency or otherwise of the court-fees paid by the plaintiff-respondent. This issue was decided against him, and it was held that the suit was governed by

Section 7(iv)(c) of the Court-fees Act, and thus ad valorem court-fee was payable. As mentioned already, the plaintiff-respondent has paid ad valorem court-fee as directed by the trial Court. The rest of the issues have all been decided in favour of the plaintiff-respondent. The suit thus stands decreed subject to the conditions mentioned above. Hence this appeal by the contesting defendants.

6. Mr Madan Mohan Prasad, learned counsel, who appeared in support of this appeal, was not able to make out any ground whatsoever for interfering with the decision of the court below. Nonetheless, we have gone through the relevant materials and the judgment under appeal. We are satisfied that the plaintiff-respondent has succeeded in establishing that the ex parte decree in Title Suit No 46 of 1954 was obtained by practising fraud upon the court and by fraudulently suppressing the summonses in the said suit. The first question which arose for determination was whether during or about the relevant time, namely, 1953-54 and 1954-55, the plaintiff-respondent ever resided at Garh Banaili in the district of Purnea and whether the correct address of the plaintiff-respondent, which was known to the plaintiff of Title Suit No 46 of 1954, was deliberately suppressed with a view to keep the plaintiff-respondent in dark about the suit. On this vital question, besides the oral evidence, there are unimpeachable documentary evidence which go to establish that during or about the relevant time the plaintiff was residing at his village home at Nasriganj in the district of Shahabad and never at Garh Banaili in the district of Purnea and further that the correct address was known to the plaintiffs of Title Suit No 46 of 1954, yet, they deliberately with a view to keep the plaintiff in dark persisted in giving the wrong address in the summonses of the suit, and, ultimately, on the false plea that the plaintiff was evading service of summons obtained an order for effecting substituted service under the provisions of Rule 20 of Order 5 of the Code of Civil Procedure. (After discussing documentary evidence his Lordship proceeded.)

These documents clearly indicate that appellant no 1 knew the correct address of the plaintiff during the relevant period as being village Nasriganj, P. S and P O Nasriganj, District Shahabad.

It also knew that the plaintiff was not residing at Garh Banaili, P. S Kisha, district Purnea yet, it fraudulently and deliberately persisted in sending summonses of the suit to an incorrect address and ultimately obtained an order for effecting substituted service on false allegations.

(After discussing oral evidence his Lordship proceeded.)

On this evidence, it is apparent that the affidavit which he had sworn stating that the statements made in the body of the petition including the statement that the defendants of Title Suit no 46 of 1954 were knowingly avoiding service of summonses were true to the best of his knowledge and belief contained at least an incorrect and irresponsible statement. I am, accordingly, constrained to hold that this witness has little regard for truth. Taking all these materials on the record into consideration, I have no hesitation in affirming the finding that the plaintiff-respondent was, during the relevant time, to the knowledge of at least appellant no 1, who was the sole plaintiff in Title Suit no 46 of 1954 till the substituted service was effected, actually residing at village Nasriganj, District Shahabad, and there can be no doubt that the petition (Ext. 3), referred to above, wherein it was stated by D W 3, the Law Agent of appellant no 1, that the defendants of that suit including the plaintiff-respondent were knowingly avoiding service of summonses, was really by way of a subterfuge to snatch an ex parte decree against the plaintiff-respondent and the pro forma defendant-respondents.

7. The trial court has exhaustively dealt with the several factors constituting fraud, as alleged by the plaintiff-respondent, in paragraph 23 of its judgment. No attempt whatsoever has been made in this Court by the learned Counsel appearing for the appellants to point out that any of the conclusions reached by the trial Court in regard to the fraud, alleged by the plaintiff, was not sustainable. The trial Court has also found that there was motive for suppressing the summonses in Title Suit No 46 of 1954, and, in this connection it has referred to paragraph 5(a) of the plaint of that suit (Ext. 2) and to the several entries in the order-sheet of that suit (Ext. E-1) and to the evidence of D W. 3. According to the deposition of D W. 3, appellant no 1 had transferred all its rights and interests in the suit properties in Title Suit No 46 of 1954 including its accrued rights and interests and all claims under a registered indenture to Messrs Kaju Jarangdh Co Ltd., on the 14th August, 1954. That being the position, I fail to see how appellant no 1 had any locus standi to institute Title Suit No 46 of 1954, which was instituted on the 22nd September 1954, that is, more than a month after the transfer.

Within a couple of months of the institution of the suit, the aforesaid transferee company from appellant no 1 had parted with all its rights in the suit properties in favour of appellant no 2. This transfer was effected on the 16th November, 1954. If appellant no 1 had not transferred all its rights and interests including its ac-

crued rights as well in the suit properties, which were the subject-matter of Title Suit No. 46 of 1954, the claim by it for mesne profits or compensation from the 1st July, 1951 until the 14th August, 1954, might have been understandable, but as it had transferred its accrued rights and interests as well, no suit for mesne profits or compensation for any period either prior to the 14th August, 1954 or later was maintainable by appellant no. 1. The proper plaintiff to institute the suit, if it so liked, was the transferee company, Messrs. Kaju Jharkhand Coal Co. Ltd.

When this transferee company transferred in its own turn its entire interest to appellant no. 2, there was no assignment, creation or devolution of any interest at all in favour of appellant no. 2 by appellant no. 1, the sole plaintiff in the suit, within the meaning of Rule 10 of Order 22 of the Code of Civil Procedure, and thus no application for substitution or for adding appellant no. 2 as a co-plaintiff was maintainable. It might have been open to appellant no. 2 to institute an independent suit of its own claiming such mesne profits or compensation from the plaintiff-respondent and his men which had not become barred under the law of limitation.

There is nothing on the record to show that Messrs. Kaju Jarangdih Coal Co. Ltd. had transferred all that it had purchased from appellant no. 1 including the latter's accrued rights and interests in the suit properties and all claims relating thereto or it transferred only its future rights and interests in those properties. In my opinion, in the circumstances, there was clearly a motive for appellant no. 1 of fraudulently suppressing the summonses of Title Suit No. 46 of 1954.

If the plaintiff-respondent had been served with the summonses of that suit, he would have easily taken the plea that appellant no. 1 having already transferred all its rights including the accrued rights and interests and claims in regard to the suit properties on the 14th August, 1954 was not entitled to institute the suit for mesne profits and/or compensation on the 22nd September, 1954. There was also motive for not giving notice of the amendment in the plaint in so far as appellant no. 2 was added as a co-plaintiff, because it might have been pointed out by the plaintiff respondent that no question of assignment, creation or devolution of interest pending the suit from appellant no. 1 to appellant no. 2 arose, and, as such, the application for substitution or for addition of appellant no. 2 as a co-plaintiff was not at all maintainable. In the context of these facts, a reference to the order sheet of that suit (Ext. E-1) becomes revealing. On the 26th July, 1955, appellant no. 2 filed a petition praying for being substituted in place of the original

plaintiff, namely, appellant no. 1, on the allegation that it had purchased the suit properties covered by Title Suit No. 46 of 1954.

The petitioner, however, did not apparently disclose the person or persons from whom appellant no. 2 had purchased the suit properties. The court was kept in dark about this essential fact, and a fraud was practised on the court. In all applications purporting to be under the provisions of rule 10 of Order 22 of the Code of Civil Procedure, it is incumbent upon the applicant to state the nature of the assignment or devolution and the party or parties from whom the assignment or devolution is claimed before leave of the court can be obtained by the applicant to continue the suit. In the instant case, appellant no. 2 had purchased the suit properties or interest therein from a party which was a stranger to the suit and, in law as well as in fact, no interest had devolved on appellant no. 2 from appellant no. 1, and, as such, the application filed on behalf of appellant no. 2 on the 26th July, 1955 was wholly misconceived. But, as pointed out above, the court was kept wholly ignorant of this position and the application was put up for hearing and orders on the day following the day on which it was filed. On the 27th July, 1955, the Court passed the following orders:

"Heard pleader on the petition dated 26-7-55:

ORDER

Let the name of the applicant be added as a co-plaintiff and let the plaint be amended accordingly. Put up tomorrow for ex parte hearing."

On 28th July, 1955, the following order was passed by the Court:

"Plaintiff No. 1 files a verified petition stating that they have no objection to their addition of the name of M/s. Bokaro and Ramgarh Ltd. as a co-plaintiff or substituting the name. Plaintiff No. 2 files hajri. Heard.

Defendants do not appear on calls. Suit taken up ex parte. P. W. 1 Shyam Bihari Lal is examined.

ORDER

Claim proved.

Suit decreed ex parte with costs including P. F. at 2½%

It appears from the above order that appellant no. 1, who was plaintiff no. 1 in Title Suit No. 46 of 1954 after appellant no. 2 had been added as a co-plaintiff by order no. 25 dated the 27th July, 1955, filed a verified petition stating that they had no objection to appellant no. 2 being made a co-plaintiff or being taken as the sole plaintiff in substitution of its name. This petition, to say the least, was unnecessary, because the Court had already passed an order adding appellant

no 2 as a co-plaintiff a day earlier. In my opinion, however, fraudulently the appellants or appellant no 2 had managed to obtain an order adding it as a co-plaintiff in the suit and thereby amending the plaint. It was incumbent on the Court to see to it that the notice of the amended plaint was served on the defendants of that suit. The Code of Civil Procedure, in my opinion, casts a duty on the court to see that the defendants are made aware of any amendment in the plaint, whether the amendment be in regard to the addition of parties or in regard to the contents thereof. Unfortunately, the learned Subordinate Judge, who passed the ex parte decree, did not direct any notices to be issued to the defendants with a view to make them aware about the amendment of the plaint. He should have issued such notices and awaited the service report, and, if the defendants so desired, granted them an opportunity to file a written statement before putting up the suit for hearing and disposal, whether ex parte or otherwise. On this ground alone, I am of the opinion that the ex parte decree is vitiated and must be set aside.

8. During the execution stage as well, the conduct of the appellants was no better. It is not, however, necessary to refer to things which transpired during that stage, because if the ex parte decree itself was vitiated by fraud, as shown above, the execution proceedings or the delivery of possession purported to have been effected in favour of appellant no 2 can be of no avail to the appellant and cannot bind the plaintiff-respondent. Reference may, however, be made to a prayer made on behalf of the decree-holders, namely, the present appellants for issuance of a writ of delivery of possession after dispensing with the notices under Order 21, Rule 22 of the Code of Civil Procedure. On the 5th January, 1956, a petition together with an affidavit was filed praying for issue of delivery of possession after dispensing with the notice under Order 21, Rule 22 of the Code of Civil Procedure on the ground that the judgment-debtors including the plaintiff-respondent were avoiding service of notices, and there was an apprehension of the properties sought to be taken possession of being damaged by the judgment-debtors.

It has been rightly pointed out by the trial court that the notice under Order 21, Rule 22 of the Code of Civil Procedure have to be issued, when an application for execution is made more than one year after the date of the decree or against the legal representatives of a party to the decree or where the application is made for execution of a decree under the provisions of Section 44A of the Code of Civil Procedure, unless for reasons to be recorded in writing, the

court considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. It is thus clear that it is only at the time when an application for execution is filed that the court may, in a fit case, consider the desirability of dispensing with a notice under Order 21, Rule 22 of the Code of Civil Procedure. In the present case, the court passed an order dispensing with the notice under Order 21, rule 22 of the Civil Procedure Code on the 7th January, 1956, whereas the execution case had been stated on the 17th November, 1955 (vide Ext E (1)-1).

This was clearly an illegal order which was obtained from the court again on a false allegation that the judgment-debtors, namely, the plaintiff-respondent and the pro forma respondents were evading the service of notices under Order 21, Rule 22 of the Code, when, in fact, the notices were not being sent to them by their correct addresses known to the decree-holders. As long back as the 7th March, 1953 (Ext 7), it had been asserted on behalf of the plaintiff that he was not working the mines at Rauta and it having also been established that the appellants knew that the plaintiff-respondent was not residing during the relevant period at Garh Banaili, the petition dated the 5th January, 1956 alleging that the judgment-debtors were avoiding service of notice and that there was an apprehension of the properties sought to be taken possession of being damaged by them did not contain true allegations and, in my opinion, it appears that this petition was yet another fraudulent step taken by the decree-holder of Title Suit No 46 of 1954 to keep the court as well as the judgment-debtors in dark and snatch an order of delivery of possession.

9. The trial court's finding in regard to the date of knowledge, as alleged by the plaintiff-respondent in paragraph 10 of the plaint, is not specific and can be described as rather a halting finding. The plaintiff's case was that he had come to know for the first time on the 3rd November, 1959 about the petition for ascertainment of mesne profits from one Shri Ramanand Prasad (P. W 6), and, thereafter, he entered appearance in the proceeding for ascertainment of mesne profits on the 5th December, 1959 (vide Ext D(1)-1, the vakalatnama). Thereafter, on enquiry, he could learn about the filing of Title Suit No 46 of 1954 and of the ex parte decree and about the fraud practised by the appellants in obtaining the said ex parte decree against him. The appellants in paragraph 11 of their respective written statements have denied the correctness of the plaintiff's case as to the date of knowledge. It has been characterised by them as a self-serving statement made for the purpose of this suit.

Their case is that the plaintiff had knowledge of every stage of the suit but had suffered an *ex parte* decree to be passed, because he had no case to contest. I have already found above that the plaintiff had a very good case for contesting Title Suit No. 46 of 1954. In my opinion, there is no reason to doubt the correctness of the plaintiff's case.

(After discussing evidence, his Lordship proceeded).

The appellants' plea that the plaintiff had knowledge of every stage of the suit and other proceedings resulting therefrom or must be deemed to have knowledge cannot be accepted for the reasons, already discussed. In the circumstances, there can be no doubt that the plaintiff had no information, as asserted by him about the suit and the decree till at least the 3rd November, 1959 and the suit having been filed on the 31st May, 1960 must be held well within time.

10. It follows from the above discussions that there is no merit in this appeal whatsoever. The judgment and decree passed by the trial court must, therefore, be affirmed. In the result, the appeal is dismissed with costs.

11. M. P. VERMA, J. :— I agree. —
SSG/D.V.C. Appeal dismissed.

AIR 1969 PATNA 233 (V 56 C 59)

S. C. MISRA AND P. K. BANERJI, JJ.

Mt. Pano Kuer and others, Appellants v. Baleshwar Pandey and others, Respondents.

A. F. A. D. No. 1232 of 1961, D/- 1-5-1968, from decision of Sub-J., Gaya, D/- 21-9-1961.

Civil P. C. (1908), S. 100 and O. 1, R. 8 — Frame of suit was held not in accordance with the provision — Easement acquired by villages, held, could not be deprived — (Easements Act (1882), S. 15).

The suit was for partition of an orchard. The plaintiffs alleged that they, defendants 1 to 5 and their ancestors and the landlords contributed their lands in pursuance of a decision to have a place where Barat parties might stay. On such plot, the orchard in question was raised. The lower court disbelieved the defence version that the orchard was owned exclusively by the landlords over which the plaintiffs had no right whatever. It directed partition of the orchard according to the area contributed by each of the donor or his ancestors and for compensation for persons who were allotted lesser number of trees.

Held, on appeal (1) that the concurrent finding of fact that the plaintiffs had title

to areas of the orchard could not be disturbed in second appeal; and

(2) But, since for more than 20 years, the orchard had been in the enjoyment of the village community ever since its dedication even according to the plaintiff allegations, the village community must be deemed to have acquired an easement over the land and the frame of the suit being not in accordance with O. 1, R. 8 the village community could not be deprived of their right to use the orchard as a whole irrespective of the shares of various persons who contributed their lands. (1901) ILR 24 Mad 387 (PC) & AIR 1930 Bom 333, Rel. on. (Para 5)

Cases Referred: Chronological Paras (1930) AIR 1930 Bom 333 (V 17)=

32 Bom LR 314, Babaji Daso v. Jivaji Yeshvant 5

(1901) ILR 24 Mad 387=28 Ind App 81 (PC), Vasudeva Padhi v.

Maguni Devan 5

Kailash Roy, Lakshman Saran Sinha and Devendra Prasad Sharma, for Appellants; Lal Narain Sinha, Rameshwar Prasad II and Kamendra Kumar, for Respondents.

MISRA, J. :— This appeal is by the defendants. The suit was brought for partition of an orchard bearing Khesra Nos. 465, 466, 470, 472, 504, 505, 506, 507, 509 and 510 of Khata No. 48 in village Barauli in the district of Gaya. According to the plaintiffs, the plaintiffs and their ancestors and defendants Nos. 1 to 5 and their ancestors and the landlord, namely, late Rameshwar Prasad Narain Singh, father of defendants Nos. 14, 15 and husband of defendant No. 16, decided that there should be in the village a place where Barat parties might stay. For that reason, they selected a plot near plot no. 468, which was Devi Asthan. Hence, the plaintiffs and defendants Nos. 1 to 5 agreed to contribute their lands as mentioned in Sch. A, measuring 1.44 acres. Then an orchard was planted. This was done in 1335 Fs., corresponding to 1928. After the orchard was ready, the parties who contributed their land came in joint possession of the orchard and enjoyed the usufruct according to their respective shares. There were certain changes in the shares due to sales and inheritance of the lands the details of which are given in schedule B of the plaint. In Baisakh 1363 Fs., some persons cut some trees from the orchard as mentioned in schedule D of the plaint and they did not distribute the timber to the plaintiffs according to the share. They finally refused to do so on the 24th of June, 1956. Hence, the suit.

2. Defendants Nos. 1 to 5 filed one set of written statement supporting the case of the plaintiffs. Defendants Nos. 6 to 11 having got a clue of transfer from defen-

dants 14 to 16 filed another set of written statement and defendants Nos 14 to 16, the ex-landlords, filed another set of written statement. They have raised more or less identical pleas. They denied the allegation of the plaintiffs. According to them, the ex-landlord Rameshwar Prasad Narain Singh had an orchard near the Devi Asthan and he extended it by taking lands from the tenants by exchange or surrenders or auction purchase etc. He planted trees in these lands and also constructed boundary ridges all round the land in the year 1332 F.s. He was in exclusive possession of the orchard, and after his death, defendants Nos 14 and 15 came in possession of the orchard in question. They remained so till the 6th of July, 1956 when they sold it to defendants Nos 6 to 11 by registered sale deed for valuable consideration and from that time onwards defendants Nos 6 to 11 were in possession of the orchard in question.

3-4. The trial Court did not accept the defence story of the acquisition of land from the tenants, as alleged by defendants Nos 14 and 15. It held that the plaintiffs had title to the suit land and there was unity of title and possession. Accordingly, a preliminary decree was ordered to be drawn up in accordance with the shares as given in schedule B to the plaint. The shares of defendants Nos 14 to 16 were to go to defendants Nos 6 to 11 who claim to have purchased the shares of these defendants. The trees given in Schedule D of the plaint were also to be divided according to the shares of the parties as given in Schedule B of the plaint. The share in trees of defendants Nos 14 to 16 and their descendants, who were also parties to the suit, were to go to defendants Nos 6 to 11.

An order was passed for the appointment of a pleader commissioner on the petition of the plaintiffs to carve out separate takhtas for the parties. It was also directed that the pleader commissioner would allot the trees to the parties on whose land they stood so that the trees might not have to be cut down. In case the number of trees in any particular land exceeded the proportionate share of a particular party, the party who would be allotted more trees would have to pay their money value to compensate others.

On appeal from the judgment it was held by the learned Subordinate Judge, Gaya, that the finding of the learned Munsif in favour of the plaintiffs and defendants Nos. 1 to 5 that they contributed certain plots of their land near the Devi Asthan, on which the orchard was raised, rested on good evidence and they had title to the suit plots. They had also unity of title and possession and hence the plaintiffs were entitled to a decree for partition in the case and the question of

limitation did not arise. It was further held that the claim of the plaintiffs that they should be entitled to trees standing on the lands after assessing their value in proportion to the respective areas contributed by them could not be allowed. They had not made out any such case in the plaint that there was an agreement between the plaintiffs and defendants Nos 1 to 5 and their ancestors and the ancestors of defendants Nos 14 to 16 that all parties would have a share in the timber of the trees irrespective of the fact on whose land the trees stood. Accordingly, he modified the decree and directed that "the trees would go along with the lands over which they stood." He disallowed the claim of the plaintiffs, therefore, for partitioning the trees in the manner as claimed by them. The defendants other than defendants Nos 1 to 5, who are respondents, have come up in appeal.

5. Mr Kailash Roy has argued in the first place certain questions with regard to the consideration of the laggitis filed on behalf of the ex-landlords showing that all the plots on which the orchard stood were the property of the ex-landlord. He has raised, incidentally, also other objections to the consideration by the Courts below of the documents filed on behalf of the contesting defendants. Since, however, this question has been gone into by the two Courts below and they have concurrently held that the lands claimed to have been given by the plaintiffs and defendants Nos 1 to 5, in fact, were their property and not the property of the ex-landlords, that question must be taken to have been finally determined by the Court below.

Mr. Roy has, however, advanced an argument based on order I, rule 8, Code of Civil Procedure. He has contended that according to the plaintiffs' own case the orchard was raised on the land given by the plaintiffs and the defendants Nos 1 to 5 and Rameshwar Prasad Narain Singh, the ex-landlord, for the purpose of planting an orchard, the shade of the trees of which would be available to the members of the village community for resting Barat parties and holding other public functions of a similar nature and the plaintiffs and defendants Nos 1 to 5 and the ex-landlord who contributed various portions of the land, would be entitled to the fruits and the timber of the trees in proportion to the areas which they contributed. The Courts below were in error in not clarifying at least these matters in the judgment. The decree passed by the Court of appeal below might have the effect of not only demarcating the portion of the orchard which originally was the land of the plaintiffs and defendants Nos 1 to 5 but might further enable them to deprive the resi-

dents of the village of their right to utilise the space in the orchard for accommodating Barat parties or holding similar functions of a temporary nature round about the Devi Asthan. Such a decree could not be passed because, according to the plaintiffs' own case, the members of the village community, being local public, being interested, if they were to be deprived of the privilege, the plaintiffs should have framed their suit under Order 1, Rule 8, Code of Civil Procedure, in which case alone the Court, if satisfied with the plaintiffs' evidence, could pass such a decree.

The argument is well founded and it is not necessary to refer to any particular decision although I may state that Mr. Kailash Roy referred to the decisions in the cases of Vasudeva Padhi v. Maguni Devan, (1901) ILR 24 Mad 387 (PC) and Babaji Daso v. Jivaji Yeshvant, AIR 1930 Bom 333. Since in the present case the plaintiffs themselves pleaded that members of the village community were given the right to utilise the shade of the trees in this orchard for certain performances and that lasted for a period of more than twenty years as the dedication for that purpose was made in 1925 and the suit was brought much later in 1955, *prima facie*, the members of the village community must be deemed to have acquired the right of easement over this land. In any view, since the suit is not brought under Order 1, Rule 8, Code of Civil Procedure, the contention made by Mr. Kailash Roy must be taken to be sound in so far as it relates to the form of the decree.

The other contention of Mr. Roy with regard to the rights of the contesting defendants to be in exclusive possession of the orchard cannot be accepted in view of the finding of facts recorded by the Courts below. The necessary relief granted must be in this form that the plaintiffs and defendants Nos. 1 to 5's land would be demarcated as directed by the Court of appeal below by pleader commissioner with reference to the plots of land contributed by them, but they would have no right to deprive the members of the village community to use the orchard as a whole irrespective of the independent shares of the various persons who contributed their land for the purpose specified in the plaint itself. Subject to this modification in the form of the decree, the appeal fails, but in the circumstances of the case parties must bear their own costs throughout.

6. BANERJI, J. :— I agree.

TYN/D.V.C.

Appeal dismissed.

AIR 1969 PATNA 235 (V 56 C 60)

A. B. N. SINHA AND K. B. N. SINHA, JJ.

M/s. Bokaro and Ramgur Ltd. and others, Appellants v. Kathara Coal Co. Ltd. and others, Respondents.

A. F. O. O. Nos. 99, 115 and 116 of 1961, D/- 17-5-1968, from order of Dist. J., Hazaribagh, D/- 16-2-1961.

(A) Coal Bearing Areas (Acquisition and Development) Act (1957), S. 20 — Cross-objection by person aggrieved by award of Tribunal is not maintainable — Right of cross-objection is a creation of statute.

Under the Coal Bearing Areas (Acquisition and Development) Act, 1957, no right to file a cross-objection appears to have been granted. There is no provision in the Act analogous to those of O. 41, R. 22 of the Code of Civil Procedure. Right of cross-objection, like a right of appeal is a creature of statute. The determination of compensation has been expressly made appealable under S. 20 of the Act, but short of an appeal under and in accordance with Section 20, it cannot be canvassed in the Civil Court. The only manner in which that determination by the Tribunal, viz., its award can be subjected to a review is by appealing against the whole or part of it under S. 20. Cross-objection is thus ruled out.

Where cross-objection was purported to have been filed under Rule 22 of O. 41 of the Code of Civil Procedure and not having been filed within thirty days of the award of the Tribunal, it did not fulfil the requirements of Section 20 of the Act, and indeed no attempt was made to get the cross-objection so treated, the cross-objection must be dismissed, as not maintainable at all. (Para 12)

(B) Coal Bearing Areas (Acquisition and Development) Act (1957), Ss. 13, 14 — Compensation for acquisition of rights under mining leases — Claim for compensation for loss of future royalty is not maintainable.

The provisions of Section 13 of the Coal Bearing Areas (Acquisition and Development) Act, 1957 are exhaustive on the question of compensation. Under Section 14 (5), the Tribunal constituted under sub-section (2) of that Section and thus a creature of the Act is directed that in making the award, it shall have regard to the circumstances of each case and to the foregoing provisions of the Act with respect to the manner in which the amount of compensation shall be determined. "The foregoing provisions" obviously referred to the provisions of Section 13 of the Act. The claim for compensation for loss of future royalty cannot be said to fall under any of the clauses under

S 13(2) AIR 1961 SC 954, Rel on

(Para 13)

(C) Coal Bearing Areas (Acquisition and Development) Act (1957), Section 13 (2) (u) — The word "lease" does not refer to any other lease than lease under which mining rights were actually acquired.

Giving of compensation to the sub-lessees under any of the sub-clauses under S 13(2) of the Coal Bearing Areas (Acquisition and Development) Act, 1957 was no bar, on principle, to grant of compensation to the reversioner. But it appears that it will be straining the language of the relevant clause to hold that "the lease" as it finds mention in S 13(2)(u) of the Act refers to any other lease than the lease under which the mining rights were actually acquired. The entire object for enacting the Act was to empower the Union Government to acquire coal bearing lands with a view to work these areas themselves or through their appointed agents. It was, therefore necessary to acquire the lessee's rights to unworked coal bearing areas on payment of reasonable compensation to them and thus the Act provides for payment of compensation for the acquisition of the rights of mining lessees, and the compensation payable is the actual legitimate expenditure incurred by the lease-holder

(Para 19)

(D) Limitation Act (1908), S 12 — Time requisite for obtaining copy of award should be excluded in computing period of limitation

An award is not enforceable per se, at least not through execution proceedings. But there is no reason why it cannot be treated as an "order". Enforceability is by no means a necessary quality of an "order". It is true that the Code of Civil Procedure contemplates of order capable of execution, but at the same time there may be orders which are not capable of execution. Under S 2(14) of the Code of Civil Procedure, an "order" means the formal expression of any decision which was not a decree. There is no reason why an award cannot be taken to be the formal expression of the decision of the arbitrator. The essential attribute of a decision is that it formally decides controversies between the parties. In this view of the matter, under S 12 (3) of the Limitation Act the time requisite for obtaining a copy of the reasons given by the arbitrator for his award should be excluded in computing the period of limitation. AIR 1932 FC 165, Rel on

(Para 23)

(E) Coal Bearing Areas (Acquisition and Development) Act (1957), S. 13(2) — Words "rights under mining lease" — Words were descriptive of property acquired, regardless of lease under which property might have come into existence.

(Para 25)

Cases Referred- Chronological Paras

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| (1967) AIR 1967 SC 887 (V 54)= | |
| (1967) 1 SCR 707, Bihar Mines Ltd v Union of India | 25 |
| (1961) AIR 1961 SC 954 (V 48)= | |
| (1962) 1 SCR 44, Burrakur Coal Co Ltd v Union of India | 18 |
| (1932) AIR 1932 PC 165 (V 19)= | |
| ILR 60 Cal 1, Nagendra Nath Dey v Sureshchandra Dey | 23 |
| (1912) 39 Ind App 197=ILR 40 Cal 21 (PC), Rangoon Botatoung Co v The Collector, Rangoon | 23 |
| (1911) ILR 35 Bom 146=12 Bom LR 839, Laddha Ibrahim and Co v. Assistant Collector Poona | 23 |
| (1898) ILR 22 Bom 802 (FB), Nilkanth Ganesh v Collector of Thana | 23 |

Ambuja Ghose, Purnendu Ghose and Madan Mohan Prasad No. 2 (in No 99/61), S C Ghose and S N Jha (in No 115/61) and Lal Narayan Sinha and Bindabansi Prasad Sinha, (in No 116/61) for Appellants, Balbhadra Prasad Singh Shreenath Singh and Nagendra Prasad Singh No 1, for the Respondents (in all the Appeals)

A B. N SINHA, J. :— All these three appeals under Section 20 of the Coal Bearing Areas (Acquisition and Development) Act, 1957, arise out of an award, dated 16th February, 1961, made by the Tribunal constituted under Section 14(2) of the said Act in Reference Case No 25 of 1959. They have been all heard together and this judgment will govern all of them.

2 The facts leading to these appeals are as follows —

One Alfred Earnest Michell for and on behalf of an unincorporated syndicate known as the Bokaro Syndicate and one Theobore Hubert Bennerts jointly obtained a prospecting licence on 26th November, 1907 in respect of an extensive area from Maharaja Ram Narain Singh of Padma Estate in the district of Hazaribagh. The prospecting licence carried with it a right to obtain a mining lease. The licencees assigned the said prospecting licence on the 28th of February, 1908 to M/s Bokaro & Ramgur Ltd, the appellant in Miscellaneous Appeal No 99 of 1961. The licence was being renewed from time to time until 1942 in which year M/s Bokaro & Ramgur Ltd obtained a renewal for a term of 7 years i.e. upto 1949. During the continuance of the said term, the Raja of Ramgarh, the appellant in Miscellaneous Appeal No 115 of 1961, granted a mining lease under an indenture of lease, dated 21st November, 1946 (Ext A-4/2) to M/s Bokaro & Ramgur Ltd in respect of coal in and over 3200 bighas of lands situate in five villages in the district of Hazaribagh for a period of 999 years. M/s Bokaro & Ramgur Ltd, in their turn, executed a deed of

sub-lease, dated 14th December, 1946 (Ext. F-1) in the name of Kathar Coal Company Ltd., the principal respondent in all these appeals and the cross-objector in Miscellaneous Appeal No. 116 of 1961. On 3rd June, 1948, M/s. Bokaro & Ramgur Ltd., further obtained as many as ten mining leases from the Raja of Ramgarh in respect of lands in different villages. Three of those mining leases were in respect of Jhirki Colliery, North Jhirki Colliery and North Kathara Colliery. The total area covered by the aforesaid four mining leases, namely, the one dated 21st November, 1946, and three dated 3rd June, 1948, was in the neighbourhood of 7,725 bighas.

3. On the 31st March, 1956, the Government of India, in the Ministry of Production, issued a notification under sub-section (i) of Section 4 of the Land Acquisition Act, 1894, notifying that the land described in the schedule appended to the said notification covering an area of about 7 square miles was needed or was likely to be needed for public purposes, namely, for the prospecting of coal seams for the development of the collieries to be worked by the Union of India, and, invited objections to such acquisition by interested persons. Before, however, any further action could be taken under that Act, the Coal Bearing Areas (Acquisition and Development) Act of 1957 (hereinafter referred to as the Act) was passed and it came into force on 12th June, 1957. According to Section 28(1) of the Act, the aforesaid notification, under Section 4(1) of the Land Acquisition Act, was deemed to have been issued under Section 4 of the Act. The Act was amended by Act 51 of 1957 by which certain Sections including sections 13 and 28 were amended and section 9A was inserted. Ultimately, after objections to the proposed acquisition had been disposed of, the Central Government, in pursuance of sub-section (iii) of Section 28 read with Section 8 of the Act, issued a notification (SRO 3810, dated 23rd November, 1957) under section 9 of the Act, declaring the acquisition of lands measuring 3,383.29 bighas and of the rights to mine, quarry, bore, dig and search for, win, work and carry away minerals in lands measuring 1392.27 bighas fully described in Schedules A and B respectively appended to the said notification. Possession of lands and rights so acquired was taken on behalf of the Government of India on the 6th of December, 1957, and by virtue of Section 11 of the Act, the same was transferred to the National Coal Development Corporation on the 2nd of January, 1958. The Central Government assessed the compensation for the acquisition of the mining rights at Rs. 15,73,575.81 Ps. which amount was subsequently raised by them

to Rs. 17,02,709.60 and the entire amount was deposited in accordance with the relevant rules made under the Act. A dispute, however, arose as to the right to receive that compensation amount, amongst three claimants, namely, (1) M/s. Kathara Coal Company Ltd., (2) M/s. Bokaro & Ramgur Ltd. and (3) Shri Narayan Prasad Kedia. A Tribunal was accordingly constituted under Section 14 (2) of the Act and the aforesaid dispute was referred to the said Tribunal for adjudication. It appears that it was agreed between the different parties including the Central Government which filed its written statement before the Tribunal through the Managing Director, National Coal Development Corporation that the Tribunal was competent to determine the amount of compensation as well as the question of apportionment of the same. The aforesaid reference was registered as Reference Case No. 25 of 1959. Three persons, namely, Raja Bahadur Kamakhya Narain Singh, M/s. Kuju Jarangdih Colliery Co., Ltd., and Shri Puran Mull Kedia were added as parties to the proceedings before the Tribunal at their own instance.

4. The parties filed their respective written statements before the Tribunal. The case of M/s. Kathara Coal Company Ltd. was that they were sub-lessees in respect of mining rights in 1392.27 bighas described in Schedule B and in 1907.73 bighas described in plan A Block II of Schedule A of the aforesaid notification under Section 9 of the Act, and thus they alone were entitled to whole of the compensation with regard to the said mining rights. They claimed Rs. 24,75,620.72 Ps. as compensation in respect of different items as detailed in their written statement, besides interest. According to them, the amount awarded was inadequate and unjust.

5. According to M/s Bokaro & Ramgur Ltd., the appellant in Miscellaneous Appeal No. 99 of 1961, 7,725 bighas of lands covered by four of their leases from Raja of Ramgarh were affected by the acquisition. They claimed a sum of Rs. 81,97,660/- as compensation under different heads including a sum of Rs. 19,33,750 as compensation for loss of future royalties with regard to the above mentioned 7,725 bighas. Their case further was that as the sub-lease in favour of M/s. Kathara Coal Company Ltd. had been wiped out under the Bihar Land Reforms Act, they had no subsisting right at the time of acquisition. They also challenged the acquisition as illegal and unconstitutional.

6. The case of the Central Government was that the acquisition and reference were valid, that the Tribunal had jurisdiction to determine the amount of

compensation and apportionment thereof, that since mining rights were vested in M/s Kathara Coal Company Ltd before the dates of the notifications under Sections 4 and 9 of the Act M/s Bokaro and Ramgur Ltd could not be interested in the amount of compensation payable in respect of the mining rights acquired, that their case that lands other than those acquired had been affected by acquisition was untrue and that the amount of compensation as claimed by M/s Kathara Coal Company Ltd was excessive

7. The case of Raja Bahadur K. N. Singh was that even if M/s Kathara Coal Company Ltd were found entitled to compensation payment should be withheld until the final decision in the Title suit pending in the Calcutta High Court in which he had claimed specific performance of contract and for damages against the said Company. The legality and the validity of the reference were also challenged

8. The cases of N. P. Kedia and his father Puranmull Kedia, in brief, was that their family had acquired full and absolute controlling interest in Anderson Wright Ltd and in its subsidiaries including Kathara Coal Company, and by virtue of that acquisition, it was the joint family of Kedias which was the real sub-lessee and was entitled to compensation for acquisition of the sub-lease hold. Between themselves they claimed two annas interest in the compensation. M/s Kuju Jarangdih Coal Company Ltd claimed compensation for loss of proprietary interest in all the lands acquired, their case being that they had acquired the rights to royalty reserved to the lessor under the Mining Lease to Bokaro and Ramgur Ltd. They claimed compensation at Rs 9,66,875 for having been deprived of the benefit of the minimum royalty payable by the lessee Bokaro and Ramgur Ltd in respect of the entire 4675.66 bighas acquired

9. On the aforesaid pleadings and at the instance of the parties the Tribunal framed as many as seven issues including Issue No 4(a) which read as under

"Does the reference relate to other lands of the Notification besides Block II, Plan A of Schedule A, and Schedule B, Block I, Plan A?"

On issue No 1 which related to the amount of compensation payable, the Tribunal addressed itself only to the compensation payable in regard to the mining rights in 3200 bighas of land and in the light of the several directions made in the award it determined the amount at Rs 21,25,317.92 including interest from 23-11-1957 upto the date of deposit on the amount deposited namely, Rs 17,02,709.60 P. It also directed payment of interest at the rate of five per cent per annum from

the date of the acquisition, that is, 23-11-1957 to the date of payment on the amount of the excess compensation allowed. On issue No 2 which related to the question as to which of the claimants were entitled to compensation and if so, in which proportion, the Tribunal came to the finding that the entire compensation with regard to the acquisition of the mining rights in 3200 bighas was payable to Kathara Coal Company Ltd alone, and that neither the Kedias nor Bokaro and Ramgur Ltd or M/s Kuju Jarangdih Coal Company Ltd, were entitled to any share in the aforesaid compensation for acquisition of the mining rights. After an elaborate consideration of the materials on the record, it came to a conclusion that M/s Kathara Coal Company Ltd were the real sub-lessees in mining rights in 3200 bighas and that they were not the benamidars of the Kedias. So far as the Raja of Ramgarh was concerned, the Tribunal came to the conclusion that there was no substance in his contention that no payment should be made to M/s Kathara Coal Company Ltd during the pendency of his suit for specific performance of contract pending in the Calcutta High Court, in regard to issue No 4(a) quoted above, the Tribunal took the view that though in the reference petition there was a mention about 4675.60 bighas of land, that is the entire land covered under the Notification dated 23-11-1957, the reference was actually with regard to 3200 bighas only. Nonetheless, it has gone into the question of determining the compensation payable in respect of 1457.56 bighas of land. On that question it has, however, come to the conclusion that there was nothing to indicate that any portion of this land was covered by any of the leases of M/s Bokaro and Ramgur Ltd exhibited in the case, and there was nothing to show that the mining right in such land was also with M/s Bokaro and Ramgur Ltd. On that finding it has held that no question of assessment of compensation in respect of this land on the basis of the principle applicable in the case of acquisition of mining rights arose. It has also found that there was a complete lack of evidence for determining the compensation on the basis of the market value of the land. On this basis it has held that the claim of M/s Bokaro and Ramgur with regard to 1457.56 bighas was not at all maintainable. On the question of interest on the amount of compensation in excess of the admitted amount the Tribunal has come to the conclusion that there was no justification to relieve the National Coal Development Corporation from the obligation to pay interest over the said excess amount till the date of its payment or deposit, and accordingly, acting under

section 16 of the Act it has directed payment of interest on the said excess amount at the rate of five per cent per annum from the date of the acquisition to the date of its payment.

10. The Kedias and M/s Kuju Jarangdih Coal Company Ltd. being apparently satisfied with the award have not filed any appeal in so far the award was against them. As mentioned above Miscellaneous Appeal No. 99 of 1961 is by M/s. Bokaro and Ramgur Ltd. and Miscellaneous Appeal No. 115 of 1961 and Miscellaneous Appeal No. 116 of 1961 are by Raja Bahadur Kamakhya Narain Singh and Union of India respectively. M/s. Kathara Coal Company Ltd., respondent No. 1 in Miscellaneous Appeal No. 116 of 1961 have filed a memorandum of cross-objection which appears to be directed against that part of the award which has rejected the claim made on their behalf under certain heads and have prayed that the award be modified by directing that over and above the amount allowed by the Tribunal a further sum of Rs. 2,94,679.00 be directed to be paid by the National Coal Development Corporation to them. Before taking up Miscellaneous Appeals Nos. 99 and 116 of 1961, it will be convenient to dispose of Miscellaneous Appeal No. 115 of 1961 and the cross-objection filed on behalf of M/s. Kathara Coal Company Ltd.

11. In regard to Miscellaneous Appeal No. 115 of 1961, it is apparent that the mere filing of a suit for specific performance of contract and its pendency cannot clothe the appellant with any right to ask the Tribunal to stay the payment of the compensation money to the person or persons rightly entitled thereto and I am satisfied that there is no merit in this appeal which is accordingly dismissed.

12. In regard to the cross-objection filed on behalf of M/s. Kathara Coal Company Ltd., it appears that the same is not at all maintainable. Except Section 20 of the Act there is no other Section under which a person aggrieved by any award of a Tribunal constituted under Section 14(2) of the Act, can come up to the High Court and Section 20 specifically provides for an appeal to the High Court by a person aggrieved by the award of such a Tribunal, in other words, under the Act no right to file a cross-objection appears to have been granted. There is no provision in the Act analogous to those of Order 41, Rule 22 of the Code of Civil Procedure. Right of cross-objection, like a right of appeal is a creature of statute. Section 26 of the Act provides, that save as otherwise expressly provided in the Act, no Civil Court shall have jurisdiction in respect of any matter which the Central Government or the competent authority or any other person is empower-

ed by or under the Act to determine. Now, under Section 14 of the Act, in cases where the amount of any compensation payable under the Act is not fixed by agreement, the Central Government is under an obligation to constitute a Tribunal for the purpose of determining the amount of compensation and under sub-section (5) of Section 14, it is the Tribunal which is empowered to determine the amount of compensation as also to specify the person or persons to whom the compensation so determined is payable. The determination has been expressly made appealable, but short of an appeal under and in accordance with Section 20 of the Act it cannot be canvassed in the Civil Court. The only manner in which that determination by the Tribunal, viz., its award can be subjected to a review is by appealing against the whole or part of it under Section 20. Cross-objection is thus ruled out. In the present case it is also not possible to treat the memorandum of cross-objection as a memorandum of appeal. Manifestly the cross-objection purports to have been filed under Rule 22 of Order 41 of the Code of Civil Procedure and has been so filed within one month of the date of the service of notice of Miscellaneous Appeal No. 116 of 1961 on M/s. Kathara Coal Company Ltd., one of the respondents in that appeal. The cross-objection not having been thus filed within thirty days of the award of the Tribunal does not fulfil the requirements of Section 20 of the Act, and indeed no attempt was made on behalf of M/s. Kathara Coal Company Ltd., to get the cross-objection so treated. It follows that the cross-objection must be dismissed, as not maintainable at all.

13. Now as to Miscellaneous Appeal No. 99 of 1961, it is admitted that the appellant M/s Bokaro and Ramgur Ltd. had taken an assignment of a prospecting licence under an indenture of transfer (Ext. C/3) on the 28th of February, 1908 from the original who had been granted a prospecting licence by the proprietor of Ramgarh Estate. There is no dispute that the aforesaid prospecting licence was in respect of all the lands and premises comprised in and commonly known as the Bokaro and Ramgur Coal Fields and that the licence carried with it a right to obtain mining leases. Thereafter, the appellant in this appeal had obtained from the proprietor of Ramgarh Estate as many as twenty-three mining leases covering a total area of nearly 50, 659 bighas. We are concerned with only four out of those twenty-three mining leases. The first of those four was a mining lease in respect of 3200 bighas (Ext. A-4/2), situate in five villages and was dated the 21st of November, 1946. The term of the lease was 999 years. The remaining three leases

with which we are concerned were all dated the 3rd of June, 1948 (Exts D-3/1, D-3/2, and D-3/3) The mining rights under the lease of the 21st of November, 1946 was sub-leased to Kathara Coal Company Ltd on the 14th of December, 1946 (Ext F-1), and a premium of Rs 960,000 was received by the appellant from the sub-lessee in respect of the sub-lease This was the position until the Bihar Land Reforms Act, 1950, came to be passed And as a result of the operation of that Act, certain consequences followed The first consequence was that the Estate of the lessor, namely, that of the Raja of Ramgarh got vested in the State of Bihar The second consequence was that the appellant became a statutory lessee under the State of Bihar by virtue of provisions of Section 10 of the said Bihar Land Reforms Act 1950 According to the case of the appellant as originally put forward, one of the effects of the passing of the Bihar Land Reforms Act 1950 was that by virtue of the provisions of Section 10 of that Act the sub-lease in favour of M/s Kathara Coal Company Ltd was wiped out, but this case was subsequently given up by them Indeed, the appellant in this appeal, namely, M/s Bokaro and Ramgur Ltd have not claimed before us that they should be given a share out of the compensation money which has been or might be allowed to M/s Kathara Coal Company Ltd They have claimed compensation in their own rights and it is this claim which is the subject-matter of this appeal

14. Under the Notification of acquisition issued under Section 9 of the Act, the lands measuring 3283 29 bighas and right to mine and carry away mineral in lands measuring 1392-27 bighas were acquired It is, however, admitted that the 3200 bighas covered by either the head-lease (Ext A-4/2) or the sub-lease (Ext. F-1) was made up of the whole of 1392 27 bighas fully described in Block I Schedule B of the aforesaid Notification and of only 1807 73 bighas out of 3283 29 bighas described in Plan A, Block II of Schedule A of the said Notification The Tribunal has, therefore, rightly pointed out whereas only mining rights in respect of 1392 27 bighas had been acquired in 1807 73 bighas both the mining right as well as the surface rights had been acquired It will be convenient to deal with the claims arising out of the acquisition of mining rights separately from the claims arising out of the acquisition of the surface rights. The question of right to compensation arising out of the acquisition of the balance of 1475 36 bighas will also be dealt with separately

15. It appears from the award under appeal that before the Tribunal the appellant's claim to compensation was con-

sidered under two heads (1) Compensation for loss of future royalty and (2) compensation for expenditure incurred in obtaining the prospecting lease and in developing the area In regard to the claim under the first head, the Tribunal while holding that the appellant Company by reason of the acquisition of the mining rights, in the aforesaid 3200 bighas as free from all encumbrances as provided for in Section 10(1) of the Act had undoubtedly lost its right to receive royalties from the sub-lessee, has, however, declined to allow any compensation on the ground that no such claim was admissible under Section 13 of the Act The claim under the second head has been rejected on the ground that there was no reliable evidence to show that the prospecting operations over the 3200 bighas in question had been carried out by the appellant company at any time before the date of the lease in its favour

16. Learned counsel who appeared in support of this appeal in substance reiterated the claims which had been made before the Tribunal According to him, the appellant should be allowed compensation under a third head as well, namely, in respect of the expenditure incurred by it in obtaining the lease on the 21st of November, 1946 quantifying the claim, it was argued that the appellant was at least entitled to a sum of Rs 6,87,793 of which the break up was as under

(i) Rs 4,80,000/- as compensation for loss of future royalty

(ii) Rs 1,35,784/- as compensation for expenditure incurred by the appellant in obtaining the lease on the 21st of November 1946, and,

(iii) Rs 72,009/- as compensation for the expenditure incurred in obtaining the prospecting licence, proportionate to 3200 bighas

17. In regard to the claim for compensation for loss of future royalty, it was urged on behalf of the appellant that at the time of the acquisition, the appellant was to get Rs 10/- per bigha from the sub-lessees (vide Exts H-1, F-1 and A/5) But out of this Rs 10/- the appellant had to pay Rs 5/- to its lessor, and therefore, the net loss of the appellant by reason of the acquisition came to Rs 5/- per bigha per year, and accordingly, Rs 16,000/- per year for 3200 bighas He sought to capitalise this amount by multiplying the same by thirty a period which according to him, was allowable under the Mineral Concession Rules The total sum claimed, therefore, came to Rs 4,80,000/- It was contended that there could be no doubt that by virtue of the operation of Section 10 of the Bihar Land Reforms Act, the appellant Company had come to acquire the status of a statutory lessee and its rights to receive royalty from the sub-lessees in that capacity could not be

gain said. It was, however, no longer possible, it was contended, to go on receiving the royalty reserved under the sub-lease because the mining rights which had been acquired and which on the date of acquisition lay with the sub-lessees had been so acquired free from all encumbrances, as provided for in Section 10(1) of the Act. The liability to pay royalty on the part of the sub-lessees was in the nature of an encumbrance and as the Act provides that the acquisition will be free from all encumbrances, the appellant's right to receive royalty had been wholly destroyed. It was further urged that it could not have been the intention of the Legislature that no compensation was payable in respect of any loss or injury inflicted on any person by reason of the acquisition. On the other hand, it was contended on behalf of the Union of India that a right to receive royalty could not be described as a mining right and as under clause B of the Notification only mining rights had been acquired, the right to receive royalty could not be said to have got vested in the State. And, thus no question of payment of any compensation to the appellant under this head could arise. It was pointed out that it was apparent that the appellant did not own the mining right acquired on the date of acquisition, and as such its claim was not covered by Section 13(2) of the Act and was, therefore, wholly inadmissible. *M/s. Kathara Coal Company Ltd.*, which also figures as respondent in this appeal has not contested the claim of the appellant.

18. I am of the opinion that the contention raised on behalf of the Union of India is sound and must be accepted. Section 13 of the Act deals with compensation for (i) prospecting licences ceasing to have effect and (ii) compensation for the acquisition of rights under mining leases. We are not concerned with the former, namely, compensation for prospecting licences ceasing to have effect. Under the Notification under Section 9 of the Act mining rights in some lands and lands in another block have been acquired. Sub-section (2) of Section 13 which deals with the compensation for acquisition of rights under a mining lease reads as under:

"(2) Where the rights under a mining lease are acquired under this Act, there shall be paid to the person interested compensation, the amount of which shall be a sum made up of the following items, namely:—

(i) if the lease was granted after prospecting operations had been carried out in respect of the land under prospecting licence, the sum of all items of reasonable and bona fide expenditure actually incurred with respect to the matters specified in clauses (i), (ii), (iii) and (iv) of

sub-section (1) before the date of the lease;

Provided that where two or more leases had been granted in relation to any land covered previously by one prospecting licence, only so much of the expenditure aforesaid as bears to the total expenditure the same proportion as the area under the mining lease in respect of which the rights have been acquired bears to the total area covered by the mining leases shall be payable under this clause;

(ii) any reasonable and bona fide expenditure of the nature referred to in clauses (i), (ii) and (iii) of sub-section (1) actually incurred in relation to the lease, together with the salami, if any, paid for obtaining the lease;

(iii) the expenditure, if any, incurred by way of payment of dead-rent or minimum royalty during any year or years when there was no production of coal;

(iv) interest on any such expenditure referred to in clauses (i), (ii) and (iii) as has actually, been incurred during the period commencing from the date of the lease and ending with the year in which the rights under the lease are acquired, interest being calculated in the following manner, that is to say —

Interest at the rate of five per centum per annum in respect of the expenditure incurred during each calendar year for the first five years commencing from the year in which such expenditure was incurred plus interest at the rate of four per centum per annum in respect of each subsequent year after the expiration of the first five years and ending with the years in which the rights under the lease are acquired;

Provided that the total sum payable under this clause shall not exceed one-half of the total amount referred to in clauses (ii) and (iii)."

It is apparent that where rights under mining lease are acquired, the statute has laid down several items which can be taken into consideration for arriving at the total compensation payable. It is also clear that the compensation payable is the sum total of the actual legitimate expenditure incurred by the lease holder plus a sum in the nature of interest. In *Burrakur Coal Co., Ltd. v. Union of India*, AIR 1961 SC 954, it was held that Section 13 dealt with the whole subject of payment of compensation to the owner or lessee of the mine for his entire interest in the land including the rights to minerals. It follows that the provisions of section 13 are exhaustive on the question of compensation. Under sub-section (5) of Section 14 the Tribunal constituted under sub-section (2) of that Section and thus a creature of the Act is directed that in making the award, it shall have regard

to the circumstances of each case and to the foregoing provisions of the Act with respect to the manner in which the amount of compensation shall be determined. "The foregoing provisions" obviously referred to the provisions of Section 13 of the Act. The appellant's claim for compensation for loss of future royalty cannot be said to fall under any of the clauses under sub-section (2) of Section 13 of the Act, and that appears to me to be the short answer to the maintainability of the appellant's claim on account of any loss of future royalty.

19. In regard to the claim for Rs. 1,35,784/- as compensation for the expenditure incurred by the appellant in obtaining the lease on the 21st of November, 1946, it has been urged that this claim falls under Section 13(2)(ii) and was thus allowable. On reference to Ext. A-4/2, the indenture of lease in favour of the appellant, it appears that the appellant had actually incurred an expenditure of Rs. 1,35,784 for obtaining the said lease, Rs. 1,28,000/- having been paid by way of premium and Rs. 7784/- having been spent on stamp and registration. The question, however, is whether it can be said that the said amount was incurred in relation to the lease under which the mining rights had been acquired. It may be that the rights and properties of the appellant under its lease dated the 21st of November, 1946 had not been destroyed by reason of the appellant having become a statutory lessee under Section 10 of the Bihar Land Reforms Act, and, it may also be that giving of compensation to the sub-lessee under any of the sub-clauses under sub-section (2) of Section 13 was no bar, on principles, to grant of compensation to the reversioner. But it appears to me that it will be straining the language of the relevant clause to hold that "the lease" as it finds mention in Section 13(2)(ii) of the Act refers to any other lease than the lease under which the mining rights were actually acquired. The entire object for enacting the Coal Bearing Areas (Acquisition and Development) Act, 1957 was to empower the Union Government to acquire coal bearing lands with a view to work those areas themselves or through their appointed agents. It was, therefore, necessary to acquire the lessee's rights to unworked coal bearing areas on payment of reasonable compensation to them and thus the Act provides for payment of compensation for the acquisition of the rights of mining lessees, and the compensation payable is the actual legitimate expenditure incurred by the lease-holder. In the instant case, it is not in dispute that the mining rights at the date of the acquisition were in M/s. Kathara Coal Company Ltd. and not in their lessor's M/s. Bokaro and Ramgur Ltd. I am, therefore, of the

opinion that the expenses incurred by the appellant in relation to his lease cannot be equated with the expenses incurred in relation to "the lease", the rights under which were acquired. In this view of the matter, this particular claim as well cannot be sustained.

20. In regard to the last item of claim amounting to Rs. 72009/- I find myself in complete agreement with the Tribunal that there was no reliable evidence whatsoever that any prospecting operations over the 3200 bighas in question had been carried out by the appellant company at any time before the date of the lease in its favour. If at all, this claim was sustainable only under Section 13(2)(i) read with Section 13(1)(i) of the Act. But none of the four witnesses examined on behalf of the appellant before the Tribunal have succeeded in establishing that any prospecting operations had been carried out and thus the condition on which this claim could be allowed cannot be said to have been made out, namely, it has not been established that the lease in favour of the appellant had been granted after prospecting operations had been carried out by them in respect of the land under the prospecting licence or in respect of the land covered by their lease. This claim as well, therefore, fails.

20-A. The appellant company can have no claim for compensation in respect of the acquisition of the surface right in 1807 73 bighas. Proving of ownership or interest in a mine under any parcel of land does not raise any presumption or afford any evidence regarding ownership of the surface. In the instant case, it appears from the terms of the head-lease (Ext. A-4/2) that what was demised was the underground coal mining rights in 3200 bighas situate in five villages, the rights in the surface being retained in the lessor. This is apparent from the recitals and the covenants included in the said Indenture of lease. It follows that for the acquisition of the surface rights which by virtue of the provisions of the Land Reforms Act must be taken to have vested in the State of Bihar, no claim was sustainable at the instance of the appellant.

21. In regard to 1475 56 bighas of lands which have been also acquired under the relevant Notification, the Tribunal has held in the first place that the reference was confined to the mining rights in 3200 bighas only and in the second place it has found that there was no evidence on the record on which the market value of the said lands could be determined. In regard to the first finding, the crucial document was the reference petition. While mentioning the particulars of the reference, the entire land covered under the Notification issued under Section 9 of the Act has been men-

tioned, under the heads date and number of the Notification and of the declaration and situation of the land. It may be mentioned that possession of the lands acquired along with the mining rights had already been taken under S. 12 of the Act on the 6th of December, 1957. In the circumstances, it is difficult to read the reference as being confined to the mining rights in 3200 bighas only. It must, therefore, be held that the reference was also in respect of the aforesaid 1475.56 bighas of lands as well. As the Tribunal has not determined its market value, it would have been necessary to remand the case for that purpose. But in view of the fact that the appellant Company has not been able to show that any portion of the said area was covered by any of its leases, viz., Exts. D-3/2, D-3/1, and D-3/3, it cannot be said that they had any interest in those lands, and, as such, no useful purpose will be served by remanding the case for the purpose of ascertaining the market value. Some attempt was made to identify a portion of the lands covered under Ext. D-3/1 and Ext. D-3/2 with a portion of the aforesaid area but it was not successful. Indeed, before the Tribunal as mentioned in paragraph 70 of the award it was accepted on behalf of the appellant that the aforesaid land could not be said to be connected with the lands covered by the above mentioned leases.

22. Miscellaneous Appeal No. 99 of 1961 is thus disposed of.

23. In regard to Miscellaneous Appeal No. 116 of 1961, a preliminary objection was raised on behalf of M/s. Kathara Coal Company Ltd. to the effect that the appeal having been filed on the 14th of April, 1961 which was more than 30 days from the date of the award dated 12-3-1961, was barred by limitation. It, however, appears that if the time requisite for obtaining the copy of the award under appeal is allowed, the appeal was well within time. In my opinion, the case is covered by sub-section (4) of Section 12 of the Limitation Act, and the appeal cannot be said to be barred by limitation. None of the three cases on which reliance was placed on behalf of M/s. Kathara Coal Company Ltd. is relevant on the issue. In (1898) ILR 22 Bom 802 (FB), Nilkanth Ganesh v. Collector of Thana all that was held was that the Land Acquisition Act (10 of 1877) did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceeding. In (1911) ILR 35 Bom 146, Laddha Ibrahim and Co. v. Assistant Collector, Poona, it was held that award under the Land Acquisition Act (1 of 1894) was not a decree or order capable of execution under the Code of Civil Procedure. In (1912) 39 Ind App 197 (PC), Rangoon Botatoung Co. v.

Collector, Rangoon, the point decided was that no appeal lay to the Judicial Committee from the High Court disposing of an appeal from an award, as the Land Acquisition Act, 1894 had not expressly provided for any such appeal. All that may be said to follow from the above decisions is that an award is not enforceable per se, at least not through execution proceedings. But there is no reason why it cannot be treated as an "order". Enforceability is by no means a necessary quality of an "order". It is true that the Code of Civil Procedure contemplates of order capable of execution, but at the same time there may be orders which are not capable of execution. Under Section 2 clause (14) of the Code of Civil Procedure, an "order" means the formal expression of any decision which was not a decree. I can see no reason why an award cannot be taken to be the formal expression of the decision of the arbitrator. The essential attribute of a decision is that it formally decides controversies between the parties. In this view of the matter, I am of the opinion, that under sub-section (3) of Section 12 of the Limitation Act the time requisite for obtaining a copy of the reasons given by the arbitrator for his award should be excluded in computing the period of limitation. There is good authority in support of the proposition (vide the case Nagendra Nath Dey v. Sureshchandra Dey, AIR, 1932 PC 165) that any application by a party to an appellate court asking it to set aside or revise a decision of a subordinate Court is an appeal in the ordinary acceptance of that term. On this view, the present appeal by the Union of India can be treated as an application to set aside or modify an award and thus time requisite for obtaining a copy of the award shall be excluded as provided for in sub-section (4) of Section 12 of the Limitation Act. The preliminary objection thus fails.

24. In Miscellaneous Appeal No. 116 of 1961, the Union of India disputes the quantum of compensation which has been allowed to M/s. Kathara Coal Company Ltd.

25. The first question which was raised on behalf of the Union of India turns on a construction of sub-section (2) of Section 13 of the Act. It was urged that the sub-lease which had been granted to M/s. Kathara Coal Company Ltd. was not subsisting on the date of the acquisition, what in fact, was subsisting was a lease deemed to have been granted to them under Section 10 of the Bihar Land Reforms Act with effect from the date of vesting, namely, the 3rd of November, 1951. It was urged that compensation to M/s. Kathara Coal Company Ltd. could have been awarded only with reference to that statutory lease and not with refer-

ence to their lease which had ceased to subsist by virtue of the operation of Section 10 of the Bihar Land Reforms Act. It was, however, conceded on behalf of the Union of India that even if this contention of theirs found favour with the Court, they were not going to withdraw the amount of compensation which they had already deposited to the credit of M/s. Kathara Coal Company Ltd. And in that case it would be unnecessary to go into the details of the several items for which compensation had been allowed to them. It was clearly stated on their behalf that it was only when this above contention failed that it would be necessary to go into the details of the different items. The soundness of this contention was strenuously combated on behalf of M/s Kathara Coal Company Ltd. It was submitted on their behalf that on principle as also on the language of sub-section (2) of Section 13 of the Act, it was quite clear that the words "rights under a mining lease" as occurring in the opening sentence of sub-s (2) of S 13 were descriptive of the property acquired and not of any particular lease that might be in operation at the time of acquisition. It was also urged that under Section 10 of the Bihar Land Reforms Act, the interest of the sub-lessees was not at all touched and thus the sub-lease subsisted as before. Very elaborate arguments were advanced on behalf of both sides on this question. Two things, in my opinion, clearly stand out (1) that the sub-lessee did not get any new sub-lease under Section 10, his lease subsisted by virtue of the statutory grant in favour of his lessor under Section 10 of the Bihar Land Reforms Act, and (2) that sub-section (2) of Section 13 on a proper construction was not intended to cover only statutory leases as are contemplated under Sections 9 and 10 of the Bihar Land Reforms Act. This question, in my opinion was more relevant for consideration in the appeal by M/s Bokaro and Ramgur Ltd. but as that appeal could be disposed of on rather comparatively simpler points, I have not discussed this point in that appeal. So far as the position of the sub-lessees is concerned in whom the mining rights were vested at the time of the acquisition I have, no doubt, that their interest was not at all touched by Section 10 of the Bihar Land Reforms Act. Sub-section (1) of Section 10 of the Bihar Land Reforms Act inter alia provides that —

"..... where immediately before the date of vesting of the estate or tenure there is a subsisting lease of mines or minerals comprised in the estate or tenure or any part thereof, the whole or that part of the estate or tenure comprised in such lease shall, with effect from the date of vesting, be deemed to have been leased by the State Government to the

holder of the said subsisting lease for the remainder of the terms of that lease, and such holder shall be entitled to retain possession of the lease-hold property."

It is true that under Section 2(1) of the Bihar Land Reforms Act "lease", in relation to mines and minerals, includes a sub-lease and a lessee includes a sub-lessee. The true meaning and import of sub-section (1) of Section 10 of the Bihar Land Reforms Act, as quoted above, is, however, apparent when reference is made to sub-section (3) of Section 10. That sub-section provides that —

"The holder of any such lease of mines and minerals as is referred to in sub-section (1) shall not be entitled to claim any damages from the outgoing proprietor or tenure-holder on the ground that the terms of the lease executed by such proprietor or tenure holder in respect of the said mines and minerals have become incapable of fulfilment by the operation of this Act."

It will be apparent if sub-section (1) and sub-section (3) are read together then Section 10 speaks of subsisting lease from the outgoing proprietor or tenure-holder, otherwise there was no reason to provide for protecting the outgoing proprietor or tenure-holder against claims for damages by their erstwhile lessees on the ground that the terms of the lease executed by such proprietor or tenure-holder had become incapable of fulfilment by operation of the Act. This construction is in consonance with the well recognised object of the Bihar Land Reforms Act. This question can be looked at from another angle as well. If Section 10 of the Bihar Land Reforms Act contemplates both a lease as well as a sub-lease by the State in favour of the lessor as well as the sub-lessee, the position would be mutually destructive. The State cannot be the lessor vis-a-vis the lessee as well as the sub-lessee at the same time. The State having come in the position of the outgoing proprietor or the tenure-holder will undoubtedly be the lessor of the erstwhile lessee and in case both the sub-lessee as well as the lessee are deemed to have obtained a statutory lease from the State, the position will be already anomalous by bringing into existence two lessees in respect of the same lease-hold estate. Such an anomalous position could not have been contemplated by the Legislature. Indeed, the terms of Section 10A of the Bihar Land Reforms Act as inserted in the said Act by the Bihar Land Reforms (Amendment) Act, 1964 clearly show that the operation of Section 10 had not been wiped out by the sub-leases. Under Section 10A the sub-lessees have now been brought as lessees directly under the State. This could be possible only if their original sub-leases were subsisting. It follows, therefore, that

the sub-lease which had been granted by M/s. Bokaro and Ramgur Company Ltd. to M/s. Kathara Coal Company Ltd. had not been wiped off and had not been substituted by a new lease by virtue of Section 10 of the Bihar Land Reforms Act. The decision of the Supreme Court, namely, in Bihar Mines Ltd. v. Union of India, AIR 1967 SC 887 holding that the effect of Section 10 of the Bihar Land Reforms Act was that a new statutory lease came into existence on the date when the estate vested in Government is thus of no relevance. Further it appears to me that while on the one hand the principle underlying the mode of computation of compensation as laid down in Sec. 13 of the Act was to liberate the power of eminent domain from the limitations of the Land Acquisition Act and of the Land Acquisition (Mines) Act and thus from the obligation of payment of the market value or the just equivalent of the surface and the minerals underlying the same, on the other hand, it quite clearly provides for compensation in respect of the investment made by the lessee or sub-lessee concerned, for acquiring the lease-hold properties to the extent of expenses incurred out of the pocket and for some interest thereon. In other words, Section 13 of the Act on its very terms appears to lay down the formula for determining the amount of compensation payable to the lessee to the extent each one of them might have invested over the lease-hold regardless of the date of the lease, provided the expenses had a bearing or were related to the activities necessary for securing the lease and for developing the property. The Act has provided for payment for all the advantages which the State secures by the acquisition. That the provisions of Sec. 13 are not designed to cover statutory lease brought into existence under Section 10 of the Bihar Land Reforms Act, is also clear from the language of the provisions of Section 13. If, for instance, clause (ii) of sub-section (2) of Section 13 were intended to cover statutory leases under section 10 of the Bihar Land Reforms Act, and, it must be supposed that the Parliament was aware of the Bihar Land Reforms Act when it came to pass the Coal Bearing Areas (Acquisition and Development) Act, 1957, the Parliament would have provided for the payment of such expenses only as are envisaged to be incurred by the grantee of a mining lease in respect of lands in which the minerals belong to the Government, as provided for in Rules 28, 29 and 36 of Chapter IV of the Mineral Concession Rules, 1949. The total amount of money required to be paid by a prospective lessee under the Mineral Concession Rules was only about two thousand rupees. But we find that it is not so. In clause (ii) of

sub-s. (2) of S. 13 not only has the Parliament provided for various items of expenditure of the nature referred to in clauses (i), (ii) and (iii) of sub-section (1) of Section 13 which expenses would be practically unknown to the statutory lease, it has further provided for compensating the lessee or the sub-lessee, as the case may be, for the salami paid for obtaining the lease. It is well known that no salami is payable for a statutory lease. Indeed, a statutory lease comes into existence by a legal fiction. Thus we find that there are intrinsic materials in the section itself which go to indicate that the words "rights under a mining lease" as occurring in sub-section (2) of Section 13 were really descriptive of the property acquired, regardless of the lease under which the property might have come into existence. Thus regarded, there is clearly no substance in the contention that it is only a statutory lease which had come into existence under Section 10 of the Bihar Land Reforms Act, at least so far as Bihar was concerned, that were contemplated by Section 13(2) of the Act. In any case, I have held above that no statutory lease can be said to have come into existence in respect of the sub-lessees, namely, M/s. Kathara Coal Company Ltd. This contention, therefore, fails.

26. Coming to the details of the items in respect of which compensation has been allowed to M/s. Kathara Coal Company Ltd., the only item which was seriously contested relates to compensation under the head of minimum royalty. It was urged that in no case compensation under that head could exceed Rs. 5/- per bigha per year. The Tribunal has allowed claim for minimum royalty at the rate of Rs. 7/8/- per bigha upto June, 1957 and at the rate of Rs. 10/- per bigha for the period from 1-7-1957 to 23-11-1957, the date of the acquisition. In respect of the period upto 31-1-1955, however, as the Union Government had themselves allowed royalty at the rate of Rs. 5/- till that date, the Tribunal has only allowed the difference between the royalty at the rate of Rs. 7/8- and Rs. 5/- upto January, 1955 and Rs. 7/8/- thereafter until the 30th of June, 1957. It will be noticed that the correctness of the figures of the expenditure as claimed under different heads has not been disputed. The cash book and other account papers like the journal, ledger and vouchers have all been accepted. In regard to allowing minimum royalty at the rate of Rs. 7/8/- per bigha per year, it would be found that the Tribunal had granted at that rate on the basis of actual payment made by M/s. Kathara Coal Co. Ltd. to their lessors. This payment was made on the basis of a bona fide settlement between M/s. Kathara Coal Company Ltd. and M/s. Bokaro and Ramgur Company.

Ltd. The settlement had been arrived at in course of a dispute about the correct interpretation of the term relating to payment of royalty in the deed of sub-lease and it appeared as pointed out above that M/s Kathara Coal Company Ltd. had made actual payment at the rate of Rs. 7/8/- per bigha, in pursuance of the said settlement upto June, 1957. There was nothing to show that the settlement was not bona fide. The settlement, however, was for a period ending with June, 1957. The liability to pay minimum royalty after June, 1957, namely, 1-7-1957 to 23-11-1957, the date on which the acquisition was made was clearly governed by the contract embodied in that behalf in the deed of the sub-lease and, in fact, during the period from 1-7-1957 to 23-11-1957 payment had been made at Rs. 10/- per bigha per year. In the circumstances, I can see no justification to interfere with the award of the Tribunal in regard to the compensation allowed to M/s. Kathara Coal Company Ltd. by way of reimbursing them for the payments by them of minimum royalty. In regard to the directions of the Tribunal for payment of interest at the rate of 5% per annum on the excess amount determined from the date on which it became payable, that is, the date of acquisition to the date of payment, as well, I can see no reason to interfere with the discretion exercised in that behalf. The Tribunal has referred to the letters exchanged between N. C. D. C. and M/s. Kathara Coal Company Ltd. showing the latter pressing for payment and the former delaying the same on one pretext or another. It has also pointed out that though the properties were acquired on 23-11-1957 and almost simultaneously dispute had arisen between the various claimants, the reference was abnormally delayed till the 25th of May, 1959. In the circumstances, it cannot be said that the Tribunal has exercised its discretion arbitrarily in regard to the directions for payment of interest on the excess amount.

27. No other point was urged on behalf of the Union of India in Miscellaneous Appeal No. 116 of 1961.

28. It follows from what has been discussed above that all the three appeals as also the cross-objection preferred by M/s. Kathara Coal Company Ltd. must be dismissed. In the result, the appeals fail and are dismissed. In the circumstances and on the facts of this case, there will be no order as to costs in any of the appeals.

29. K. B. N. SINGH, J. :— I agree.
MBR/D.V.C. Appeals dismissed.

AIR 1969 PATNA 246 (V 56 C 61)

KANHAIYAL J.

Messrs. All India General Transport Corporation, Petitioner v. Shri Raghunath Sahay and another, Opposite Parties.

Civil Revn. No. 1301 of 1967, D/- 10-5-1968, against decision of the Dist. J., Purnea, D/- 25-8-1967.

Civil P. C. (1908), Or. 29, R. 2(b), Or. 5, Rr. 10 and 20(A) and Or. 9, R. 13—Service of summons on a company—Word 'Corporation' in Or. 29, R. 2(b)—Meaning of—Application under Or. 9, R. 13—Court not bound to find actual date of knowledge—(Companies Act (1956), S. 34—Company registered under the Act, held, a Corporation within meaning of Or. 29, R. 2(b) of Civil P. C.)

In a suit filed against an incorporated company to recover a certain amount, summons was first tendered to an employee of the company who refused, whereupon the bailiff affixed the same in the office of the company. The court also directed service by post, which, was returned unserved. The court passed an ex parte decree on 19-5-1965. The defendant company applied under Or. 9, R. 13 to set aside the decree alleging that no summons was served on it and that it had come to know of the decree only recently. The application was dismissed on the ground that the same was not filed within 30 days from the date of service of summons under Or. 29, R. 2(b) of the Code. In a revision against the order, the Petitioner contended that service under Or. 29, R. 2(b) could not be effected on the defendant, it being a company and not a corporation; secondly, that the court having ordered service by post under Or. 5, R. 20(A) it must have awaited the return before passing the decree; and thirdly, that in any event the Court should have found as to when the defendant got knowledge of the ex parte decree.

Held, (1) that the word 'Corporation' has been used in Civil P. C. with reference to S. 34 of the Companies Act and hence service of summons in accordance with Or. 29, R. 2(b) could be effected on the defendant company, and that the provision under the proviso to Or. 5, R. 10 being permissive, the Court need not wait for the service of summons by registered post. (Para 5)

(2) that Or. 5, R. 20(A) was not applicable to the case and the order for service of summons by post was under Or. 5, R. 10, which was another mode of service prescribed in that order; (Paras 5 & 6)

and (3) that the court was not bound to find out the actual date when the defendant came to know of the passing of the ex parte decree. AIR 1922 Pat 376, Dist. AIR 1960 Andh Pra 383, Foll. (Para 7)

Cases Referred: Chronological Paras
 (1960) AIR 1960 Andh Pra 383
 (V 47)=(1959) 2 Andh WR 369,
 Sri Lakshmi Srinivasa Oil & Rice
 Mills v. P. Veeranjaneayulu 5
 (1922) AIR 1922 Pat 376 (V 9)=
 ILR 1 Pat 48, Mahabir Prasad
 Bhagat v. Balkishun Das 5
 (1887) 36 Ch. D 674, Baroness Wen-
 lock v. River Dee Company 4

Jagdish Pandey and Kali Pathak, for
 Petitioner.

ORDER :— This application is directed against an order passed by Sri S. C. Chakravarty, District Judge, Purnea in Miscellaneous Appeal No. 78 of 1966 confirming an order dated the 25th June, 1966 passed by the Munsif, Katihar in Miscellaneous Case no. 108 of 1965 refusing to set aside the decree obtained by opposite party no. 1.

2. The plaintiff-opposite party no. 1 filed a Money Suit No. 310 of 1964 for realisation of Rs. 3404.68 Paise for non-delivery of a consignment booked from Bombay to Katihar. The petitioner was defendant no. 1 and opposite party no. 2 was defendant no. 2 in the Court below. The suit was decreed ex parte against the petitioner which is a Company having its Head Office at 134/4 Mahatma Gandhi Road, Calcutta carrying on transport business all over India. The ex parte decree was passed on the 19th May 1965. The petitioner filed an application under Order IX, Rule 13 of the Code of Civil Procedure for setting aside the said decree. The case of the petitioner is that no summons has been duly served and the petitioner got the knowledge of the suit only on the 20th July, 1965 when the Director of the petitioner gave telephonic information. Thereupon, the petitioner instructed its Advocate at Patna to do necessary pairvi in the suit, and thereafter an application for setting aside the ex parte decree was filed on the 16th August, 1965.

Both the courts below have concurrently found that the summons had been duly served in accordance with the provisions of Order 29, Rule 2(b) of the Code of Civil Procedure, and the application having not been filed within thirty days from the 19th May, 1965, it was barred by time. Defendant no. 2 has not appeared at any stage of the suit or the application. Plaintiff, opposite party no. 1 has not appeared in this Court to contest the application of the petitioner.

3. The suit was instituted on the 3rd August, 1964. The Order dated the 21st September, 1964 shows that summons was served on defendant no. 2, but it was not issued against defendant no. 1 as conveyance charge was not filed. Later on, the summons on defendant no. 1 was issued, but it returned unserved. The plain-

tiff-opposite party again filed requisites and fresh summons was issued, and as noted in the order dated 22nd March, 1965 the summons was duly served. By the same order the learned Munsif directed the plaintiff to file card. Registered post card was served on defendant no. 2, but it returned unserved on defendant no. 1, the petitioner. The witnesses examined on behalf of the petitioner have denied the service of notice.

Witness no. 1, on behalf of the plaintiff, is the bailiff of the Small Cause Court, Calcutta. He stated that he served the summons on the petitioner at 134/4 Mahatma Gandhi Road, Calcutta. At first he met an employee of the petitioner and requested him to take the summons, and on his refusal he affixed the summons in the office of the petitioner, and wrote out the service report (Exhibit A). In this situation, the courts below have come to the conclusion that the summons on the petitioner, which is a corporation, had been duly served. On the question of limitation the courts below disbelieved the petitioner's case that it got knowledge on the 20th July, 1965 as stated in the petition. In view of the findings on both the points, the Courts below have dismissed the application of the petitioner. The petitioner has, therefore, filed this petition in this Court under Section 115 of the Code of Civil Procedure.

4. Mr. Jagdish Pandey, learned counsel appearing for the petitioner submitted that the provisions of Order 29, Rule 2(b) of the Code of Civil Procedure do apply only to corporations and not to the Companies and hence, there was no due service of summons on the petitioner. Secondly, he submitted that even if the case made out in the petition that the petitioner got knowledge on the 20th July, 1965 be false, it was the duty of the court to find out the actual date on which the petitioner got the knowledge and in case it was found that the petitioner got the knowledge within 30 days of the ex parte decree, the application should have been allowed.

Thirdly he submitted that the summons cannot be taken to have been served under the provisions of O. 5. R. 10 of the Code of Civil Procedure. He relied on an English case, Baroness Wenlock v. River Dee Company, (1887) 36 Ch. D 674 for the proposition of law that the Corporation is created by the Act of the Parliament and the Companies are not the corporation. Order 29, R. 2 of the Code of Civil Procedure is as follows:—

"Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the Secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the Corporation at the registered office, or if there is no registered office then at the place where the Corporation carries on business."

5. The word 'Corporation' has been used in the Code of Civil Procedure with reference to section 34 of the Indian Companies Act. Under that section when a company is registered, the Registrar of Companies certifies under his hand the fact of such registration. The effect of incorporation is that the company becomes a body corporate having perpetual succession and a common seal. It also refers to corporations established by the Act of Parliament. This is obvious because Order 29 of the Code of Civil Procedure refers to corporations while Order 30 of the Code of Civil Procedure refers to firms and there is no specific provision for the companies registered under the Indian Companies Act.

It is not disputed that the petitioner is a company incorporated under the Indian Companies Act having its registered Office at 134/4 Mahatma Gandhi Road and the summons had been affixed at the office of the petitioner. Therefore, the Courts below have not committed any error in holding that the service of summons had been duly effected on the petitioner. The contention of Mr Pandey that the court ordered that summons be served by registered post under the provisions of Order 5, Rule 20(A) of the Code of Civil Procedure, amounts to a finding by the court that there was no service of summons on the defendant. Order 5, Rule 20(A) of the Code of Civil Procedure is not applicable in this case. It only applies when summons is returned unserved. The order of the learned Munsif for service of summons by registered post was under the provisions of Order 5, Rule 10 of the Code of Civil Procedure (Patna amendment), it was in addition to the mode of service laid down in the order.

The facts of the case of Mahabir Prasad Bhagat v. Balkishum Das, AIR 1922 Pat 376 relied on by Mr. Pandey are entirely different. In that case the scope of Order 5 Rule 13 and Order 30 Rule 3 has been considered and there is no discussion of Order 5, Rule 29, of the Civil P. C. The case of Sri Lakshmi Srinivasa Oil and Rice Mills v. Veeranjaneyulu, AIR 1960 Andh Pra 383 has correctly said that the calling in aid of Order 5 Rule 20 (A) of service by post is conditioned upon the contingency arising 'when summons is registered unserved.'

6. In Order 5, Rule 10, of the Civil P. C. a proviso has been added, which permits the court to send the summons to the defendant by post in addition to the mode of service laid down in the rule. This provision is permissive and not

mandatory. When the Court finds that summons has been duly served it was not essential to wait for service of summons by registered post.

7. Another point involved in the case is the question of limitation. Both the Courts below have found that the date of knowledge given by the petitioner in paragraph no 7 of the application as the 20th July, 1965 was wrong and could not be acted upon. The Courts below have considered the evidence of both the parties in detail and have held as stated above. In my judgment it is not necessary for the courts to find out the actual date of the knowledge of the petitioner when they find, as a fact, that the date of knowledge asserted by the petitioner is wrong. In this view of the matter, I must hold that the application was barred by time and the finding of the court below is not vitiated.

8. For the aforesaid reasons, I am of the view that interference is not called for. Therefore, the petition is dismissed, but without costs.

TVN/D.V.C.

Petition dismissed.

AIR 1969 PATNA 248 (V 56 C 62)

U. N. SINHA, J.

Heavy Engineering Corporation Ltd.,
Petitioner v. K. Singh & Co, Opposite
Party.

Civil Revn. No. 1351 of 1967, D/- 11-7-1968, against order of Special Sub J. Ranchi, D/- 8-9-1967.

Civil P. C. (1908), S. 115 — Arbitration Act (1940), Ss. 8(2) and 20 — Appointment of arbitrator by Court in pending suit — Court bound to appoint two arbitrators if agreement so requires it — Order appointing one arbitrator under misconception — Application for appointment of two arbitrators by Defendant in accordance with agreement rejected by trial Court — Revision — High Court set aside order of appointment as not being in accordance with law.

In a suit valued at Rs. 3 lacs the plaintiff filed an application under Ss. 8 and 20, Arbitration Act praying that the defendant may be called upon to file an arbitration agreement in his possession and for referring the dispute to arbitrator to be appointed by Court. The defendant stated that it had no objection to the appointment of arbitrators in accordance with the terms of the agreement. According to the relevant clause of the agreement a claim of the value above Rs. 50,000 had to be decided by two arbitrators but the Court under some misapprehension and without applying its mind to the facts and circumstances of the case

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and to the law on the subject appointed one arbitrator and referred the dispute to him for his decision. The defendant then applied to the Court for appointment of another arbitrator in accordance with the terms of agreement but the Court rejected it. Pending revision against this latter order the defendant had also filed a revision against the order appointing one arbitrator along with an application for condonation of delay under S. 5 Limitation Act but the High Court had rejected it.

Held (1) that the Court was bound to appoint under S. 8(2), Arbitration Act, two arbitrators as required by the arbitration agreement and should have withdrawn its earlier order appointing only one arbitrator under some misconception.

(Para 2)

(2) that the fact that the High Court had rejected an application under S. 5 Limitation Act for condonation of delay in applying for revision against the order appointing a single arbitrator was not an affirmation of that order and was not a bar to entertain revision against order rejecting defendant's application to appoint two arbitrators.

(Para 3)

(3) that the order not being in accordance with law should be set aside. (Court directed to reappoint arbitrators in accordance with the agreement).

(Para 4)

Rai Parasnath and Kumar Bahadur, for Petitioner; Lal Narain Sinha (Advocate General) and Pradyumna Narain Singh, for Opposite Party.

ORDER :— This application has been filed by the defendant of Title Suit No. 116 of 1965, arising out of a petition filed by the opposite party in the Court of the Special Subordinate Judge, Ranchi, under Sections 8 and 20 of the Arbitration Act, 1940. The case was valued at Rs. 3,07,193. 75 Paise and the plaintiff's prayer was that the defendant may be called upon to file an agreement between the parties, which was in the defendant's custody, and for referring the dispute to arbitrator to be appointed by the Court. In reply to this petition, the defendant filed a petition on the 17th January, 1966, stating that it had no objection to the appointment of arbitrators in accordance with the terms of the arbitration agreement. Ultimately, by order passed on the 10th February, 1966, the Court appointed Sri Atmanand Singh, Chief Inspector of Factories as the arbitrator, taking the name from a list of names submitted by the plaintiff. After the arbitration matter had been sent to the appointed arbitrator, the petitioner filed an application before the Court below on the 3rd January, 1967, praying that another arbitrator and an umpire may also be appointed, in view of clause 79(4)(b) of the general conditions of the contract between the parties. That is to say, the defendant now wants

that instead of one arbitrator, the dispute should be decided by two arbitrators and an umpire, because the plaintiff's case was above the value of Rs. 50,000. The relevant clauses of the arbitration agreement between the parties are clauses 79 (4)(a) and 79 (4)(b), which are quoted below:—

Clause 79(4)(a). — "Matters in question, dispute or difference to be submitted to arbitration as aforesaid shall be referred for decision to,

(i) a sole arbitrator who shall be the Chairman or any officer of the employer nominated by him in that behalf in cases in which the claim in question is below Rs. 50,000 and in which the issues involved are not of a complicated nature. The Chairman or the officer nominated shall be the sole judge to decide whether or not the issues involved are of complicated nature;

(ii) two arbitrators who shall be the officers of equal status of the employer, to be appointed in the manner laid down in sub-clause (4)(b) of this clause for and in respect of all claims of and above the value of Rs. 50,000/- and for all claims, irrespective of the amount or value of such claims, if the issues involved therein are of a complicated nature. In the event of the two arbitrators being divided in their opinions, the matter under dispute shall be referred to an umpire to be appointed in the manner laid down in sub-clause (4)(b) hereunder for his decision."

Clause 79(4)(b). — "For the purpose of appointing two arbitrators as provided in sub-clause (4)(a)(ii), the employer shall send a panel of more than three names of officers of the employer to the contractor who will be required to suggest a panel of three names out of the list so sent to him by the employer. The Chairman shall appoint one arbitrator out of this panel as the contractor's nominee, and then appoint a second arbitrator of equal status as the employer's nominee, either from the panel or outside the panel, ensuring that one of the two arbitrators so nominated is invariably from the Accounts Department of the employer. Before entering into the reference, the two arbitrators shall nominate an umpire who shall be an officer of the employer to whom the case shall be referred in the event of any difference of opinion between them."

By the impugned order the learned Judge has rejected the defendant's prayer, mentioning the facts of the case upto the appointment of the single arbitrator by order dated the 10th February, 1966, and holding thus:—

"Thereafter all these happened as above, I do not think that when the matter was being heard by the Arbitrator, appointed by Court, the question of juris-

diction by the defendant so taken can be said or accepted to be having any head or tail. Therefore, the defendant's objection petition aforesaid on the point of jurisdiction has no basis or merit in it and the same is rejected."

2. Learned counsel for the petitioner has relied upon the arbitration agreement between the parties and has referred to Section 8 of the Arbitration Act, 1940 (Act X of 1940) and has argued that the Court below has not appreciated the true scope of the controversy between the parties at this stage and has omitted to notice that under Section 8(2) of the Arbitration Act, the Court should have appointed two arbitrators, as the agreement between the parties in clause 79(4) was that a dispute involving a claim above the value of Rs. 50,000/- must be resolved by two arbitrators. The learned Advocate-General appearing for the plaintiff-opposite party has contended that the point raised on behalf of the petitioner is barred by res judicata, in view of the earlier order passed by the learned Subordinate Judge on the 10th February, 1966, by which the dispute had been referred to one arbitrator only. It is further contended that the petitioner had moved this Court in Civil Revision No. 1384 of 1967 against the earlier order, in which the petitioner was unsuccessful. Having heard the learned counsel for the parties, I think that this is a fit case in which appropriate relief must be given to the petitioner and I will, in due course, deal with the effect of the unsuccessful attempt made by the petitioner in Civil Revision No. 1384 of 1967. As indicated above, according to the arbitration agreement between the parties, a claim of the value above Rs. 50,000/- must be decided by two arbitrators, as mentioned in clause 79(4)(a)(ii). Section 8 of the Arbitration Act envisages a situation where the Court must appoint more than one arbitrator in certain cases and it is manifest that this was one of the cases in which the Court was bound to appoint two arbitrators to resolve this dispute valued at over three lacs of rupees. It will appear that the earlier order passed on the 10th February, 1966 had been passed under some misapprehension without the Court applying its mind to the facts and circumstances of the case and to the law on the subject. After the defendant had filed its rejoinder on the 17th January, 1966, the learned Judge stated in his order-sheet that the defendant had filed a verified petition praying for appointment of arbitrator for referring the dispute for award. The mistake of the Court started at this point and it persisted throughout including the present order under revision, where the learned Judge has stated that on the 17th January, 1966, the defendant had filed a verified petition for ap-

pointment of an arbitrator and to refer the dispute for award. As indicated above the defendant had quite rightly asked for appointment of arbitrators in accordance with the terms of the arbitration agreement. The defendant had stated in its petition dated the 17th January, 1966, that "the Court should refer the dispute to them for making the award for which they shall ever pray". Obviously, the learned Judge has not considered this part of the matter or the requirements of clause 79 of the agreement between the parties and all the necessary implications of Section 8(2) of the Arbitration Act. Apart from the order passed earlier on the 10th February, 1966, I do not think that anything stood in the way of the learned Judge in withdrawing his earlier order passed under some misconception.

3. What had happened with respect to the order dated the 10th February, 1966 is as follows: This civil revision had been filed on the 6th December, 1967 against the subsequent order dated the 8th September, 1967. After filing this application the petitioner had filed Civil Revision No. 1384 of 1967 on the 14th December, 1967 with an application under Section 5 of the Limitation Act for condoning the delay. This application for condoning the delay was rejected by this Court on the 16th April, 1968. First, it is difficult to hold that the rejection of the application under Section 5 of the Limitation Act can be said to be an affirmation by this Court of the order passed on the 10th February, 1966. Secondly, this order had been passed by this court on the 16th April, 1968 and, therefore, this was not an obstacle on the 8th September, 1967 when the learned Judge refused to interfere. In my opinion, when the learned Judge's attention was drawn to the agreement between the parties and to the relevant provision of law, he should have withdrawn his earlier order, which was against the provisions of Section 8 of the Arbitration Act, under which he had purported to act. The learned Judge should have remedied the mistake which he had himself committed in appointing one arbitrator in this case. Instead of dealing with the matter in the true perspective, the learned Judge has chosen to say that the defendant's contention cannot be "accepted to be having any head or tail." In my opinion, this was not a proper approach to a serious question arising on the interpretation of Section 8 of the Arbitration Act, which alone conferred jurisdiction on the Court to appoint arbitrator or arbitrators. Therefore, this is a fit case in which this Court should interfere and reverse the impugned order.

4. The application is allowed and the learned Judge is now directed to appoint two arbitrators after a careful considera-

tion of Clause 79 of the agreement between the parties and Section 8 of the Arbitration Act. In the circumstances of the case, the parties are directed to bear their own costs of this Court. Whether Sri Atmanand Singh, Chief Inspector of Factories will again be appointed as one of the arbitrators is left to the learned subordinate Judge, as the learned counsel for the opposite party states that the defendant had never objected to his appointment and was merely asking for the appointment of a second arbitrator. I have no doubt that the learned Judge will consider this aspect of the case carefully.
KSB Revision allowed.

properties even though the properties proceeded against were her personal properties and not those of her husband. AIR 1962 Pat 72 (FB) & (1968) ILR 47 Pat 178 (FB). Rel. on. (Para 7)

Cases Referred: Chronological Paras
(1968) ILR 47 Pat 178 (FB),
Sarjug Singh v. Basisth Singh 5
(1964) Misc. Appeal No. 6 of 1964
(Pat). Bhagwat Ram v. Smt. Savitri Devi 5
(1962) AIR 1962 Pat 72 (V 49)=
1962 BLJR 110 (FB). Baijnath Prasad Sah v. Ramphal Sahni 5
M/s. Tara Kishore Prasad and Uday Sinha, for Appellants; Prem Shankar Sahay, for Respondent.

AIR 1969 PATNA 251 (V 56 C 63)
ANWAR AHMAD AND
SHAMBHU PRASAD SINGH, JJ.

Chandra Choor Deo and another, Appellants v. Smt. Krishnawati, Respondent.

A. F. O. Nos. 278, 279 and 280 of 1964, D/- 23-7-1968, from order of Addl. Sub. J; Bhagalpur, D/- 25-5-1964 and 16-5-1964.

Civil P. C. (1908), Ss. 11 and 47, O. 21, Rr. 22, 23(1) — Execution proceedings — Decree ordered to be executed by attachment and sale of deceased judgment-debtor's property — His widow failing to raise objection to saleability in spite of issuance of prior notice under O. 21, R. 22 to her — Her subsequent application under S. 47 C. P. C. for release of property is barred by res judicata even if property is her own and not of her husband.

In a proceeding for execution of a money decree by attachment and sale of the judgment-debtor's immovable property all objections to the executability of the decree have to be raised before the order for issue of attachment is made. If the notice under Order 21, Rule 22 is not served upon the judgment-debtor, that is a different matter; but if in spite of service of notice he fails to raise an objection which he might and ought to have raised at that stage the Court, in passing the order for execution of the decree, must be deemed to have decided the objection against him and the order attaching the properties operates as res judicata in all further proceedings. (Para 5)

Thus, where in an execution proceedings the widow of the deceased judgment debtor, failed to appear and take any objection to the saleability of the properties, before the order of attachment was made, in spite of the proper service of notice under O. 21, R. 22, it was not open to her to file subsequently an application under Section 47, praying for the release of the

SHAMBHU PRASAD SINGH, J. :— Similar questions of law being involved in these three appeals, they were made analogous and have been heard together and are being disposed of by this common judgment.

2. The decree-holder is the appellant in each of these three appeals. They had obtained money decrees against Krishnanand Singh, who died before the execution could be levied. Three execution cases (Nos. 31, 32 and 33 of the year 1961) were filed and in each of them, Krishnawati, the widow of Krishnanand Singh, was mentioned as the first judgment-debtor. Notices under Order 21, Rule 22 of the Code of Civil Procedure were issued against her and other judgment-debtors in all these execution cases and, as it appears from order no. 6 dated the 6th March, 1962, in Execution Cases 31 and 32 of 1961, and order no. 7 dated the 13th March, 1962, in Execution case no. 33 of 1961, the notices were properly served. By Order No. 9 dated the 10th April, 1962, in each of the three execution cases, orders for attachment were issued. Krishnawati or any other judgment-debtor had not appeared before the Court on or before that date and taken any objection to the attachment of the properties proceeded against. Subsequently, Krishnawati appeared and filed objections under Order 21, Rule 58 of the Code of Civil Procedure. Her case was that the properties proceeded against were her personal properties and not those of her husband.

These applications were dismissed for default. Applications for their restoration were also dismissed. She thereafter, filed new applications under Order 21, Rule 58 of the Code; but they too were dismissed. She then filed objections under Section 47 of the Code, praying for the release of the properties from attachment, the ground being the same that they were her personal properties. The applications were registered as Miscellaneous Cases Nos. 34, 35 and 36 of 1963 in the three execution cases Nos. 31, 32 and 33 of 1961, respectively. These applications have

been allowed by the executing Court and the decree-holders have appealed to this Court. Miscellaneous Appeal No. 278 of 1964 is directed against the order in Miscellaneous Case No 35 of 1963, Miscellaneous Appeal No 279 of 1964 is directed against the order in Miscellaneous Case No 34 of 1963 and Miscellaneous Appeal No 280 of 1964 is directed against the order in Miscellaneous Case No 36 of 1963

3. Various objections were taken by the decree-holders before the executing Court to the aforesaid applications under Section 47 of the Code. The main contention of Mr Tara Kishore Prasad, appearing for the appellants before this Court, however, is that the judgment-debtor, Krishnawati, having failed to take any objection in the Court below to the saleability of the properties before the orders of their attachment were passed in the execution cases, her applications stand barred by *res judicata* and the orders of the Court below must be set aside.

4. So far as two of the execution cases, namely, Nos. 32 and 33 of 1961, are concerned they now stand dismissed by order No 123 dated the 5th February, 1966 and order No. 124 dated the 5th March, 1966 respectively. As a result of the dismissal of these two execution cases, the order of attachment stands automatically withdrawn and the properties stand released. In that view of the matter, the objections filed by Krishnawati for the release of the properties and these appeals consequently have become infructuous and the orders passed by the court below on the objections have lost their force. In the circumstances, Miscellaneous Appeals 278 and 280 of 1964 are dismissed as infructuous and there will be no order as to costs. The order for costs passed by the Court below in Miscellaneous case no 36 of 1963 against the appellant also cannot be executed and realised from him. Mr. Prem Shankar Sahay, appearing for Krishnawati, has no objection to it.

5. Miscellaneous Appeal No. 279 of 1964, however, has to be decided on merits, because the execution case is still persisting. The contention of Mr. Prasad is supported by two Full Bench decisions of this Court, in *Baljnath Prasad Sah v. Ramphal Sahni*, AIR 1962 Pat 72, (FB), and *Sarjug Singh v. Basisth Singh*, (1963) ILR 47 Pat 178 (FB). In *Baljnath Prasad Sah's* case, AIR 1962 Pat 72 (FB), Sahai J observed as follows:—

"In a proceeding for execution of a money decree by attachment and sale of the judgment-debtor's immovable property, there are five important stages. Under the Patna amendment of Rule 22 of Order 21, the court has to issue notice in every case to the person against

whom execution is levied, requiring him to show cause why the decree should not be executed against him. Rule 23 reads:

"(1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the court shall consider such objection and make such order as it thinks fit."

This is the first stage. If the notice under Order 21, Rule 22 is not served upon the judgment-debtor, that is a different matter; but, if the notice is served upon him, he must raise all his objections to the executability of the decree at that stage. If he does, the court's decision on those objections will operate as *res judicata* in all further proceedings. If, in spite of service of notice he fails to raise an objection which he might and ought to have raised at that stage, for instance, an objection on the ground of limitation, the Court, in passing the order for execution of the decree, must be deemed to have decided the objection against him.

Ordinarily, however, the Court does not pass an express order to the effect that the decree be executed. That order is implied in the order for issue of attachment, which is the next stage. In the present case also the order under Rule 23(1) is implied in the order for issue of attachment. All objections to the executability of the decree have to be raised in such cases before the order for issue of attachment. The third stage is one when the court orders sale of the judgment-debtor's property. Rule 64 of Order 21 provides that an executing court may order the sale of any property attached by it provided that the property is liable to sale. As the Court has come to a decision at this stage that the property in question is liable to sale, any objection on the ground of non-saleability of the property must be raised before that stage. If an objection relating to saleability is raised, the Court's decision will be binding upon the parties. In case the judgment-debtor failed to raise any such question, the Court must be deemed to have decided it against him by passing an order for sale of the property because, unless it is liable to sale, it cannot pass that order."

The recent Full Bench in *Sarjug Singh's* case, (1963) ILR 47 Pat 178 (FB) has followed the decision in *Baljnath Prasad Sah's* case, AIR 1962 Pat 72 (FB). Three miscellaneous appeals were referred to the Full Bench and were heard together. The facts of one of them, Miscellaneous Appeal No. 6 of 1964 (Pat) *Bhagwat Ram v. Smt. Savitri Devi*, were similar to the facts of the case before us. A pre-

vious order attaching the properties proceeded against in that case was held to operate as *res judicata* and to bar a subsequent application.

6. Mr. Prem Shankar Sahay for Krishnawati, however, contended that the objection as to the maintainability of the application filed by her was considered and disposed of by the executing court by its Order No. 81 dated the 30th August, 1963 and as that court by that order held that the application was maintainable and the decree-holder appellant did not move the higher court, it is not open to him to raise the question of maintainability over again. According to him, Order No. 81, being an order subsequent to the order of attachment, will now operate as *res judicata* between the parties. There appears no substance in this contention of Mr. Sahay, Krishnawati had previously filed applications under O. 21, Rule 58 of the Code and the objection of the decree-holder was that, thereafter, it was not open to her to file an application under Section 47. The executing Court decided as a preliminary point that the application under Section 47 was maintainable. It did not decide whether the prayer made in the application under Section 47 was barred by *res judicata* or not and should or should not be granted to her on merits. That order does not appear to be final in nature against which the decree-holder could come in appeal.

7. For the reasons stated above, the prayer of Krishnawati for the release of the attached properties in Execution Case No. 31 of 1961 must be held to be barred by *res judicata* and Miscellaneous Appeal No. 279 of 1964 must succeed. The appeal is, accordingly, allowed; but, on the facts and in the circumstances of the case, there will be no order for costs for either of the two courts.

8. ANWAR AHMAD, J. :— I agree.
GDR/D.V.C. Appeal allowed.

AIR 1969 PATNA 253 (V 56 C 64)

K. K. DUTTA, J.

State of Bihar, Appellant v. Dasrathi Beldar and others, Respondents.

Government Appeals Nos. 48, 65 and 71 to 76 of 1966, D/- 29-4-1968.

Criminal P. C. (1898), Ss. 190 and 247 — Report of excise officer under S. 77 Bihar and Orissa Excise Act — Is a police report and not a complaint for purposes of Ss. 190 and 247 — Absence of Excise Officer on date of hearing — Acquittal of accused under S. 247 is illegal — Bihar & Orissa Excise Act (2 of 1915) S. 77 — Powers of Excise Officer.

JL/KL/E601/68

A prosecution report submitted by an Excise Officer in accordance with the provisions of the Bihar and Orissa Excise Act is to be deemed to be a police report and not a complaint not only for the purpose of Section 190 of the Code but also for the purpose of Section 247 of the Code. Hence, the provisions of Section 247 of the Code are not applicable in connection with cases of which cognizance has been taken on the basis of reports of an Excise Officer submitted in accordance with Section 74 of the Bihar and Orissa Excise Act. Therefore, an order of acquittal passed by a Magistrate under S. 247 Cr. P. C. for absence of the concerned Excise Officer who submitted the report is illegal. AIR 1968 Pat 392, Foll. AIR 1927 Cal 405 & AIR 1957 Trav.-Co. 132 & AIR 1957 Andh Pra 977, Disting.

(Paras 3, 4, 7)

Cases Referred: Chronological Paras
(1968) AIR 1968 Pat 392 (V 55)=1968

Cri LJ 1298, Govt. Appeal No. 38 of 1966, D/- 20-3-1968, State of Bihar v. Newal Mahto 3, 4

(1957) AIR 1957 Trav.-Co. 132 (V 44) = 1957 Cri LJ 549, State v. M. Meera Sahib 4, 5

(1957) AIR 1957 Andh Pra 977 (V 44) = 1957 Cri LJ 1388, Public Prosecutor v. Sheikh Dawood 4

(1927) AIR 1927 Cal 405 (V 14) = ILR 54 Cal 371, Radhika Mohan Das v. Hamid Ali 4

Ydaya Sinha, for Appellant (In all the Appeals); Upendra Prasad Verma (in Nos. 48 & 65); Jagdish Pandey (in No. 71); R. N. Tiwary (in No. 72); Janardan Sinha (in No. 73); Naseem Ahmad (in No. 74); Brishkatu Sharan Sinha (in No. 75) and Lala Kailash Behari Prasad (in No. 76) for Respondents.

JUDGMENT :— These eight appeals which arise out of orders of acquittal purporting to be under Section 247 of the Code of Criminal Procedure (hereinafter referred to as the Code), were heard together as a common question of law is involved in all these appeals.

2. The cases out of which these appeals arise are all cases in which cognizance was taken on the basis of prosecution reports submitted by officers of the Excise Department regarding commission of offences under Section 47 of the Bihar and Orissa Excise Act by the respondents concerned. Cognizance of the cases was taken on different dates ranging from the 22nd January, 1965 (in the case out of which Government Appeal No. 74 of 1966 arises) to the 27-5-1966 (in the case out of which Government Appeal No. 73 of 1966 arises) and all the cases were transferred to Munsif Magistrate for disposal according to law after cognizance thereof were taken. Processes were issued on the different dates by the Magistrates concerned, but the attendance of the respon-

dents could not be secured and thereafter in all the cases orders were passed acquitting the accused under Section 247 of the Code on different dates on which the Excise Officer, who had submitted the prosecution report, was also absent from the Court. Those orders of acquittal under Section 247 of the Code were passed by the same Munsif Magistrate, namely, Shree S. D. Sharma, on different dates ranging from the 2nd June, 1966, (in the case out of which Government Appeal No. 48 of 1966 has arisen) to the 25th June, 1966 (in the case out of which Government Appeal Nos. 71 and 72 of 1966 have arisen). The orders of acquittal under Section 247 of the Code appear to have been passed because of the absence of the Officer submitting the prosecution reports, namely, the Excise Officer concerned.

3. The main contention on behalf of the appellant is that the provisions of Section 247 of the Code had no application to these cases as summons in these cases had not been issued on the basis of any complaint but on the basis of prosecution reports submitted by the Excise Sub-Inspector, which are deemed to be police Reports in view of the provisions of Section 78 of the Bihar and Orissa Excise Act. This particular matter had come up for consideration before me in Government Appeal No. 38 of 1966—(AIR 1968 Pat 392) State of Bihar v. Newal Mahto, which was disposed of on the 20th March, 1968, and the following observations were made in that connection

"Under sub-section (1) of Section 77 a Collector has been empowered to investigate any offences punishable under this Act within the limits of his jurisdiction without the orders of a Magistrate. Sub-section (2) of this Section provides that any other Excise Officer specially empowered in this behalf by the State Government in respect of all or any specified class of offences punishable under this Act may, without the order of a Magistrate, investigate any such offence which Court having jurisdiction over the local area to which such officer is appointed would have power to inquire into or try under the aforesaid provisions. Under Section 78 powers conferred upon police officers under different Sections of the Code of Civil Procedure have been vested in any Collector or any Excise Officer empowered under sub-section (2) of Section 77 and sub-section (3) of this section provides that for the purposes of Section 156 of the Code of Criminal Procedure the area to which an Excise Officer empowered under sub-section (2) of Section 77 is appointed shall be deemed to be a Police Station, and such officer shall be deemed to be the officer in charge of such station. Sub-section (4) further provides for submission of reports by a

Collector or by any Excise Officer empowered under sub-section (2) of Section 77 after completion of investigation of the case to a Magistrate having jurisdiction to inquire into or try the case and empowered to take cognizance of offences on police-reports and it further lays down that for the purpose of S. 190 of the Code of Criminal Procedure such a report shall be deemed to be a police report. In view of these provisions there cannot be any doubt that an Excise Officer who has been empowered under sub-sec. (2) of Section 77 of the Excise Act has various powers of investigation of offences under this Act similar to those vested in a police officer empowered to investigate a case and the area in which he exercises his jurisdiction is deemed to be a police station and he is deemed to be an officer in charge of such police station and the prosecution report which he submits after investigation of the case is to be deemed to be a police report under Section 190 of the Code of Criminal Procedure. It, therefore, follows that when the Subdivisional Magistrate takes cognizance of a case on the basis of such a report the cognizance is taken under clause (b) of sub-section (1) of Section 190 on the basis of a police report and not under clause (a) of sub-section (1) of the same section on the basis of a complaint. It follows, therefore, that when cognizance of a case under the Excise Act is taken by a Subdivisional Magistrate on the basis of a prosecution report submitted by an Excise Officer, who has been duly authorised under sub-section (2) of Section 77 of the Excise Act, such a case cannot be held to be a complaint case and processes which are issued against the accused in such a case cannot be held to be issued on a complaint. Hence, provisions of Section 247 of the Code of Criminal Procedure cannot have any application in such a case as this section is applicable only in cases in which summons is issued on complaint."

4. I may mention in this connection that a Division Bench decision of the Calcutta High Court in the case of Radhika Mohan Das v. Hamid Ail, AIR 1927 Cal 405 as well as two other decisions, one of the Travancore-Cochin High Court in the case of the State v. M. Meera Sahib, AIR 1957 Trav.-Co. 132, and the other of the Andhra Pradesh High Court in the case of Public Prosecutor v. Shalkh Dawood, AIR 1957 Andh Pra 977, were cited before me on behalf of the respondent in Government Appeal No. 74 of 1966 in support of the contention that the provisions of Section 247 of the Code were applicable to such cases. In the first of these cases it was held by the Calcutta High Court, after construing Section 74(4) of the Bengal Excise Act, that the report submitted by an Excise Officer under that

sub-section would be deemed to be a Police Report for the purpose of Section 190 of the Code only and not for other purposes. It transpires, however, that in giving this decision, the Court took into consideration the provisions of Section 74(4) only of the Bengal Excise Act, which provides that the report of the Excise Officer shall be deemed to be a police report for the purpose of Section 190 of the Code. This provision corresponds to the provision embodied in S. 78 (4) of the Bihar and Orissa Excise Act. But there are various other provisions in the Bihar and Orissa Excise Act, which are also relevant on the point. As mentioned in my judgment in Government Appeal No. 38 of 1966=(AIR 1968 Pat 392), already referred to above, under sub-section (2) of Section 77, an Excise Officer has been vested with various powers to investigate offences under this Act similar to those vested in the Police Officers under the Code and according to sub-section (3) the area in which the Excise Officer exercises jurisdiction is to be deemed to be a Police Station and he is deemed to be an officer in charge of the Police Station. These provisions of the Bihar and Orissa Excise Act go far beyond the provision of the Bengal Excise Act incorporated in Sec. 74(4) of that Act, which alone has been referred to in the above Division Bench decision of the Calcutta High Court in holding that the report of an Excise Officer will be deemed to be a Police Report only for the purpose of Section 190 of the Code. This decision, therefore, does not help us in determining whether a prosecution report submitted by an Excise Officer in accordance with the provisions of the Bihar and Orissa Excise Act is to be deemed to be a Police Report for the purpose of Section 190 of the Code only or for the purposes of Section 247 of the Code also.

5. Similarly, the decision of the Travancore-Cochin High Court in the case reported in AIR 1957 Trav.-Co. 132, appears to have no bearing whatsoever as would appear from the fact that in this case reliance was placed upon an observation in an earlier case in which a reference was made to the fact that a report filed by a Police Officer with respect to a non-cognizable case comes within the purview of the definition of the term 'complaint' as defined in Section 4(1)(d) of the Code, as applicable in Travancore-Cochin. Under the corresponding provision of the Code as applicable in our State, a report of a Police Officer with respect to any offence (i. e., whether the offence is cognizable or non-cognizable) is excluded from the term 'complaint' when such a report is submitted before a Magistrate for taking action under this Code against some person. The above decision of the

Travancore-Cochin High Court, therefore, has no bearing whatsoever in determining the point under consideration.

6. The decision of the Andhra Pradesh High Court reported in AIR 1957 Andhra Pradesh 977, relates to a report of a Prohibition Officer under the Madras Prohibition Act and there is nothing to show that there is any provision in that Act corresponding to the provisions of the Bihar and Orissa Excise Act, already referred to above. This decision also, therefore, has no bearing whatsoever in determining the point.

7. On a consideration of all the above aspects, I am quite unable to accept the contention that the provisions of Section 247 of the Code are applicable in connection with cases of which cognizance has been taken on the basis of reports of an Excise Officer submitted in accordance with Section 74 of the Bihar and Orissa Excise Act. I accordingly hold that the orders of acquittal as passed by the learned Magistrate are quite illegal and cannot be allowed to stand.

8. In the result, all these appeals are allowed and the orders of acquittal passed by the learned Magistrate in the cases out of which these appeals have arisen are hereby set aside, and it is directed that all those cases shall be disposed of afresh by the learned Magistrate in accordance with law. The attention of the Magistrate, however, is drawn to the provisions of Section 249 as also of Section 512 of the Code. He may consider the desirability of proceeding under these sections in appropriate cases.

9. In conclusion, I would like to mention that I find that in four of the cases, namely, those out of which Government Appeals Nos. 65, 71, 72 and 74 of 1966 have arisen, the execution reports of the warrants of arrest issued against the accused were not received by the Magistrate in spite of a number of adjournments and several reminders, including letters to the Superintendent of Police in some of the cases. This reveals a very unsatisfactory state of affairs and it is desirable and necessary that the Superintendent of Police of the District should make an enquiry as to why the execution reports were not sent to the Magistrate concerned in spite of so many adjournments and reminders and appropriate action should be taken against the persons who may be found responsible for the same. A copy of this judgment should be forwarded to the Superintendent of Police for taking necessary action as directed above.

KSB

Appeals allowed; cases remanded.

AIR 1969 PATNA 256 (V 56 C 65)
ANWAR AHMAD AND SHAMBHU
PRASAD SINGH, JJ

Subh Narain Singh and others, Appellants v M. M. Chakravarty and others, Respondents.

Civil Revn. No 141 of 1968 D/- 6-8-1968 against order of Second Addl. Sub. J. Chapra, D/- 27-1-1968

(A) Civil P. C. (1908, Order 40 Rule 1 — Conflict of jurisdiction — Receiver for car appointed by High Court — Subsequently for same car, without knowledge of such High Court appointment, another receiver appointed by Subordinate Judge — Subordinate Judge recalling his order is correct.

Where a receiver for a car is appointed by the High Court and subsequently for the same car, without the knowledge of such High Court appointment another receiver is appointed by a Subordinate Judge, the Subordinate Judge is perfectly right in recalling his order.

(Para 4)

If the subsequent appointment is allowed to stand, there will be a conflict of jurisdiction in carrying out the orders of the two courts. All courts should endeavour to avoid such a situation and ordinarily ought not to pass an order which may lead to conflict of jurisdiction with another order already passed by a court of competent jurisdiction and not subordinate to it. AIR 1924 Pat 491 Foll.

(Para 4)

Thus, the Subordinate Judge is right in recalling his order

(Para 4)

(B) Civil P. C. (1908), Section 115 and Order 43 Rule 1(s) — Court recalling its own order appointing receiver — Recalling order appealable — Revision against recalling order hence not maintainable. AIR 1950 FC 140, Foll.

(Para 6)

Cases Referred: Chronological Paras
 (1950) AIR 1950 FC 140 (V 37) =
 1949 FCR 667 K. V. Rayarapan Nayanar v. K. V. Valia
 Madhavi Amma 6
 (1924) AIR 1924 Pat 491 (V 11) =
 ILR 3 Pat 357, Sridhar Chowdhry
 v. Mugniram Bangar 4

Kallash Roy, Kamla Prasad Roy and Rameshwar Lal, for Appellant; Bindeshwar Prasad Sinha, M. L. Sinha, Rama Raman and Ram Dayal Prasad, for Respondent.

JUDGMENT:— This appeal by the plaintiffs is directed against the order of the Second Additional Subordinate Judge Chapra, dated the 27th January, 1968, whereby he recalled his previous orders dated the 20th and the 22nd January 1968.

2. The appellants filed a suit for the partition of the joint family properties

some time in 1963. By an order of the Court passed on the 29th September 1966, on the joint application of the appellants and respondent No 6, an amendment of the plaint was allowed and a car bearing registration number WBF 8223 was also included in the list of properties sought to be partitioned. On the 29th January 1963 another application was filed by appellant No 1 and respondent No. 6 to the effect that the registration number of the car had been changed to BRD 1965 and, as the relationship between the parties to the suit had been deteriorating on account of the said car, it was prayed that a receiver be appointed in respect of the said car.

The Court, after hearing the parties, by its order dated the 20th January 1968, appointed Shri Brijkashore Singh, advocate as receiver in respect of the said car. As the car was in the custody of the officer in charge of Chapra Town police station, the receiver applied on the 22nd January 1968 for a true copy of the order of the Court appointing him as receiver, which was granted to him. On the 24th January 1968, an application was filed by firm Ganesh Narain Brijlal (Private) Limited (respondent No. 3), stating therein that the said car was ordered by the Calcutta High Court to be placed in charge of the receiver appointed by that Court on the 11th January 1968 and praying that the receiver appointed by the Court below be directed to produce the said car in the Court below. It was also stated therein that the officer in charge of Chapra Town police station was in possession of the said car on the 20th January 1968 for and on behalf of the receiver appointed by the Calcutta High Court and, finally, it was prayed that the appointment of Shri Brijkashore Singh as receiver be cancelled.

Another petition was filed by Shri Ajoy Kumar Choudhuri to the effect that Shri M. M. Chakravarti (respondent No 1), the official receiver of the Calcutta High Court, had already been appointed receiver of the car in Commercial Cause Suit No 2800 of 1967 and that the petitioner had been sent by the official receiver to take possession of the aforesaid car on his behalf. It was also stated therein that the Subdivisional Officer, Sadr, Chapra, directed the local police to take possession of the aforesaid car at the request of the petitioner and, as such, the police seized the car on the 17th January 1968 and was in possession of the same on behalf of the receiver appointed by the Calcutta High Court. The petition filed by appellant No 1 and respondent No 6 did not disclose that a receiver had already been appointed by the Calcutta High Court. Another petition under Order 1, Rule 10 of the Code of Civil Pro-

AIR 1969 PUNJAB & HARYANA 225
(V 56 C 41)

R. S. SARKARIA, J.

Manmohan Singh Johal, Convict Appellant v. State, Respondent.

Criminal Appeal No. 121 of 1965, D/- 19-8-1968, from order of Addl. S. J. Julunder, D/- 1-2-1965.

(A) Criminal P. C. (1898), S. 196A — Conspiracy can have plurality of objects — Charge-sheet showing various objects of conspiracy including commission of offences of forging passports and fraudulently and dishonestly using them as genuine for enabling passengers to go abroad — No distinction can be made between primary and subsidiary objects — To such a case sub-s. (2) and not sub-s. (1) would apply — Trial under S. 196A is not invalid because the primary object was to send people abroad which by itself is not an offence. 1967 Delhi LT 344 Relied on — Penal Code (1860) Ss. 120B, 471.

(Para 12)

(B) Criminal P. C. (1898), S. 196-A — Sanction of Government — 'Government', meaning of — Order should be in name of Governor and duly authenticated — Proof — Order can, however, be challenged on the ground that it was made by person not authorised — Consideration of Rules of Business of Government framed under Art. 166 (3) — Order made by Home Secretary without reference to Minister-in-charge of department — Order is invalid — Constitution of India, Arts. 166 (3), 154.

The 'Government' spoken of in Section 196-A, Criminal P. C., means the Governor acting on the advice of the Council of Ministers, or on the advice of the individual Minister to whom the Department concerned has been allocated under the Rules of Business framed by the Governor. In the ultimate analysis it may also mean a Secretary to the Government to whom the transaction of that business has been delegated by the Minister concerned by a standing order or otherwise in accordance with the Rules of Business framed by the Governor under Clauses (2) and (3) of Article 166 of the Constitution. If an order according the consent for the purposes of sub-section (2) of Section 196-A, Criminal P. C. is passed by the Council of Ministers, authorised Minister, or the authorised Secretary, and is thereafter expressed in the name of the Governor as required by Clause (1) of Article 166 and authenticated in accordance with the Rules of Business, then in view of the provisions of Clause (2) of Article 166, this order cannot be challenged on the ground that it was not passed or made by the Governor. (Para 22)

If the order is not expressed in the name of the Governor, and is not duly authenticated in the manner prescribed, evidence can be led to show that the order was, in fact, passed or made by the Governor. (Para 23)

Though an order, which is expressed in the name of the Governor and is authenticated in accordance with the Rules of Business, cannot be assailed on the ground mentioned in Clause (2) of Article 166 of the Constitution, viz., that it was not made by the Governor, yet it can be challenged on any other ground, for instance, that the person who made that order on behalf of the Governor had no authority under the Rules of Business or any other law to make that order or take the decision on behalf of the Governor. Under Article 154 of the Constitution, the executive power of the State vests in the Governor, but that executive power is to be exercised, (excepting in a few cases, where he has to act directly in his discretion) through officers subordinate to him. The word 'officer' in Article 154 (1) of the Constitution includes the Ministers. Thus, this executive power, including the matter of granting sanctions, rests with the Council of Ministers or the Minister-in-charge of the Department concerned. (Para 24)

Giving of sanction or consent for prosecution under the Criminal Procedure Code would fall well-nigh within the ambit of 'Administration of Criminal Justice', an item 5 in Rules of Business (Punjab) Part I, R. 3, Sch. framed by the Governor under Art. 166 (3). The expression "Administration of Justice" is of very wide amplitude. But the enumeration of this item no. 5 under the caption "Administration of Criminal Justice through the Home Secretary" does not amount to delegation of the power to the Home Secretary to transact that business without reference to the Minister-in-charge of that Department. The word 'through' indicates that while classifying the various Departments these Rules simply prescribe a channel through which the business would be carried on by the Ministers. (Para 29)

From the scheme of these Rules, particularly the material Rules, 6, 9, 18-25, 28 and 51 it is clear that ordinarily all business of the Government is to be disposed of in the Departments through the Secretaries, who are official heads of these Departments, by or under the authority of the Minister-in-charge of the Department. There are no standing orders or directions issued by the Minister-in-charge, i.e. Home Minister in this case, authorising the Home Secretary to accord sanction or consent for prosecution. There

is nothing in the Rules which directly delegates that power to the Home Secretary Generally speaking, the Rules themselves do not delegate the power of transacting executive business to the Secretaries. They, however, envisage such delegation of authority by the Minister-in-charge of the Department.

(Paras 29, 32, 38)

The conclusion is thus inescapable that the Home Secretary could not take this policy decision in the case and accord the necessary consent under Section 196-A (2) of the Code of Criminal Procedure on behalf of the Government without reference to the Minister-in-charge of the Department. In such a situation, the validity of the order, expressed and authenticated by the Home Secretary, can be questioned on the ground that the Home Secretary had, under the law, no authority to pass that order (Para 39)

Though an order giving consent under Section 196-A (2) of the Code of Criminal Procedure, which is made and expressed in strict compliance with clauses (1) and (2) of Article 166 of the Constitution, cannot be impugned on the ground that it was not made by the Governor, its validity can be challenged on the ground that it was not made by the Governor in accordance with law. In other words, evidence can be led to show that the Government servant, who purportedly expressed it in the name of the Governor, did not have, under the law or the Rules of Business, the necessary authority to make it. Wrong precedents could not be invoked to override the letter of the Rules of Business. (Para 47)

Held that there was no valid sanction or consent in writing by the Government under Section 196-A (2) of the Code of Criminal Procedure with regard to the charge of criminal conspiracy under S. 120-B, Indian Penal Code. AIR 1943 F. C. 75 and AIR 1945 P. C. 156 Foll. AIR 1961 SC 221 and AIR 1961 SC 1762 and AIR 1963 S. C. 666 and AIR 1967 S. C. 1145 Relled on AIR 1952 S. C. 181 Expl. Cr. A. No. 89 of 1963 D/- 30-3-1964 (Punj) and 1968 Cur. L. J. 18 (Pb. & Har) Ref. (Para 47)

(C) Criminal P. C. (1898), Ss. 537, 237 — Charge of conspiracy of forging passport and other travel documents — Accused acquitted of charge of forging passport — Conviction for forging other related document not illegal, when accused knew of the charge and was not prejudiced — Penal Code (1860), S. 466.

The omission to frame a distinct charge under Section 466, Penal Code, with regard to the forging of the entries in Visa Applications, International Vaccination Certificates, Baggage Declarations Forms, and Embarkation Forms, which were only auxiliaries to the passports, for charge of forging of which the ac-

cused was acquitted, was a mere irregularity, cured by Sections 535 and 537, if not covered by Section 237 of the Code of Criminal Procedure, particularly when no prejudice was shown to have been caused to the accused, who clearly understood the nature of the offence for which he was being tried and was afforded a full and fair opportunity of defending himself. His conviction under S. 466 could not be challenged on this ground. (Para 78)

(D) Criminal P. C. (1898), S. 342 — Purpose of examination under — All possible questions not asked — Accused fully made aware of case against him — Proceedings are not vitiated.

The examination under Section 342 is designed (a) to secure communication to the accused to the full extent what is alleged against him in the prosecution evidence and (b) to elicit explanation or defence of the accused he wishes to put forward in respect thereof. If examination of the accused substantially achieves that aim so that the accused is made fully aware as to what case he has to meet, the proceedings cannot be held to be vitiated, simply because all possible questions with regard to the circumstances in evidence, natural probabilities, and reasonable inferences arising from the evidence, have not been exhausted and put to the accused while recording his statement under Section 342. (Para 83)

(E) Evidence Act (1872), Ss. 45 and 47 — Accused charged with forgery — Conviction can be based solely on expert testimony, though as a measure of precaution the evidence should be corroborated by other evidence — Penal Code (1860), Ss. 465, 471.

Where the charge against the accused is one of forging a writing, as a rule it is imprudent to convict him solely on the basis of the expert testimony.

But it is merely a rule of caution and not an absolute rule of law. There is nothing in law to prevent the Court from recording a conviction on expert evidence alone. The reason is that the identification of handwriting is an imperfect science. There the margin of error is great. Experts often give dogmatic opinions unsupported by reasons. The value of the expert evidence, however, varies with the circumstances of each case and the reasons given by him in support of his opinion. Its value is to be judged with the same yardstick with which the evidence of any other witness is appraised. It is to be seen how far it fits in with the surrounding circumstances and the natural probabilities of the case. If in a given case the evidence of the expert is materially corroborated and confirmed by the other evidence, there is nothing in law to debar the Court from

recording a conviction of the accused on the basis of such expert testimony.

(Paras 93, 94)

(F) Evidence Act (1872), S. 3 — Circumstantial evidence — Conviction based on — Nature of circumstantial evidence required.

In cases dependent on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person, and incapable of explanation upon any other reasonable hypothesis, save that of the accused's guilt. (Para 99)

(G) Penal Code (1860), Ss. 464, 465, 466 — Making false document — Making document by copying false entries from forged document — It is 'making false document'.

If a person deliberately prepares Embarkation Forms in contravention of the statutory requirements, merely by copying out false entries from the forged passports, then he would be 'making a false document' as defined in Section 464, Penal Code, so that his act would amount to 'forgery' as defined in Section 463, Penal Code, it being presumed that the intention of the accused in copying out the entries was fraudulent. The offence committed by the person in respect of the Embarkation Forms, therefore, will fall under Section 465, if not under Section 466, Penal Code. (Para 108)

Cases Referred: Chronological Paras

- (1968) 1968 Cur LJ 18 = 1968 Cri LJ 709 (Punj & Har), State v. Smt. Kartar Devi 15, 66
 (1967) AIR 1967 SC 1145 (V 54) = (1967) 2 SCR 406, Bijoya Laxmi Cotton Mills Ltd. v. State of W. B. 15, 51, 57
 (1967) 1967 Delhi LT 344 = Cri App No. 97-D of 1963, D/- 7-10-1966, Sardul Singh v. State 11, 12
 (1965) AIR 1965 Punj 270 (V 52) = 1965 (2) Cri LJ 119, Parkash Chandra v. Union of India 15
 (1965) Cri App No. 956 of 1964 D/- 29-11-1965 (Punj), State v. Bishan Sarup Dalwala 15
 (1964) Cri App No. 89 of 1963, D/- 30-3-1964 (Punj), Master Girdhari Lal v. State 63, 67, 68, 69
 (1964) Cri App No. 388 of 1963 D/- 14-8-1964 (Punj), Rachhpal Singh v. State 15, 67
 (1963) AIR 1963 SC 666 (V 50) = 1963 (1) Cri LJ 623, Tulsi Ram v. State of U. P. 15, 49, 50
 (1961) AIR 1961 SC 221 (V 48) = (1961) 1 SCR 728, State of Bihar v. Rani Sonabati Kumari 15, 44
 (1961) AIR 1961 SC 1762 (V 48) = 1961 (2) Cri LJ 828, E. G. Barsay v. State of Bombay 27

- (1961) AIR 1961 Punj 333 (V 48) = 63 Pun LR 238 = 1961 (2) Cri LJ 148, Tara Chand Verma v. State 15, 64
 (1952) AIR 1952 SC 181 (V 39) = 1952 Cri LJ 955, Dattatraya Moreshwar v. State of Bombay 19, 59, 61

- (1945) AIR 1945 PC 156 (V 32) = 72 Ind App 241, Emperor v. Sibnath Banerjee 15, 42, 43, 45
 (1943) AIR 1943 FC 1 (V 30) = 44 Cri LJ 558, Keshav Talpade v. Emperor 40
 (1943) AIR 1943 FC 75 (V 30) = (1944) 6 FCR 1, Emperor v. Sibnath Banerjee 15, 40

H. L. Sibal, Sr. Advocate with S. S. Sandhawalia, for Appellant; K. L. Arora, for Respondent.

JUDGMENT: Forty-four persons were committed for trial under Section 120-B read with Sections 465, 466, and 471, Indian Penal Code, to the Court of Session, Jullundur, on a charge of criminal conspiracy, having a plurality of objects, namely, to obtain fraudulently passports from persons at various places in the Punjab, to insert false and forged entries and photographs in them, and to use such forged passports and other travel documents for travelling to United Kingdom. Two of them, including Manmohan Singh Johal, were also charged for the substantive offence under Section 466, Indian Penal Code. They were tried by Shri C. G. Suri, Ex-officio Additional Sessions Judge, Jullundur. Thirty-six of these accused persons were passengers, hailing mostly from the Jullundur District of Punjab. Out of these passenger accused, the learned trial Judge has acquitted 15, and convicted the rest and sentenced each of them to imprisonment till the rising of the Court and a fine of Rs. 101/-. Out of the accused catalogued as "travel agents or their employees functioning in Jullundur in the year 1959", the learned trial Judge has acquitted accused Nos. 40, 41 and 43 and convicted the rest.

2. Manmohan Singh Johal (Accused No. 37) has been convicted under Section 120-B read with Section 471 of the Penal Code, and sentenced to 5 years' rigorous imprisonment and a fine of Rs. 50,000/-, and in default of payment of fine, to undergo 2 years' further rigorous imprisonment. He has been further convicted under Section 466, Indian Penal Code, and sentenced to 5 years' rigorous imprisonment, with the direction that the sentences on both the counts shall run concurrently.

3. Amrit Lal Kapila (Accused No. 38), has been convicted under Section 120-B read with Section 471 of the Penal Code, and sentenced to 3 years' rigorous imprisonment and a fine of Rs. 10,000/-, and,

in default, to undergo further rigorous imprisonment for one year.

4. Kashmira Singh (Accused No. 44), has also been convicted.

5 Harbhajan Singh Sanghera (Accused No 39) has been convicted under Section 120-B read with S 471, Indian Penal Code, and sentenced to 3 years' rigorous imprisonment and a fine of Rs 10,000/-, or, in default of payment of fine, to undergo further rigorous imprisonment of one year

6. A. Joseph Verghese (Accused No. 42), who was the Port Registration Officer at Cochin from where the passenger accused had sailed, has been convicted under Section 120-B read with S 471, Indian Penal Code, and sentenced to 6 months' rigorous imprisonment.

7. Out of the 26 convicts, only 4, namely, Manmohan Singh Johal, Amrit Lal Kapila, Harbhajan Singh Sanghera, and A. Joseph Verghese have preferred Criminal Appeals 121, 119, 118 and 120 of 1965, respectively, against their conviction, to this Court. This judgment will dispose of all the four appeals.

8. The facts of the prosecution case, in brief, are as follows—

On the 9th October, 1959, 'M. V. Neptunia' sailed from Cochin Port carrying 188 passengers for Genoa. Out of those passengers, 80 had been booked with the Shipping Agents Messrs Volkart Brothers of Cochin by the 'Ranjit Travel Agency', (hereinafter referred to as the R. T. A.) Jullundur, of which Manmohan Singh Johal, Accused No 37, was the sole proprietor, Amrit Lal Kapila, Accused No 38, was the Manager, and Tilak Ram, Accused No. 43, and Kashmira Singh, Accused No 44, were employees. The last named was working as motor-driver to Manmohan Singh Johal, proprietor of the R. T. A. 'M. V. Roma' belonging to Messrs. Laura Lines sailed from Cochin Port on the 14th October, 1959. Jit Singh (Accused No 36), who was also booked by the R. T. A. with Messrs. Harrison and Cross-fields, Shipping Agents, sailed by that ship.

The passengers of both the aforesaid ships that sailed on the 9th and 14th October, 1959, were cleared at the port by Joseph Verghese (Accused No. 42). Accused Nos. 1 to 35 disembarked at Genoa on or about the 23rd October, 1959, and went by train to London where they were checked and found travelling with forged travel documents. Mr K. R. Sood of the Indian High Commission in London made enquiries from the passengers and recorded their statements in a set form. Thereafter, these passenger-accused, including Jit Singh (Accused No 36) were sent to India.

After obtaining the consent of the Punjab Government under Section 196-A of the Code of Criminal Procedure (the

validity of which is hotly disputed in this case), all the aforesaid 44 accused were challaned in the Court of a Magistrate at Jullundur, who, after making a preliminary judicial enquiry, charged and committed them for trial to the Court of Session with the aforesaid result

9. The first point of law raised by Mr Chari, the learned counsel for Amrit Lal Kapila, Accused No 38, is that the trial in this case was invalid because no complaint as contemplated by S 196-A, Criminal Procedure Code, was made in this case. It is maintained that in Section 196-A (1), the use of the expression "the object of the conspiracy" indicates clearly the goal to be achieved. It means the ultimate object which is sought to be achieved by the conspiracy. The object in this case as disclosed by the charge-sheet says Mr. Chari, was to send people to England, which by itself was not an offence or an illegal act, though it was sought to be achieved by illegal means, i.e., forging of passports and other travel documents. According to the counsel, the expression 'illegal means' embraces both aspects of wrong, civil wrongs as well as criminal offences. It is urged that in these circumstances, sub-section (1) and not sub-section (2) of Section 196-A was applicable. Since the cognizance in this case was taken on a Police report and not on a complaint, the proceedings were null and void ab initio

10. Though this argument is ingenious and plausible, yet on a careful consideration, in the circumstances of the case, it will appear to be untenable. A glance at the charge-sheet would show that the conspiracy with which the accused were charged had a plurality of objects, including the commission of offences viz., to forge passports and other travel documents and to fraudulently or dishonestly use as genuine those forged documents. Thus, the salient intention and design of the conspirators was to prepare false documents for enabling the passengers to go abroad. It is wrong to say that there can be only one object of a conspiracy. Nor is it permissible, in my opinion, to make a distinction between the primary or subsidiary object of a conspiracy. In its dictionary sense, the word 'object' is of very wide amplitude. It means "that about which any power or faculty is employed", "that towards which the mind is directed in any of its states or activities", "that for the attainment of which efforts are directed", and "that which is aimed at or desired". The term "object" is synonymous with 'aim', 'end', 'design', 'purpose' or 'view'. Conspiracy, therefore, can be hatched with a series of objects in view.

11. This argument was raised before Grover J in Sardul Singh v. State, 1967 Delhi L. T. 344 Criminal Appeal No 87-D

of 1963 (Delhi). It was rejected with these observations:

"I find it difficult to accede to the contention of the learned counsel for the appellants that the prime object of the conspiracy was to send the passengers abroad. The dominant intention apparently was to make spurious documents.... The principal and main object was to forge and to use forged documents for enabling the passengers to go abroad.... It can well be said that in the present case the object of the conspiracy was to do the various acts which have been stated in the charge of alternatively what was stated in the police report on which the cognizance of the offence was taken. Nevertheless the object was such as would attract the applicability of clause (2) of S. 196-A and not clause (1)."

12. I am in respectful agreement with the above observations. The facts of Sardul Singh's case, 1967 Delhi LT 344 = Cri App. No. 97-D of 1963 (Delhi) were similar. Indeed, Mr. H. L. Sibal, the learned counsel for Manmohan Singh Johal appellant has conceded that sub-section (2) and not sub-section (1) would apply.

13. The next legal objection which was raised in the alternative by Mr. Chari and was canvassed at length by Mr. H. L. Sibal, is, that sanction for prosecution, as contemplated by the Code of Criminal Procedure is not a routine, mechanical executive act, but is a decision of policy which has to be taken by the Minister, Council of Ministers, or the Governor. According to Mr. Chari, this power could not be delegated by the Minister to the Home Secretary. Mr. Sibal, however, is not rigid in his contention that this power to accord sanction or consent under sub-section (2) of S. 196-A, Criminal Procedure Code, could not be delegated by the Governor to the Home Secretary. He has laid stress on the fact that this power had not been delegated by the Governor or the Minister to the Home Secretary, who had consequently no authority to take a decision in the matter at his own level without reference to the Minister.

14. It is emphasised that the recital in the consent, Exhibit P. 303, to the effect, that the Governor of Punjab was pleased to give his sanction to the initiation of these proceedings, had been shown to be factually wrong. Thus, the essential prerequisite for prosecution of the accused persons in respect of an offence under Section 120-B read with Sections 465, 466 and 471 of the Indian Penal Code was missing, and their trial on that charge was null and void. Mr. Sibal has referred to the Rules of Business framed by the Governor under Article 166 of the Constitution. He has stressed that the Rules in Part I, Exhibit C. W. 1/1, fram-

ed by the Governor, concern only the allocation of business among the Ministers, while the Rules relating to the transaction of business are to be found in Part II. Mr. Sibal points out that there is nothing in the Rules of Business (Exhibits C. W. 1/1 and C. W. 1/2) giving specifically or by necessary implication, powers to the Home Secretary to give consent for initiation of proceedings under Section 196-A, Criminal Procedure Code, on behalf of the Government. The Rules in Part I (Exhibit C. W. 1/1) only classify the Departments and prescribe a channel through which the business of the Government is to be carried on by the Council of Ministers, or the Minister under whose charge the Department has been placed by the Governor. In the view of the learned counsel, these Rules do not delegate the various items of business enumerated therein to the Secretaries. On the contrary, Rule 18 (Exhibit C. W. 1/2) of the Rules of Business of the Punjab Government expressly says that cases shall ordinarily be disposed of by or under the authority of the Minister-in-charge who may, by means of standing orders, give such directions as he thinks fit for the disposal of cases in the Department. No such standing order authorising the Home Secretary to accord sanction for prosecution under Section 196-A, Criminal Procedure Code, has been produced.

14A. In anticipation of the arguments of the learned counsel for the State, Mr. Sibal contends that he is not challenging the validity of the consent order, Exhibit P. 303, on the ground that it is not an order or instrument made or executed by the Governor, but on the ground that it has not been made or executed in accordance with law, and that the recital in the order is wrong. It is urged that Clause (1) of Article 166 postulates that there should be a previously passed order of the Government, which means an order passed by the Minister-in-charge or the Council of Ministers and only thereafter the question of expressing that order or decision to have been taken in the name of the Governor would arise. According to the learned counsel, if there is no order of the Government passed in accordance with the Rules of Business of the Punjab Government, but of a Secretary not authorised by the Government, its expression in the name of the Governor or its subsequent authentication under Clause (2) of Article 166 would not afford any immunity against an attack on the ground that the order was not in accordance with law.

15. In support of his contention, Mr. Sibal has relied upon State v. Smt. Kartar Devi, 1968 Cur LJ 18 : (1968 Cri LJ 709) (Pb & Har); Tara Chand Verma v. State, 63 Pun LR 238 : (AIR 1961 Punj

333); Criminal Appeal No. 388 of 1963, *Rachhpal Singh v. State*, decided by a Single Bench of this Court on 14-8-1964 (Punj), Criminal Appeal No. 956 of 1964, *State v. Bishan Sarup Dalwala*, decided by a Division Bench of this Court on 29-11-1965 (Punj); *Emperor v. Sibnath Banerjee*, AIR 1943 F. C. 75; *Emperor v. Sibnath Banerjee*, AIR 1945 P. C. 156; *State of Bihar v. Rani Sonabati Kumari*, AIR 1961 S C 221, *Tulsi Ram v. State of Uttar Pradesh*, AIR 1963 SC 666, *Parakash Chandra v. Union of India*, AIR 1965 Punj 270 (D. B.); and *M/s. Bijoya Lakshmi Cotton Mills Ltd. v. State of West Bengal*, AIR 1967 SC 1145.

16. In reply Mr. K. L. Arora, the learned counsel for the State, maintains that under Article 154 of the Constitution, the executive power of the State which vests in the Governor, can be exercised by him either directly or through officer subordinate to him in accordance with the Constitution. The Rules of Business of the Punjab Government contained in Part I (Exhibit C. W. 1/1) have been framed by the Governor not only under Clauses (2) and (3) of Article 166 of the Constitution, but also under Article 154 (1) of the Constitution. In this connection, counsel has laid stress on the words "In exercise of... and all other powers enabling him in this behalf" occurring in the preamble of the Rules in Part I (Exhibit C. W. 1/1). Counsel has then referred to Rule 2 of the Rules of Business, Exhibit C. W. 1/1, which says 'that the business of the Government shall be transacted in the Departments specified in the Schedule annexed'. The Governor has, consequently, not only in exercise of his powers under Article 166, Clauses (1) and (2), but also under Article 154, directed by these Rules that the business of the Government shall be transacted in the Departments through such and such Secretary. According to Mr. Arora, the word 'through' occurring in this Rule is significant. In the annexed Schedule, referred to in Rule 2, there is item no. 5, which according to the learned counsel, delegates all the powers to the Home Secretary with regard to the administration of criminal justice, excluding some 18 matters enumerated therein. The accord of sanction or consent under Section 196-A, Criminal Procedure Code, says Mr. Arora, is a matter which the Home Secretary, by virtue of item No. 5 relating to the administration of criminal justice, was empowered to deal and decide.

17. Mr. Arora has also referred to Rule 9, Clause 1, in Part II (Exhibit C. W. 1/2) which authorises the Secretary to the Government to sign every order or instrument of the State and further says 'such signature shall be deemed to be the proper authentication of such order

or instrument.' Mr. Arora contends that in view of item no. 5 in the Schedule annexed to the Rules in C. W. 1/1 and Rule 9 in C. W. 1/2, the Home Secretary had duly passed the order or accorded the consent, Exhibit P. 303, on behalf of the Government. This order is expressed in the name of the Governor as is required by Clause (1) of Article 166, and Rule 8 of the Rules of Business, Exhibit C. W. 1/2, it has been duly authenticated in accordance with the Rules made by the Governor. Consequently, it cannot be called in question in this Court on the ground that it was not made by the Governor.

18. According to Mr. Arora, the validity of the order, Exhibit P. 303 is, in substance, being challenged on that ground that this order though duly authenticated in accordance with the Rules and expressed in the name of the Governor, has not, in fact, been made by the Governor. The defendants cannot, in view of Clause (2) of Article 166 of the Constitution, go behind that order and question its validity.

19. Mr. Arora has controverted Mr. Chari's argument that the Governor or the Minister could not validly delegate the authority to grant consent under Section 196-A, Criminal Procedure Code. The Constitution itself, says Mr. Arora, envisages such delegation of powers. The language of Section 196-A, Criminal Procedure Code, also shows that the Government could delegate its function of according the consent even to a District Magistrate. The Home Secretary was a far higher officer of the Government. Mr. Arora has cautioned the Court not to follow the decisions which proceed on an interpretation of Section 198-B, Criminal Procedure Code. Those provisions, says Mr. Arora, constitute a complete code in themselves, and different considerations apply to the accord of sanction under Section 198-B, Criminal Procedure Code. Mr. Arora has cited *Dattatraya Moreswar v. State of Bombay*, AIR 1952 S C. 181, and has endeavoured to distinguish the numerous rulings cited by Mr. H. L. Sibal.

20. Section 196-A, Criminal Procedure Code, reads as follows:

"196-A. No Court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code,

(1) In a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of section 196 apply, unless upon complaint made by order or under authority from the State Government or some officer empowered by the State in this behalf, or

(2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the State Government has, by order in writing, consented to the initiation of the proceedings:

Provided that where the criminal conspiracy is one to which the provisions of sub-section (4) of section 195 apply no such consent shall be necessary."

21. Thus, the sole question for determination is, whether Exhibit P. 303 is a valid consent to the initiation of the proceedings for prosecution of the appellants and the other accused persons for the offence of criminal conspiracy, when the object of that conspiracy was to commit offences under Sections 465, 466 and 471, Indian Penal Code.

22. The 'Government' spoken of in Section 196-A, Criminal Procedure Code, means the Governor acting on the advice of the Council of Ministers, or on the advice of the individual Minister to whom the Department concerned has been allocated under the Rules of Business framed by the Governor. In the ultimate analysis it may also mean a Secretary to the Government to whom the transaction of that business has been delegated by the Minister concerned by a standing order or otherwise in accordance with the Rules of Business framed by the Governor under Clauses (2) and (3) of Article 166 of the Constitution. If an order according the consent for the purposes of sub-section (2) of Section 196-A, Criminal Procedure Code, is passed by the Council of Ministers, authorised Minister, or the authorised Secretary, and is thereafter expressed in the name of the Governor as required by Clause (1) of Article 166 and authenticated in accordance with the rules of Business, then in view of the provisions of Clause (2) of Article 166, this order cannot be challenged on the ground that it was not passed or made by the Governor.

23. There is also authority for the proposition that if the order is not expressed in the name of the Governor, and is not duly authenticated in the manner prescribed, evidence can be led to show that the order was, in fact, passed or made by the Governor. In the instant case, the consent in writing was expressed to have been made in the name of the Governor. It was further signed by the Home Secretary, who, under the Rules of Business, was competent to authenticate it. The immunity envisaged in Clause (2) of Article 166 of the Constitu-

tion, therefore, was available to this order. That is to say, its validity cannot be challenged on the ground that this order was not made by the Governor. But since two pages of this order, in which the names of certain accused were enumerated, were found missing, the trial Court examined Shri R. K. Sondhi, Superintendent of the Home Secretary, C. W. 1, and Shri A. N. Kashyap, then Home Secretary as C. W. 2, who had signed the order in question. The competency of Mr. Kashyap, the then Home Secretary, to accord this consent, Exhibit P. 303, was questioned at the earliest opportunity by the defence, Mr. A. N. Kashyap, C. W. 2, conceded that the case was not put up before the Minister, because according to precedent, the Home Secretary was entitled to grant sanction in such cases without reference to the Minister. Mr. Sondhi, C. W. 1, stated that the Home Secretary could, in his discretion decide whether the matter should be placed before the Minister in-charge or not.

24. From the plethora of case law on the subject, the rule that can be deduced is that though an order, which is expressed in the name of the Governor and is authenticated in accordance with the Rules of Business, cannot be assailed on the ground mentioned in Clause (2) of Article 166 of the Constitution, viz., that it was not made by the Governor, yet it can be challenged on any other ground for instance, that the person who made that order on behalf of the Governor had no authority under the Rules of Business or any other law to make that order or take the decision on behalf of the Governor. The reason is that the Governor under our Constitution is a constitutional head. Only in few matters he has to act directly in his discretion. In all other matters, he has to act on the advice of the Council of Ministers or individual Minister concerned in accordance with the Rules. It is true that under Article 154 of the Constitution, the executive power of the State vests in the Governor, but that executive power is to be exercised, (excepting a few cases, where he has to act directly in his discretion) through officers subordinate to him. It is well settled that the word 'officer' in Article 154 (1) of the Constitution includes the Ministers. Thus, the ultimate analysis, this executive power, including the matter of granting sanctions, rests with the Council of Ministers or the Minister-in-charge of the Department concerned.

25. Now let me advert to the Rules of Business framed by the Governor under Article 166 of the Constitution. Clause (3) of this Article says:

"(3) The Governor shall make rules for the more convenient transaction of the

business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

26. This clause speaks of two distinct subjects in relation to business of the Government. Firstly, it speaks of the allocation of such business among Ministers. Secondly, it speaks of the transaction of such business. While in some States, such as West Bengal, consolidated rules relating both to the transaction and the allocation of such business among Ministers have been framed, in the State of Punjab, the Rules relating to the allocation of the business among Ministers have been framed separately from the Rules relating to the transaction of such business. The Rules, Exhibit C W 1/1 (Part I) are captioned, "Business of the Punjab Government (Allocation) Rules, 1953". The Rules in Exhibit C W 1/2 (Part II) are captioned, "The Rules of Business of the Government of Punjab, 1953". Though the Rules in Exhibit C W 1/1 and in Exhibit C W 1/2 are not to be read in isolation from each other, yet their division into two parts under somewhat different headings would help the Court in their construction. The Rules in Exhibit C W 1/1 (Part I) are 4 in number. Rule 1 only gives the name of the Rules. Rule 2 says

"2 The business of the Government shall be transacted in the Departments specified in this Schedule annexed, and shall be classified and distributed between those Departments as laid down therein."

Rule 3 provides:

"3 The Governor shall, on the advice of the Chief Minister, allot among the Ministers the business of the Government by assigning one or more Departments to the charge of a Minister."

Provided that nothing in this Rule shall prevent the assigning of one Department to the charge of more than one Minister."

27. In the instant case, it is not disputed that under Rule 3, the Governor had assigned the Department of Home Affairs to the charge of the Home Minister.

Rule 4 lays down:

"4 Each Department of the Secretariat shall consist of the Secretary to the Government, who shall be the official head of that Department, and of such other officers and servants subordinate to him as the State Government may determine. Provided that—

(a) more than one Department may be placed in charge of the same Secretary.

(b) the work of a Department may be divided between two or more Secretaries."

28. Then there is the Schedule spoken of in Rule 3. It classifies the Departments, such as 'General Administration', 'Law and Order', 'Administration of Justice', etc. Then, under these classified headings is written 'through Chief Secretary', 'through Home Secretary', etc. We are concerned only with the Department, 'Administration of Justice'. Under that caption it is written 'through Home Secretary'. Then thereafter are enumerated several items of business, which will be transacted in the Department of Administration of Justice through the Home Secretary. Item No. 5 reads as follows:

"5 Administration of criminal justice including constitution, powers, maintenance and organisation of courts of criminal jurisdiction within the State, excluding—

(1) Appeals against acquittals and Government applications for enhancement of sentences

(2) Conduct of particular cases in criminal courts

(3) ** ** **

(4) ** ** **

(5) ** ** **

(6) ** ** **

(7) Cases of conditional grants of pardon.

(8) ** ** **

(9) All cases under sections 401 and 402, Criminal Procedure Code, except cases regarding the grant of remission of sentences to prisoners by the Minister-in-charge, Jails on his visit to jails

(10) All cases relating to grant of pardons, reprieves, respites or remission of punishment, or to suspend, remit or commute the sentence of any person except cases regarding the grant of remission of sentences to prisoners by the Minister-in-charge, Jails on his visit to jails.

(11) ** ** **

(12) ** ** **

(13) ** ** **

(14) ** ** **

(15) ** ** **

(16) ** ** **

(17) ** ** **

(18) ** ** **

29. It cannot be disputed that giving of sanction or consent for prosecution under the Criminal Procedure Code would fall well-nigh within the ambit of 'Administration of criminal justice', an expression which is of very wide amplitude. But the real question is, whether the enumeration of this item no 5 under the caption "Administration of Justice" (through the Home Secretary) amounts to delegation of the power to transact that business without reference to the Minister-in-charge of that Department. In my opinion, the answer to this question must be in the negative. The word 'through' immediately preceding 'the Home Secretary' in the heading under

which item No. 5 is enumerated, and also elsewhere in the headings, indicates that while classifying the various Departments these Rules simply prescribe a channel through which the business would be carried on by the Ministers. The words "Administration of Justice through Home Secretary" only mean that the Minister, who has been assigned by the Governor under Rule 3, the Department of the Administration of Justice, shall be responsible for transacting inter alia the business enumerated as item no. 5, viz., 'Administration of Criminal Justice, through the Home Secretary'. It cannot, by any stretch of imagination, be construed as delegating the business of item no. 5 to the Home Secretary, empowering him to take all administrative decisions relating thereto without reference to the Minister-in-charge. Such a construction will be repugnant to our democratic polity; it will make the Ministers mere figureheads and the Secretaries, their masters. The Rules in Exhibit C. W. 1/1 read along with the orders passed by the Governor under Rule 3 will help to determine as to which Minister of the Government is empowered under the Rules to do the business of the administration of criminal justice, as stated in aforesaid item no. 5 of the Schedule.

30. So far as the delegated powers of the Secretaries and other officers are concerned, we have to advert to the Rules in Exhibit C. W. 1/2, which are further sub-divided under different headings. Rule 4 in Part I, captioned 'Disposal of Business', says:

"4. The Council shall be collectively responsible for all executive orders issued in the name of the Governor in accordance with these Rules whether such orders are authorised by an individual Minister on a matter pertaining to his portfolio or as the result of discussion at a meeting of the Council, or howsoever otherwise."

31. Mr. Arora has laid a good deal of stress on the words "or howsoever otherwise" occurring in the above Rule. This expression, according to the learned counsel, indicates that if a Secretary to Government issues an order in the name of the Governor even without reference to the individual Minister concerned or the Council, the Council shall be collectively responsible for the same. Thus, this Rule impliedly authorises the Secretaries to the Government to carry on the business of the executive Government as classified and enumerated in the Schedule in Exhibit C. W. 1/1, excepting where under a standing order of the Minister or otherwise, he is required to obtain the decision of the Minister.

32. The contention of the learned counsel appears to be devoid of force.

Firstly, the stress in these Rules is on the words "executive orders issued in accordance with these Rules" and the expression "or howsoever otherwise" is to be read as relating to those orders which are issued in accordance with the Rules. In any case, Rule 4 enjoins only the collective responsibility on the Council of Ministers. It will not ipso facto validate orders issued by the Secretaries, in breach of these Rules, in the name of the Governor. Secondly, Rule 4 is not to be read independently of the other Rules in this Part. Rule 6 (Part I, Exhibit C. W. 1/2) provides:

"6. Without prejudice to the provisions of R. 4, the Minister-in-charge of a Department shall be primarily responsible for the disposal of the business pertaining to that Department."

33. Rule 9 (1), which is also material, reads as follows:

"9 (1). Every order or instrument of the Government of the State shall be signed either by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under-Secretary or an Assistant Secretary or such other officer as may be specially empowered by the Governor in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument."

34. The Rules in Part II in Exhibit C. W. 1/2 relate to the 'Procedure of the Council'.

35. The material Rules in Part III (Exhibit C. W. 1/2) are as follows:

"18. Except as otherwise provided by any other Rule, cases shall ordinarily be disposed of by or under the authority of the Minister-in-charge who may, by means of standing orders, give such directions as he thinks fit for the disposal of cases in the Department. Copies of such standing orders shall be sent to the Chief Minister and the Governor.

19. Each Minister shall by means of standing orders, arrange with the Secretary of the Department what cases or classes of cases are to be brought to his personal notice. Copies of such standing orders shall be sent to the Chief Minister and the Governor.

20. Except as otherwise provided herein, a case shall be submitted by the Secretary in the Department to which the case belongs to the Minister-in-charge.

21. Every Monday, the Administrative Secretary shall submit to the Minister-in-charge, a statement showing particulars of cases disposed of in the Department by the Minister, and of cases, which he considers important, disposed of by the Administrative Secretary himself during the preceding week. A copy of each of the said statements shall be submitted to the

Chief Secretary, Chief Minister and the Governor.

25. If a question arises as to the Department to which a case properly belongs to the matter shall be referred for the decision of the Chief Secretary who will, if necessary, obtain the orders of the Chief Minister."

36. Rule 23 enumerates those classes of cases which shall be submitted to the Chief Minister before the issue of orders.

37. Rule 51 in Part IV (Exhibit C. W. 1/2) reads as follows:

"These Rules may, to such extent, as necessary, be supplemented by Instructions to be issued by the Governor on the advice of the Chief Minister."

38. From the scheme of these Rules, particularly the material Rules, quoted above, it is clear that ordinarily all business of the Government is to be disposed of in the Departments through the Secretaries, who are official heads of those Departments, by or under the authority of the Minister-in-charge of the Department. No standing orders or directions issued by the Minister-in-charge, i.e. Home Minister in this case, authorising the Home Secretary to accord sanction or consent for prosecution, have been referred to or produced by the learned counsel for the State. There is nothing in the Rules which directly delegates that power to the Home Secretary. Generally speaking, the Rules themselves do not delegate the power of transacting executive business to the Secretaries. They, however, envisage such delegation of authority by the Minister-in-charge of the Department. Only one instance of such delegation of a power to the Chief Secretary under Rule 25 (Exhibit C. W. 1/2) has been pointed out to me. Under that Rule, if a question arises as to whether a matter concerns a particular Department, it will be referred for decision to the Chief Secretary, who will, if necessary, obtain the orders of the Chief Minister.

39. The conclusion is thus inescapable that the Home Secretary could not take this policy decision and accord the necessary consent under Section 196-A (2) of the Code of Criminal Procedure on behalf of the Government without reference to the Minister-in-charge of the Department. Home Secretary's statement in the witness-box, that he was entitled on the basis of past practice and precedent, to issue the necessary orders in question on behalf of the Government, only confirms the conclusion that there is nothing in the Rules or in any standing or other order of the Minister expressly authorising the Home Secretary to dispose of such matters without reference to the Minister-in-charge. There is ample authority for the proposition that in such a situation, the validity of the order, ex-

pressed and authenticated by the Secretary, can be questioned on the ground that the Secretary had, under the law, no authority to pass that order.

40. The leading case on the subject is AIR 1943 F. C. 75. In that case 9 persons were detained in West Bengal under Rule 26 of the Defence of India Rules. By a judgment, Keshav Talpade v. Emperor, AIR 1943 F. C. 1 pronounced on 22nd April, 1943, the Federal Court held Rule 26 of the Defence of India Rules to be ultra vires the Central Government. Immediately after this judgment was pronounced, the 9 detenus made applications under Section 491, Criminal Procedure Code, to the High Court, praying for their release on the ground that their detention was illegal. On 28th April, 1943, the Governor-General promulgated an Ordinance, whereby the rule-making power of the Central Government under the Defence of India Act was made wider so as to cover the terms of Rule 26 as it had all along stood. By another section of the Ordinance, it was provided that no order theretofore made against any person under Rule 26, Defence of India Rules, shall be deemed to be invalid or shall be called in question on the ground merely that the said Rule purported to confer powers in excess of the powers that might at the time the said Rule was made be lawfully conferred by a Rule made or deemed to have been made under Section 2, Defence of India Act, 1939.

41. The validity of the Ordinance was also contested, but here I am not concerned with that point. However, one of the questions raised before the Federal Court was that the requirement of R. 26 of the Defence of India Rules had not been complied with in respect of the orders of detention. On behalf of the Crown, it was urged that the orders were in proper form and the presumption set out in illustration (e) to Section 114, Evidence Act, viz., that official acts have been regularly performed, attached to those orders. An affidavit, sworn by Mr. Porter, Additional Home Secretary to the Bengal Government, was furnished in which it was affirmed that he considered the materials placed before him, and in accordance with the general order of the Government, directed the issue of an order of detention. Mr. Porter was acting on the basis that the final order in each case had to be passed by the Governor or the Minister. The Federal Court held (by a majority) that every one of these orders was bad in law as in no case did it appear that the matter was considered by the Governor at any stage, much less that at the time the order was made he was satisfied with regard to any of the matters set out in the order of detention.

42. The matter went up in appeal before the Privy Council, AIR 1945 PC 156. Though the Privy Council reversed the judgment of the Federal Court as to whether or not Rule 26 was ultra vires the Central Government, yet it upheld its decision that sub-section (2) of Section 59 of the Government of India Act, 1935, only relates to one specific ground of challenge, namely, the order or instrument made or executed by the Governor, and that it did not debar a person from questioning the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of a condition necessary to the valid making of that order. In a normal case, the existence of such a recital in a duly authenticated order, in the absence of any evidence as to its accuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a prima facie case that the recital is not correct. Hence the Court has jurisdiction to investigate the validity of the orders. In the result, it was held that since it did not appear that the matter was considered by the Governor at any stage, much less that at the time the order was made he was satisfied with regard to any of the matters with regard to the order of detention, the inaction of the Home Minister on the later submission of the fuller material to him could not cure the invalidity of the order.

43. It may be noted that Section 59 of the Government of India Act, 1935, corresponds to Article 166 of the Constitution, while Section 49 of that Act corresponds to Article 154 of the Constitution. Consequently, the rule laid down by the Privy Council in AIR 1945 PC 156, still holds the field.

44. Sibnath Banerjee's case, AIR 1945 PC 156 was relied upon by the Supreme Court in AIR 1961 SC 221. The facts of Rani Sonabati Kumari's case, AIR 1961 SC 221 were, that she instituted a suit on 20th November, 1950, against the State of Bihar, in the Court of the Subordinate Judge, Dumka, for a declaration that the Bihar Land Reforms Act, 1950, was ultra vires the Bihar Legislature, and was, therefore, illegal, void, unconstitutional, and inoperative, and that the defendant had no right to issue any notification under the said Act or to take possession or otherwise meddle or interfere with the management of her estate. She also claimed a permanent injunction restraining the defendant, its officers, servants, employees, and agents from issuing any notification under the said Act in respect of the plaintiff's estate, and from taking possession of the said

estate. The Court issued an ex parte ad interim injunction, which after hearing the defendant, was made absolute whereby the defendant was restrained from issuing any notification or taking over possession of the suit property under the said Act, and from interfering or disturbing in any manner the plaintiff's possession. The State did not prefer any appeal and the order became final. The State of Bihar issued on May 19, 1952, a notification under Section 3 (1) of the aforesaid Act declaring that the plaintiff's estate had passed to and became vested, in the State. The plaintiff moved the Subordinate Judge, alleging that action should be taken against the defendant for contempt of Court. The Subordinate Judge found that the defendant State was guilty of contempt of Court.

45. One of the points for consideration before the Supreme Court was, whether the publication of the notification under Section 3 (1) of the said Act, which was treated by the Subordinate Judge to be the disobedience, had been established to be "the act of the State". It was urged on behalf of the Court that the publication of the notification was 'an executive act — an exercise of the executive power of the State —' and since such a power could be exercised either by the Governor directly or through some officer subordinate to him, it could not be predicated from the mere fact that the notification was purported to be made in the name of the Governor in conformity with the provisions of Article 166 (1) of the Constitution, that it was the Governor who was responsible for the notification and not some officer subordinate to him. On this reasoning the further contention was, that unless the respondent proved that the Governor himself had authorised the issue of the notification, the State or the State Government could not be fixed with liability therefor so as to be held guilty of disobedience of the order of injunction. Ayyangar J., who delivered the judgment of the Supreme Court, observed:

"The submission of the learned counsel is correct to this extent that the process of making an order precedes and is different from the expression of it, and that while Article 166 (1) merely prescribes how orders are to be made, the authentication referred to in Article 166 (2) indicates the manner in which a previously made order should be embodied. As observed by the Privy Council in 72 Ind App 241 : (AIR 1945 PC 156) with reference to the term "executive power" in Ch. 2 of Part 3 of the Government of India Act, 1935 (corresponding to Part VI, Ch. II of the Constitution) — the term 'executive' is used in the broader sense as including both a decision as to action and the carrying out of the decision".

"Section 3 (1) of the Act confers the power of issuing notifications under it, not on any officer but on the State Government as such though the exercise of that power would be governed by the rules of business framed by the Governor under Article 166 (3) of the Constitution. But this does not afford any assistance to the appellant. The order of Government in the present case is expressed to be made "in the name of the Governor" and is authenticated as prescribed by Article 166 (2), and consequently "the validity of the order or instrument cannot be called in question on the ground that it is not an order or instrument made or executed by the Governor."

46. It may be observed that in that case the order of the Government was not being impugned on the ground that the Additional Secretary to Government, who had signed that order of the Governor, had no authority under the Rules of Business to pass it. In the instant case, however, the authority of the Home Secretary to pass the impugned order is being hotly contested. Their Lordships of the Supreme Court in para 41 of the judgment made it clear that they were not laying down any rule to the effect that an order expressed in the name of the Governor and duly authenticated as prescribed in Article 166 (2) could not be challenged on any ground whatever. This is what they have said in para 41 of the judgment:

"Authorities have, no doubt, laid down that the validity of the order may be questioned on grounds other than those set out in the Article, but we do not have here a case where the order of the Government is impugned on the ground that it was not passed by the proper authority. Its validity as an order of Government is not in controversy at all."

47. The next case worthy of note is *E. G. Barsay v. State of Bombay*, AIR 1961 SC 1762. In Barsay's case the order granting the sanction under Section 6 (1) of the Prevention of Corruption Act for prosecution of Major Barsay was signed by the Deputy Secretary to the Government of India. It was issued in the name of the Central Government and it was not expressed in the name of the President as is required by Article 77 (1) of the Constitution. It was held by the Supreme Court that the provisions of Article 77 were directory, and evidence could be led to show that it had been passed by the proper authority. Dharam Vir, an Assistant in the Ministry of Home Affairs, gave evidence before the Court that the papers relating to Major Barsay's case, AIR 1961 SC 1762 were submitted to the Home Ministry by the Inspector-General of Police for obtaining the necessary sanction, and that the

papers were put up before the Deputy Secretary in that Ministry who gave the said sanction under his signature. It was clearly established that the Deputy Secretary was competent to accord sanction on behalf of the President in exercise of the powers conferred on him, presumably under the Rules framed by the President in this behalf.

48. The facts of the case before me are different. Here, the evidence brought on the record does not show that the Home Secretary was authorised under the Rules of Business to accord the sanction without reference to the Minister-in-charge of the Department.

49. Mr. Sibal next referred to *Tulsi Ram v. State of Uttar Pradesh*, AIR 1963 SC 666. In that case, the charge against the appellants was of criminal conspiracy under Section 120-B read with Sections 467, 468, 471 and 420, Indian Penal Code. One of the points raised on behalf of the appellants before the Supreme Court was, that no sanction as required by Section 196-A of the Criminal Procedure Code was on the record of the case, and, therefore, the entire proceedings were void ab initio. There was, however, on record a letter from the Under Secretary to the State Government in its Home Department, addressed to the District Magistrate, informing that the Governor had been pleased to grant sanction for prosecution of the appellants. It was argued that this communication could not be treated either as a valid sanction or its equivalent. The Supreme Court refusing permission to raise this plea for the first time before them, observed:

"It is not his (Mr. Mulla's) contention that there was no sanction at all but the gravamen of his complaint is that there is no proper proof of the fact that sanction was given by the authority concerned after considering all the relevant facts and by following the procedure as laid down in Article 166 of the Constitution. Had the point been raised by the appellant in the trial court, the prosecution would have been able to lead evidence to establish that the Governor had in fact before him all the relevant material, that he considered the material, and after considering it he accorded the sanction and that that sanction was expressed in the manner in which an act of the Governor is required to be expressed. . . . There would have been good deal of force in the argument of learned counsel had Ex. P 1560 not been placed on record. Though that document is not the original order made by the Governor or even its copy, it recites a fact and that fact is that the Governor has been pleased to grant sanction to the prosecution of the appellants for certain offences as required by Section 196A of the Code of Criminal Procedure. The document is an official

communication emanating from the Home Department and addressed to the District Magistrate at Kanpur. A presumption would, therefore, arise that sanction to which reference has been made in the document, had in fact been accorded. Further, since the communication is an official one, a presumption would also arise that the official act to which reference has been made in the document was regularly performed. In our opinion, therefore, the document placed on record *prima facie* meets the requirements of Section 196A of the Code of Criminal Procedure and, therefore, it is not now open to the appellants to contend that there was no evidence of the grant of valid sanction. We, therefore, overrule the contention raised by learned counsel."

50. In the present case, however, the objection with regard to the validity of the sanction or consent was raised in the trial Court at the first available opportunity. The principle discernible in *Tulsi Ram's case*, AIR 1963 SC 666 however, is that if the objection had been taken at the proper time, evidence could be led to show whether or not the Governor had accorded the sanction after considering all the relevant material.

51. The law on the point was recently considered by their Lordships of the Supreme Court in AIR 1967 SC 1145. In that case, the Society of Farmers and Rural Industrialists requested the State of West Bengal to acquire, compulsorily, certain lands for the establishment of an Agricultural Colony. The State issued a notification on February 4, 1955, under Section 4 of the West Bengal Land Development and Planning Act, 1948, stating that an extent of about 28.59 acres of lands, situated in the named villages, was likely to be needed for a public purpose. The notification was published in the Calcutta Gazette on February 17, 1955. It was signed by the Assistant Secretary, Land and Revenue Department of the Government of West Bengal.

52. The respondent State then directed the Society to prepare a development scheme and submit the same to the Collector, to enable him to hear objections as per the rules framed under the Act. On or about March 21, 1955, the Society submitted a development scheme and the Collector issued notice, under Rule 5 (2) of the West Bengal Land Development and Planning Rules, 1948, inviting objections to the scheme being sanctioned. The Mills, whose land was being taken away, filed objections, which were overruled by the Collector. On February 10, 1956, the Land Planning Committee, which is the prescribed authority under the Act, recommended acceptance of the scheme, and for issue of a declaration by the Government under Section 6 of the Act. On

July 21, 1956, the Government issued the declaration, which was published in the State Gazette on August 9, 1956. This declaration was signed by the Deputy Secretary, Land and Revenue Department, Government of West Bengal. On August 28, 1956, notice of the intention to take possession of the lands was issued under Rule 8 of the Rules.

53. On September 13, 1956, the Mills moved the Calcutta High Court by a writ petition under Article 226 of the Constitution. The stand taken by the Mills was that the proceedings had been initiated by the Assistant Secretary of the Department, and orders issued either by him or by the Deputy Secretary and hence actions taken by them, though in the name of the State Government, were not valid inasmuch as they were not in conformity with the Act. The argument was that under the Rules of Business framed by the Governor under Article 166 (3) of the Constitution, the business pertaining to the department of Land Revenue, to which those proceedings related, was to be dealt with personally by the Minister-in-charge, and proceedings to be taken under the Act. Since the orders were issued by the Assistant Secretary or the Deputy Secretary of the Department without reference to the Minister-in-charge, the entire proceedings were illegal and void.

54. On behalf of the State, it was urged that as the notification issued under Section 4, and the declaration made under Section 6 of the Act, had been authenticated in the manner specified in the rules made by the Governor under Article 166 (2) of the Constitution, it was not open to the appellant to go behind and question the validity of either the notification or the declaration, which contained a recital that the Governor was of the opinion that the lands were needed for a public purpose.

55. The writ petition was heard by a Single Judge of that High Court, who accepted the contentions of the Mills and held that the impugned order was illegal and void. The State went in appeal to the Division Bench, which also held that Article 166(2) is only to the effect that, when authentication is made in the manner mentioned therein, what is made conclusive is that the order has been made by the Governor; but, whether in making the order, the Governor has acted in accordance with the law, still remains open to adjudication. The Division Bench also held that by virtue of the power conferred under the Rules of Business issued by the Governor, it is open to a Minister by making proper Standing Orders, to delegate his functions and authorise disposal of such functions to his subordinates. After considering the Rules

of Business and other relevant provisions, the Division Bench held that inasmuch as the Minister had admittedly not dealt with those proceedings, the notification issued subsequent to the stage of the issue of the notification under Section 4 of the Act, must be set aside as void. In view of the fact that the Division Bench held that the issue of notification under Section 4 is not a matter which has to be dealt with by a Minister, and as the exercise of the functions in that regard has been delegated under the Standing Order, that notification was allowed to stand. In consequence, the learned Judges modified the order of the Single Judge.

56. The Mills appealed to the Supreme Court. The Supreme Court dismissed the appeal and upheld the decision of the Division Bench with these observations:

"The learned Judges are perfectly correct in their view that what the authentication makes conclusive under Article 166 (2), is, that the order has been made by the Governor. But the further question, as to whether in making the order, the Governor has acted in accordance with law, remains open for adjudication."

57. In *B. L. Cotton Mill's case*, AIR 1967 SC 1145 their Lordships of the Supreme Court were concerned with the interpretation of the Rules of Business framed by the Governor of West Bengal on August 25, 1951. Rules 4 and 5 of the West Bengal Rules are almost identical with Rules 2 and 3 of Rules of Business of the Punjab Government (Exhibit C. W. 1/1). West Bengal Rule 19 is, excepting the proviso, in pari materia with Rule 18 of the Punjab Rules (Exhibit C. W. 1/2). West Bengal Rule 20 corresponds to R. 19 of the Punjab Rules (Exhibit C. W. 1/2). The Supreme Court approved the construction placed by the Calcutta High Court on the said Rules of Business. On this point, Valdivialingam J. observed as follows:

"We are also in agreement with the views expressed by the High Court that the Governor's personal satisfaction was not necessary in this case as, this is not an item of business, with respect to which, the Governor is, by or under the Constitution, required to act in his discretion. Although the executive government of a State is vested in the Governor, actually it is carried on by Ministers; and, in this particular case, under Rules 4 and 5 of the Rules of Business, referred to above, the business of Government is to be transacted in the various departments specified in the First Schedule thereof. Item 5 therein is the Department of Land Revenue and the Governor has allotted the business of that Department to a Minister. We are further in agreement with the views of the High Court that the said Minister-in-charge, has got power

to make Standing Orders regarding the disposal of cases, in his Department, under the Rules of Business issued by the Governor, on August 25, 1951, under Article 166 (3) of the Constitution. In this case, there is no controversy that the Minister-in-charge of the Department of Land and Revenue, has made Standing Orders on November 29, 1951, by virtue of powers given to him under Rules 19 and 20 of the Rules of Business."

58. In the case before me, however, no Standing or other Order, issued by the Minister-in-charge under Rules 18 and 19 of the Rules of Business, has been produced. The conclusion, therefore, is inescapable that the Minister-in-charge never authorised the Home Secretary under Rules 18 and 19 to dispose of cases relating to the grant of sanction under the Code of Criminal Procedure, for prosecution at his own level, without prior reference to him (Minister-in-charge).

59. *Dattatraya Moreshwar's case*, AIR 1952 SC 181 does not advance the case of Mr. Arora. The main rule laid down in that case was that the provisions of Article 166 (1) of the Constitution are merely directory, and an omission to comply with those provisions does not render an executive action a nullity. If it is shown that the decision required by law to be taken by the appropriate Government was, in fact, taken by that Government, there is no breach of the procedure established by law.

60. The contention of the petitioner in that case was that the order or the executive action of the Government had not been expressed and authenticated in the manner provided in Article 166. On behalf of the State, it was pointed out that there was a distinction between the taking of an executive decision and giving formal expression to the decision so taken. Usually executive decision is taken on the office files by way of notings or endorsements made by the appropriate Minister as officer. If every executive decision has to be given a formal expression the whole governmental machinery will be brought to a standstill. *S. R. Das J.*, (as he then was) accepted the contention of the Attorney-General and observed:

"I agree that every executive decision need not be formally expressed and this is particularly so when one superior officer directs his subordinate to act or forbear from acting in a particular way, but when the executive decision affects an outsider or is required to be officially notified or to be communicated it should normally be expressed in the form mentioned in Article 166 (1), i.e., in the name of the Governor."

61. In *Dattatraya Moreshwar's case*, AIR 1952 SC 181 it had been amply proved on the record that the decision under Section 11 (1) of the Preventive Deten-

tion Act had, in fact, been taken by the appropriate Government. In the case before me, however, the evidence that has come on the record shows that the matter never went up to the Government, i.e., Minister-in-charge of the Department, or the Council of Ministers, but the decision was taken by the Home Secretary at his own level.

62. It will not be out of place to refer here to some decisions of this Court in the matter of sanctions accorded under Section 198-B of the Code of Criminal Procedure.

63. In Criminal Appeal No. 89 of 1963, Master Girdhari Lal v. State, decided by Capoor J. on 30th March, 1964 (Punj) the allegation was that Master Girdhari Lal had published a news item in the issue of 'Naya Bharat' dated 27th June, 1961, which was defamatory of Deputy Superintendent of Police, Tarn Taran (Shri Ajaipal Singh). In the other case, the allegation was that Master Girdhari Lal had published in the issue of his paper, dated 25th January, 1962, defamatory matter in respect of the conduct of Ghanshyam Das, Head Clerk of the office of the Settlement Officer, Gurdaspur. The conduct impugned in each case was pertaining to the discharge of the official duties of the respective officers. The objection raised on behalf of Master Girdhari Lal was, that the sanction purporting to have been accorded under S. 198-B of the Code of Criminal Procedure, was not given by the State Government. The sanction orders were issued in each of the two cases under the signature of Shri J. D. Khanna, Deputy Secretary to Government, Punjab, Home Department, and those orders recited that the Governor of the Punjab was satisfied that the respective issues of the 'Naya Bharat' contained matters defamatory to Shri Ajaipal Singh in one case, and Ghanshyam Das in another. It was pointed out that on the evidence of the prosecution itself, it was clear that the matter was never considered by the Governor of the Punjab or the Punjab Government, but only by the Deputy Secretary, Home. It stood established from the evidence of Shri B. K. Gurtu, Supdt. of the Punjab Civil Secretariat, that neither of the cases went up beyond the level of the Deputy Secretary Home, and in actual fact, it was he who applied his mind to the cases and sanctioned prosecution. Thus, the question for determination before the learned Judge was:

"Whether in these circumstances it can be held that the sanction for the prosecution in each case was that of the State Government".

64. Without inviting the attention of the learned Judge to any Rule of Business, it was urged on behalf of the State that it should be presumed that the De-

puty Secretary Home was, under the Rules of Business framed by the Punjab Government, authorised to discharge the functions of the State Government under clause (c) of sub-section (3) of S. 198-B of the Code of Criminal Procedure. Repelling the contention, Capoor J. observed:

"It does not appear that any such delegation of the powers under section 198-B (3) (c) would be legal as that provision does not speak of any further power to delegate."
The learned Judge further observed:

"Though in the case before me it is clause (c) of sub-section (3) of S. 198-B which is applicable, the same principle should apply and it must be held that the sanction which is given after examination at the Deputy Secretary's level only and not at Government's level, was not a sanction of the Government. In 1961 Punj LR 238 the learned Chief Justice while discussing the difference in the forms of sanction required in sub-sections (3) (b) and (c) observed. The idea appears to be that if a Minister is defamed, it should be left to a responsible civil servant to decide whether the special procedure should be sanctioned, and if a civil servant is defamed, it is left to the Government, that is, the Governor acting on the advice of his Council of Ministers, to decide whether the case is fit one for sanction".

65. In the result, the learned Judge accepted the contention of Master Girdhari Lal and held that the sanction order having been issued by the Deputy Secretary at his own level was bad in law.

66. In 1968 Cur LJ 18 : (1968 Cri LJ 709 (P. & Hyna.), a Division of this Court considered a converse case.

67. Master Girdhari Lal's case, Cri. App. No. 89 of 1963 D/- 30-3-1964 (Punj) was cited before the learned trial Judge also. The learned trial Judge declined to follow the rule in Master Girdhari Lal's case, Cri. App. No. 89 of 1963 D/- 30-3-1964 (Punj) with these observations:

"In the interpretation of section 190-B (198-B), Criminal Procedure Code, absolutely different considerations have prevailed and the interpretation of S. 196-A, Criminal Procedure Code, would involve absolutely different considerations. . . . In Criminal Appeal No. 388 of 1963, D/- 14-8-1964 (Punj) the question of validity of sanction was mainly decided by relying on Criminal Appeal No. 89 of 1963. It appears to have been represented to the Hon'ble Judge that the State felt satisfied with the decision in Criminal Appeal No. 89 of 1963 D/- 30-3-1964 (Punj) and had not filed any appeal against the order of acquittal. The P. P. informs me that an appeal has actually been filed and is pending in the Supreme Court. Be that

as it may, I find that the two decisions of Single Bench in Criminal Appeals Nos 89 and 388 of 1963 involved the interpretation of a different section and different considerations had prevailed. The Rules of Business framed under clauses (2) and (3) of Article 166 of the Constitution of India and the precedent and the old standing practice had not been proved in those two cases."

68. I have been informed by the learned counsel on both sides that no appeal against the decision of Capoor J in Master Girdhari Lal's case, Cri. App. No 89 of 1963 D/- 30-3-1964 (Punj) is pending in the Supreme Court or elsewhere.

69. It may, however, be noted that the provisions of Section 198-B, Criminal Procedure Code, constitute a complete code in themselves. The ratio of the said cases which proceed on an interpretation of Section 198-B, is that the Government cannot delegate its power of granting sanction under that section to any Secretary to the Government. To that extent, the ratio of Master Girdhari Lal's case, Cri. App. No 89 of 1963 D/- 30-3-1964 (Punj) cannot apply to the accord of sanction or consent under Section 196-A (2), which expressly provides that this power can be delegated by the Government even to the District Magistrate. A fortiori Government could delegate this power to the Home Secretary who is a far senior officer of the Government. But in the instant case, as observed already, it has not been shown that this power had been delegated by the Government to the Home Secretary. The Government under our democratic polity, in the ultimate analysis, for the purpose of accord of sanction, means the Council of Ministers, or the Minister under whose charge the Department of Criminal Justice is placed by the Governor. The Home Secretary has not been authorised by the Minister in accordance with the rules to accord the sanction or consent. To that extent, the ratio of Master Girdhari Lal's case, Cri. App. No 89 of 1963 D/- 30-3-1964 (Punj) is a sure guide.

70. In short, the principle that emerges from the above discussion is, that though an order giving consent under Section 196-A (2) of the Code of Criminal Procedure, which is made and expressed in strict compliance with clauses (1) and (2) of Article 166 of the Constitution, cannot be impugned on the ground that it was not made by the Governor, its validity can be challenged on the ground that it was not made by the Governor in accordance with law. In other words, evidence can be led to show that the Government servant, who purportedly expressed it in the name of the Governor, did not have, under the law or the Rules of Business, the necessary autho-

rity to make it. In view of the Rules of Business, Exhibits C. W. 1/1 and C. W. 1/2, and in the absence of any Standing Order issued under Rules 18 and 19 of the Rules of Business, Exhibit C. W. 1/2, by the Minister-in-charge (Home Minister) delegating the disposal of this business to the Home Secretary, the latter could not, without reference to the Home Minister or the Council of Ministers, dispose of the matter and accord the necessary sanction at his own level. Wrong precedents could not be invoked to override the letter of the Rules of Business. I have, therefore, no hesitation in holding that there was no valid sanction or consent in writing by the Government under Section 196-A (2) of the Code of Criminal Procedure with regard to the charge of criminal conspiracy under Section 120-B, Indian Penal Code. On this short ground, the appeals preferred by Amrit Lal Kapila, Harbhajan Singh Sanghera and Joseph Verghese appellants must succeed. There was no separate substantive charge under Section 466, Indian Penal Code, against these three appellants. I would, therefore, allow their appeals, set aside their convictions, and acquit them.

71. With regard to Manmohan Singh Johal, however, in addition to the charge of criminal conspiracy under Section 120-B, Indian Penal Code, he was charged for the substantive offence under Section 466, Indian Penal Code. In his case the question that remains to be considered is, whether his conviction for an offence under Section 466, Indian Penal Code, can be sustained by the evidence on record.

72. Mr. H. L. Sibal contends that Mr. Johal was not specifically charged for forging the auxiliary travel documents, such as Visa Applications, International Vaccination Certificates, etc., but was simply charged for forging the passports. The learned counsel maintains that a perusal of the judgment of the trial Court would show that Joseph Verghese appellant has been acquitted of the charge of forging the passports, but convicted for forging auxiliary travel documents, i.e., for a distinct offence with which he was never specifically charged. It is maintained that for this reason only, the conviction of Mr. Johal for an offence under Section 466, Indian Penal Code, cannot be sustained.

In order to appreciate this argument, it is necessary to quote in extenso the charges as framed against Mr. Johal, which read as follows:

"I. V. K. Agnihotri, Special Magistrate, Punjab at Ambala Cantt, hereby charge you, Manmohan Singh Johal alias Mohan Singh alias Mohini, son of Shiv Singh Johal, Prop. M/S Ranjit Travel Agency, G. T. Road, Jullundur, as follows:

First. — That you along with the co-accused in this case during the period 1956 to October, 1959, in the Districts of Jullundur and Hoshiarpur and other places, were a party to a criminal conspiracy having for its objects the doing or causing to be done illegal acts and acts which are not illegal by illegal means, to wit, to obtain fraudulently passports from the persons at various places in the Punjab and after obtaining the same to forge them by removing photographs of the original passports holders thereof and by replacing or substituting them with the photographs of intending passengers who never held any passports but desired to go to United Kingdom and by making false endorsements therein with regard to countries for which they were never issued or with regard to the period of validity of the same or with regard to addition of children to suit the intending passengers and to forge other travel documents and to use such forged passports and other travel documents as genuine knowing or having reason to believe that they were forged, and to enable you or and intending passengers to travel to United Kingdom on those passports and other travel documents either as adults or as children under assumed names or assumed parentages or under both and that you have thereby committed an offence punishable under section 120-B r/w Sections 465, 466, and 471 I. P. C. and within the cognizance of the Court of Session, Ambala.

Secondly. — That you, during the aforesaid period, at one of the aforesaid places, in pursuance of the aforesaid conspiracy, forged entries in documents, to wit passports Exhibits P. 12 to P. 16 and P. 18 to P. 24, purporting to be made by public servants in their official capacity and that you thereby committed an offence punishable under section 466 I.P.C. and within the cognizance of the Court of Session, Ambala.

And I hereby direct that you be tried by the said Court on the said charges.

Sd/- V. K. Agnihotri,
Special Magistrate, Punjab,
at Ambala Cantt.

The 15th August, 1961.

** ** *

73. It is correct that in clause Secondly of the charge-sheet, there is no specific mention of the travel documents other than the passports, but Cl First of the charge-sheet does specifically say that the object of the conspiracy was to forge passports and other travel documents. The international Vaccination Certificates, visa applications, etc., were undoubtedly auxiliary or subsidiary documents, and the charge-sheet read as a whole would leave no doubt in the mind of the accused that he was being tried, inter alia, for

forging entries not only in the passports but also in the connected travel documents.

74. All the circumstances appearing in the evidence with regard to the forging of entries in the passports, Exhibits P. 12, P. 13, P. 19, P. 19/C, P. 19/H, P. 21, P. 22, P. 23, and P. 24, Visa Applications, Exhibits P. 36/1 and P. 36/2, International Vaccination Certificates, Exhibits P. 215 to P. 219, P. 224 to P. 226, and P. 262 to P. 273, Baggage Declaration Forms, Exhibits P. W. 17/9, P. W. 17/10, and P. W. 17/12, and Embarkation Forms, Exhibits P. 42, P. 42-A, P. 44, P. 44-A, P. 45, P. 45-A, P. 34, P. 34-A, P. 35, and P. 35-A, were duly put to Manmohan Singh Johal during his examination under Section 342, Criminal Procedure Code, before the trial Court in Questions. Nos. 10, 11, 13, 14, 17, 22, 24, 26, 27, 34, 35, 37, 38, 45, 49, 50, 59, 62, 64, 73, 81, 82, 83, 94, 96, 102, 104, 105, 113, 116, 123, 126, 127, 135, 138, 139, 140, 147, 156, etc. Thus, no prejudice was caused to the accused owing to the non-mention of other travel documents, namely, Visa Applications, International Vaccination Certificates, Embarkation Forms, Baggage Declaration Forms, etc., in the second head of the charge-sheet. In any case, it was a curable irregularity, which could not affect the legality of the conviction of Mr. Johar under Section 466, Indian Penal Code, for forging the aforesaid travel documents.

75. Furthermore, I do not agree with the learned counsel for the appellant that the trial Judge has acquitted Manmohan Singh Johal of the charge of forging some entries in the passports. In para 14 (iii) at page 92 of the judgment, the learned trial Judge has observed:

"According to the G. E. Q. D. (Government Examiner of Questioned Documents) these blanks had been filled in by Johal (A. 37) while according to the expert, examined by the defence, these writings are in the hand of Krishan Kumar Kesar (A. 37/D. W. 12). Even if it may appear that the Government Expert has not been able to properly identify these sketchy writings for the reason that he did not have before him the sample writing of the actual writer, it would be no ground for disbelieving his opinion with regard to the other writings in the forged documents when his opinion is supported by a number of other circumstances reliably proved in the present case. It does not seem to be very material whether Johal sullied his own hands or employed and hired some others to do the dirty job for him as long as it is proved that he was arranging for the completion of these forged travel documents."

76. It is on the basis of the above-quoted sentences, occurring in the judg-

ment, that the defence counsel builds his argument viz., that the trial Judge has acquitted Mr. Johal of the charge of forging entries in the passports. I do not think, it is permissible to take out isolated sentences, the judgment has to be construed as a whole. These sentences have to be read along with the preceding and the concluding sentences of this sub-para. In the foregoing part of this sub-para, the learned trial Judge has observed.

"The handwriting experts examined by the prosecution and the defence may also suggest that in the forgeries of the endorsements in the passports and in the forgeries in the vaccination certificates there was a sort of specialization or division of labour in the sense that endorsements about the renewals and extensions to other countries were made by one person, the signatures underneath these endorsements were forged by another person and the insertions of the names of the children in the blanks on pages 1 and 3 etc. of the passports were made by a third person. The same set of rubber stamps and seals were used in forging and fabricating these endorsements in the passports and the vaccination certificates and the childish spelling mistakes in some of these rubber stamps which recur in all the passports leave no doubt in our mind that the same set of persons and the same set of seals and stamps were used for these forgeries."

77. The last part of this sub-para reads as follows:

"When Johal or his manager were away from their ordinary place of business and they could not get hold of others to complete such documents they had to rely on their own hands and the evidence of the Government Expert with regard to those forgeries is not belied by the production of any other person who was alleged to have completed those documents by filling in the blanks, which are ascribed by the prosecution to Johal and Amrit Lal accused. Besides the expert evidence there is unimpeachable evidence that these documents were being dealt with and completed by these two accused."

78. Thus construed, it is quite clear that the learned trial Judge found that Johal had forged not only some entries in passports, but also in auxiliary documents, namely, Visa Applications, International Vaccination Certificates etc. I would, therefore, hold, even at the cost of repetition, that the omission to frame a distinct charge under Section 466, Indian Penal Code, with regard to the forging of the entries in Visa Applications, International Vaccination Certificates, Baggage Declaration Forms, and Embarkation Forms, which were only auxiliaries to the passports, was a mere irregularity, cured by Sections 535 and

537, if not covered by Section 237 of the Code of Criminal Procedure, particularly when no prejudice is shown to have been caused to the accused, who clearly understood the nature of the offence for which he was being tried and was afforded a full and fair opportunity of defending himself. The contention, thus, stands overruled.

79-87. The trial Judge has convicted Mr. Johal under Section 466, Indian Penal Code, for forging passports and other connected travel documents on the basis of the following evidence and inferences (After narrating the evidence his Lordship reviewed the evidence, during the course of which his Lordship observed).

88. It must be remembered that the examination under Section 342, Criminal Procedure Code, is designed (a) to secure communication to the accused to the full extent what is alleged against him in the prosecution evidence and (b) to elicit explanation or defence of the accused he wishes to put forward in respect thereof. If examination of the accused substantially achieves that aim so that the accused is made fully aware as to what case he has to meet, the proceedings cannot be held to be vitiated, simply because all possible questions with regard to the circumstances in evidence, natural probabilities, and reasonable inferences arising from the evidence, have not been exhausted and put to the accused while recording his statement under Section 342, Criminal Procedure Code.

89. Though Dev P. W. was cross-examined at length by the defence counsel in the first instance, he was recalled for further cross-examination at the instance of the accused, Johal accused, therefore, fully knew what evidence Dev had given against him. No prejudice has been caused to the accused owing to the failure of the trial Court to put a separate question with regard to Dev's evidence.

90. The prosecution had established that a Bank Draft, Exhibit P. W. 50/10, was drawn on the Punjab National Bank Ltd., Jullundur City, on the 28th September, 1959, with which Bank Johal had his accounts. This draft was endorsed by Sudarshan Singh, Accused No. 3 (who travelled along with Balhar Singh, Accused No. 3, under the assumed name on the forged passport, Exhibit P. 13) in favour of one Lachhman Singh, who further endorsed it in favour of Mannohan Singh Johal. The last named (Mr. Johal) wrote on the draft:

"Please credit it to my current account No. 6918/4.

Sd/ M. S. Johal
29-9-1959."

91. The money was thus credited to Mr. Johal's account. This circumstance of the receipt of Rs. 4500/- was duly put to

Johal in Question No. 177. Thus, in spite of the infirmities, Dev's evidence, having been corroborated by other circumstantial evidence, was rightly relied upon by the learned trial Judge.

92. Now I take up the evidence of the Document Expert. The evidence of Mr. N. Dass Gupta, P. W. 120, examined by the prosecution, with regard to Manmohan Singh Johal (A. 37) is at page 406 of the file of the lower Court. S. 8/1 to S. 8/32 and V. 1 to V. 5 were the specimen or admitted writings of Mr. Johal, which were used by the Expert witness for comparison with the questioned writings marked as G series on passports, Exhibits P. 12 to P. 24, marked as K series (K. 1 to K. 36) in the correspondence and the hotel stay registers, etc., marked as M series (M. 1 to M. 150) on the International Vaccination Certificates, marked as N series (N. 1 to N. 7) on the Visa Applications, marked as O series (O. 1 to O. 8) on the Embarkation Forms, and marked as P series (P. 1 to P. 12) on the Baggage Declaration Forms. In his opinion, the person who wrote the specimen writings S. 8/1 to S. 8/32 and V. 1 to V. 5, also wrote the aforesaid questioned writings on the passports, I. V. Cs, Visa Applications, Embarkation Forms, Baggage Declaration Forms, etc. With regard to the questioned writings marked as G. 15, G. 43, G. 45/1, G. 45/2, G. 51, G. 74, G. 83, G. 88, G. 96, G. 111 and M. 9, the Expert opined that these also were probably written by the same person (Mr. Johal), who wrote the specimen writings. He gave detailed reasons in support of his opinion.

93. The main criticism of the learned counsel for the appellant against the testimony of Mr. N. Dass Gupta is, that his opinion has been contradicted by the Expert examined by the defence, and that where the charge against the accused is one of forging a writing, as a rule it is imprudent to convict him solely on the basis of the expert testimony.

94. I have no quarrel with this proposition. It is merely a rule of caution and not an absolute rule of law. There is nothing in law to prevent the Court from recording a conviction on expert evidence alone. The reason is that the identification of handwriting is an imperfect science. There the margin of error is great. Experts often give dogmatic opinions unsupported by reasons. The value of the expert evidence, however, varies with the circumstances of each case and the reasons given by him in support of his opinion. Its value is to be judged with the same yardstick with which the evidence of any other witness is appraised. It is to be seen how far it fits in with the surrounding circumstances and the natural probabilities of the case.

If in a given case the evidence of the Expert is materially corroborated and confirmed by the other evidence, there is nothing in law to debar the Court from recording a conviction of the accused on the basis of such expert testimony.

95-97. In the instant case, the evidence of Mr. N. Dass Gupta finds material corroboration from the circumstantial evidence brought on the record.

(His Lordship examined the evidence of this witness and continued).

98. After going through the evidence of the Experts, I am clearly of the view that the evidence of Mr. A. S. Kapur, A. 37/D. W. 17, (handwriting expert examined by the defence — Ed.) is not reliable while that of Mr. N. Dass Gupta, P. W. 120, is creditworthy. Firstly, Mr. Kapur did not examine all the original writings which are in question. He only saw photographs of some of them supplied to him by the accused. Even the examination of these originals made by him in Court was only for about one hour. Furthermore, the surrounding circumstances and the other overwhelming evidence brought on record by the prosecution clothe the opinion of Mr. N. Dass Gupta with a high degree of probability. Particularly, the set habit of the writer, as revealed by the specimen as well as the questioned entries in the passports in committing the same spelling mistakes, such as writing the word 'Belgium' as 'Belguim', etc., goes to show that at least those entries on the passports were written by Mr. Johal.

99. The evidence on this charge against Mr. Johal is mainly circumstantial. It is well settled that in cases dependent on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person, and incapable of explanation upon any other reasonable hypothesis, save that of the accused's guilt. In the instant case, the whole chain of circumstances established against Mr. Johal, coupled with the testimony of the handwriting expert, Mr. N. Dass Gupta, P. W. 120, Piara Singh, P. W. 89, and Dev, P. W. 103, leads only to one reasonable inference, viz., that it was Johal accused himself and none else, who forged at least the entries G. 13 and G. 15 in the passport, Exhibit P. 13, and G. 39, G. 41 and G. 43 in the passport, Exhibit P. 16. To put it in another form, so far as the aforesaid entries in Exhibits P. 13 and P. 16 are concerned, the opinion of the Document Expert stands confirmed by the stark circumstance that these two passports, when they came into the hands of Mr. Johal, did not contain any false entries, and when they were passed by him further to the passenger-accused at the time of em-

barkation, they had, among others, the false entries G. 13, G. 15, G. 39, G. 41 and G. 43 in them.

100-107. (His Lordship reviewed the rest of the evidence and continued)

108. If a person deliberately prepares such Embarkation Forms in contravention of the statutory requirements, merely by copying out false entries from the forged passports, then he would be 'making a false document' as defined in Section 464, Indian Penal Code, so that his act would amount to 'forgery' as defined in Section 463, Indian Penal Code, it being presumed that the intention of the accused in copying out the entries was fraudulent. The offence committed by Mr. Johal in respect of the Embarkation Forms, therefore, will fall under S. 465, if not under Section 466, Indian Penal Code.

109. (His Lordship reviewed the evidence as regards International vaccination certificate and concluded).

110. In view of my finding that it has been established by the prosecution beyond all manner of doubt that the entries G. 13 and G. 15 in the passport, Exhibit P. 13, and G. 39, G. 41 and G. 43 in the passport, Exhibit P. 16, were forged by Mr. Johal appellant himself, I maintain his conviction under S. 466, Indian Penal Code, but reduce his sentence to 4 years' rigorous imprisonment and a fine of Rs 5,000/-, and, in default of payment of fine, to suffer one year's further rigorous imprisonment. His conviction on the charge under Section 120-B read with Section 471, Indian Penal Code, is, however, set aside for want of a valid sanction for prosecution.

RGD Conviction under S. 466, I.P.C. maintained but sentence reduced and conviction under S. 120-B/471, I.P.C. set aside.

AIR 1963 PUNJAB & HARYANA 241 (V 56 C 42)

R. S. SARKARIA, J.

Kartar Singh Sher Singh, Plaintiff, Appellant v. Harcharan Singh and others, Defendants, Respondents.

Regular Second Appeal No. 914 of 1968, D/- 20-9-1968, from decree of Sr. Sub J., Ferozepur, D/- 29-3-1963

(A) Evidence Act (1872), S. 3 — Circumstantial evidence — Existence of agreement — Partnership Act (1932) Sections 42, 47—Contract to continue partnership after death of a partner may be implied from conduct of parties — Limitation Act (1908) Art. 106—Two brothers A and B entering into partnership — B died on 3-11-1957 — Heirs of B continu-

ing business till its dissolution on 5-2-1958 by mutual consent—A filing suit for rendition of accounts on 4-2-1961—A's suit held to be within time — AIR 1952 All 506 and AIR 1924 Mad 708 Diss. from.

A and B, two brothers entered into partnership and started business of commission agents. Accounts were maintained by B who was in charge of account books. On death of B on 3-11-1957, his heirs including his eldest son H continued the business with surviving partner A, till it was dissolved by mutual consent on 5-2-1958. A instituted suit on 4-2-1961 against H and other heirs of B for rendition of accounts of dissolved firm. A filed two entries dated 5-2-1958 in account books evidencing division of partnership and closing of business that day. It was nobody's case that the entries were deeds of dissolution of partnership. The suit as well as the first appeal was dismissed on ground of suit being time barred. On second appeal the question was whether there was any agreement between the partners A and B, that in case of death of either of them, the heirs of deceased would become partners in place of deceased.

Held (i) that the entries of 5-2-1958 showed that even after the death of B the business of the firm under the same style and name was continued by his heirs, particularly his eldest son and the surviving partner A.

(Paras 8, 9)

(ii) that from such conduct and circumstances, the existence of an agreement of the kind in question between the original partners could be inferred.

(Paras 10, 11, 29)

There is nothing in S. 42 to indicate that the contract to which the operation of cls (a), (b), (c) and (d) of that section is subject, should only be an express contract, or that it should be a contract between more than two partners. A contract to continue the partnership after the death of a partner may be implied from the conduct of the parties. Though the contract must be one between the original partners, the conduct of the surviving partner and the heirs of the deceased partner after the death of partner may evidence an original contract that the partnership should not be dissolved on the death of a partner.

(Paras 16, 21 27)

(iii) That the suit was within time. Observations in AIR 1952 All 506 and AIR 1924 Mad 708 Diss. from. AIR 1915 All 259 Foll. Case law discussed.

(Para 29)

(B) Civil P.C. (1908), S. 100—Concurrent findings of fact — Misconstruction of documents—Finding of Courts below, perverse—High Court is not debarred from

reviewing it in second appeal—AIR 1930 PC 91 Explained. (Paras 12, 13)

Cases Referred: Chronological Paras

- (1965) 67 Pun LR 601 = 1965 Cur LJ 452, Commr. of I. T. v. Rama Wholesale Cloth Syndicate 4, 12
 (1965) 67 Pun LR 1164, Khushal Chand v. Hardwari Lal 4, 12
 (1963) AIR 1963 SC 302 (V 50) = (1963) 3 SCR 623, V. Ramchandra Ayyar v. Ramalingam Chettiar 4, 12
 (1960) 62 Pun LR 29 = ILR (1959) Punj 1269, Smt. Lal Devi v. Muni Lal 4, 12
 (1959) AIR 1959 Mad 283 (V 46) = (1959) 1 Mad LJ 282, M. S. V. Narayanan Chettiar v. S. M. Umayal Achi 11, 12
 (1959) AIR 1959 Raj 140 (V 46) = ILR (1959) 9 Raj 334, Kesrimal v. Dalichand 20
 (1957) AIR 1957 SC 49 (V 44) = 1956 SCR 691, Sree Meenakshi Mills Ltd. Madurai v. Commr. of I. T. Madras 4, 12
 (1957) AIR 1957 SC 852 (V 44) = 1958 SCR 49, Oriental Investment Co. Ltd. v. Commr. of I. T. Bombay 12
 (1956) AIR 1956 Nag 46 (V 43) = ILR (1955) Nag 498, Chainkaran Sidhakaran Oswal v. Radhakishan Vishwanath Dixit 11, 19
 (1952) AIR 1952 All 506 (V 39) = 1952 All LJ 696, Mt. Sughra v. Babu 14, 23, 26, 28
 (1946) AIR 1946 All 259 (V 33) = ILR (1946) All 309, Lala Ram Kumar v. Kishori Lal 11, 14, 21, 22, 23, 25, 28
 (1935) AIR 1935 Lah 350 (V 22) = ILR 16 Lah 881, Punjab & Sind Bank Ltd. v. Kishen Singh Ghulab Singh 11, 17
 (1930) AIR 1930 PC 91 (V 17) = ILR 11 Lah 199, Wali Muhammad v. Muhammad Bakhsh 5, 13
 (1924) AIR 1924 Mad 708 (V 11) = 80 Ind Cas 378, Abdul Jaffar v. K. Venugopal Chettiar 28

J. N. Kaushal, Sr. Advocate, for Appellant; S. C. Goyal, for Respondent No. 1.

JUDGMENT :— Circumstances giving rise to this regular second appeal are as follows:

Kartar Singh and Prem Singh, two brothers, entered into partnership and started business of commission agents under the style of 'Prem Singh Kartar Singh'. Under the partnership agreement, the accounts were to be maintained by Prem Singh, who was incharge of the account books. It was agreed between the parties that on the death of either of the partners, the partnership would not be dissolved but the heirs of the deceased partner would be substituted in place of the deceased as partners. Prem Singh died in November, 1957. Conse-

quently, his heirs became partners in his place. On 4-2-1958, the partnership was dissolved and a new firm came into being on 5-2-1958 to carry on business under the style of 'Kartar Singh Balbir Singh'. The heirs of the deceased started another firm on 5-2-1958 under the name of 'Prem Singh Harcharan Singh'.

2. On the above facts, Kartar Singh instituted the suit on 4-2-1961 against Harcharan Singh and other heirs of the deceased partner, Prem Singh, for rendition of accounts of the dissolved firm 'Prem Singh Kartar Singh'. The defendants resisted the suit, alleging that the partnership had dissolved on 3-11-1957 by operation of law, i.e. on the death of Prem Singh, and that, consequently, the suit was time-barred. It was denied that there was any agreement between the partners, Prem Singh and Kartar Singh, that on the death of a partner his heirs would be substituted in his place. The parties went to trial on these issues:

1. Whether there was a firm known as Prem Singh Kartar Singh. If so, what were the terms between the partners?

2. Whether there was any agreement between the partners to this effect that on death of a partner, his legal representatives become partners. If so, what is its effect?

3. Whether the suit is within time?

4. Whether the account books of the firm are with defendants, and they are liable to render accounts?

5. Whether the defendants are entitled to special costs?

3. Under issue No. 1, it was found that there was a contractual partnership carrying on business under the style of 'Prem Singh Kartar Singh' and that Prem Singh and Kartar Singh were its partners, sharing the profits of the business equally. Issues 4 and 5 were decided against the defendants in favour of the plaintiff. Issues 2 and 3 were decided against the plaintiff. In the result, the suit was dismissed as time-barred. The plaintiff's appeal was dismissed by the Senior Subordinate Judge, exercising enhanced appellate powers at Ferozepore. Hence this second appeal by the plaintiff.

4. The first contention of Mr. J. N. Kaushal, the learned counsel for the appellant is, that in this case both the Courts below have grossly misconstrued the documents, Exhibits PA and PB, and drawn a conclusion therefrom which no judicial mind will ever arrive at. In short, it is stressed that the concurrent finding of the Courts below on issue no. 2 is a perverse finding and, therefore, the High Court has, under Section 100 of the Code of Civil Procedure, jurisdiction to reopen the finding and examine and

review the evidence itself. In support of his contention, the learned counsel has taken me through the writings, Exhibits PA and PB, and has referred to Sree Meenakshi Mills Ltd., Madurai v. Commissioner of Income-tax, Madras, AIR 1957 SC 49; V. Ramachandra Ayyar v. Ramalingam Chettiar, AIR 1963 SC 302 Smt. Lal Devi v. Sh. Muni Lal (1960) 62 Pun LR 29, Commissioner of Income-tax v. Rama Wholesale Cloth Syndicate, (1965) 67 Pun LR 601; and Khushal Chand v. Hardwari Lal, (1965) 67 Pun LR 1164.

5. On the other hand, Shri S C. Goyal, the learned counsel for the respondents contends that it is wrong to say that the view taken of the documentary evidence, Exhibits PA and PB, by the Courts below is perverse. It is stressed with reference to Section 47 of the Indian Partnership Act, 1932 (hereinafter called 'the Act') that these documents, Exhibits PA and PB, are not a deed of dissolution of partnership or even evidence of such dissolution, at best, they are evidence of the fact that the affairs of the old firm, which had been dissolved on the death of Prem Singh, were wound up on 5-2-1958. In the alternative, it is contended that even if the Courts below have misconstrued the writings, Exhibits PA and PB, that will not give jurisdiction to this Court in second appeal to reopen the finding of fact arrived at by the Court below, because only a misconstruction of those documents, which are title deeds or form the basis of the suit, amount to an 'error of law' within the meaning of Section 100 of the Code of Civil Procedure. In support of this contention, reliance has been placed on a judgment of the Privy Council in Wali Muhammad v. Muhammad Bakhsh, ILR 11 Lah 199 : (AIR 1930 PC 91).

6. The question for determination before the Courts below was, whether the suit was time-barred. This issue further resolves itself into the question, when was the partnership dissolved? Whether it was dissolved automatically on the death of Prem Singh as alleged by the defendants, or it was dissolved on 5-2-1958. Answer to the last question involved determination of the issue as to whether there was any agreement between Prem Singh and Kartar Singh, partners, that in the case of death of either of them, the heirs of the deceased would become partners in place of the deceased. In this case, the plaintiff brought on record the documents, Exhibits PA and PB, to show that on the death of Prem Singh, his heirs, including his eldest son, Harcharan Singh defendant, continued the business with the surviving partner, Kartar Singh plaintiff, till it was dissolved by mutual consent on 5-2-1958. The language of Exhibit PA and PB, which are entries in the ac-

count books of the dissolved firm, is almost identical. Rendered into English, Exhibit PA reads as follows:

"The shop of M/S. Prem Singh Kartar Singh has been divided today, the 5th February, 1958, and this shop has fallen to the share of Kartar Singh Balbir Singh. Henceforth no entry shall be made in these account books. If any dues are recoverable, the same shall be divided half and half between the proprietors.

Sd/ Harcharan Singh

Dated 5-2-1958,

(Defendant)."

7. Some surrounding circumstances may also be noted: (1) Prem Singh and Kartar Singh partners were real brothers. Consequently, the existence of a contract between them that on the death of either of them the heirs of the deceased would be substituted as partners, would not be something unusual, because such a covenant will not lead to the induction of any stranger into the business, but only the kith and kin of the surviving partner. (2) Harcharan Singh, who signed the memoranda, Exhibits PA and PB, is admittedly the eldest son of the deceased partner, Prem Singh. (3) The writings, Exhibits PA and PB, are entries made in the account books of the dissolved firm, which account books, according to the finding of the trial Court, used to remain in the custody of Prem Singh and were maintained by him.

8. Harcharan Singh defendant, when he appeared in the witness-box, was confronted in cross-examination with the writings, Exhibits PA and PB, and asked to explain them. He admitted that these entries were in his hand, but added that he had executed them with regard to the division of the building of the shop, and that on that day at the same time, the entire urban property was divided. But no particulars of that property were entered in these writings. This explanation given by Harcharan Singh defendant was as ridiculous as it was ludicrous. The only reasonable construction which could be placed on these writings was, that they evidence division of the partnership known as the shop of 'M/s. Prem Singh Kartar Singh' and the closing of its business on that day. In ordinary parlance also, the word 'shop' is often used for the term 'firm'. In this case, however, in the context, the word 'shop' does not admit of any other construction, except as meaning the 'firm' or the 'partnership'. It is immediately followed by the words 'M/s. Prem Singh Kartar Singh', the name of the firm.

The word 'shop' cannot be read in isolation from the following words and sentences appearing in the writing. The next sentence "Henceforth no entry shall be made in these account books" further

clarifies and emphasises that by the use of the word 'shop' the firm or the partnership, namely 'M/s. Prem Singh Kartar Singh' was meant, and not the building in brick and mortar, in which the firm was carrying on its business. Thus, the only reasonable construction of these writings was that the firm 'M/s Prem Singh Kartar Singh' continued to function even after the death of Prem Singh till 5-2-1958, on which date the accounts of that firm were closed. It clearly raises the inference that the death of Prem Singh, his heirs stepped into his shoes as partners of the firm along with the surviving partner.

9. The Court below has attached undue importance to the fact that these writings were signed only by Harcharan Singh, one of the alleged partners, and not by all the alleged partners, and that, consequently, these writings had no binding effect. The argument is attractive but fallacious. It is nobody's case that this was a contract or agreement between the partners dissolving the firm. These writings, at best, are only a memoranda or recital of a transaction that had already taken place. They are just a piece of evidence — and I must say, a valuable piece — showing the conduct of the eldest son and heir of the deceased partner as well as the surviving partner. In other words, it shows that even after the death of Prem Singh, the business of the firm under the same style and name was continued by his heirs, particularly his eldest son and the surviving partner, Kartar Singh.

10. The main fact in issue is, whether there existed an agreement between the original partners, Prem Singh and Kartar Singh, to the effect that on the death of either of them the heirs of the deceased would become partners with the survivor in the firm. In view of the definition of 'proved' given in Section 3 of the Evidence Act, this fact could be established either (1) by producing direct evidence as to its existence, such as, a written agreement executed by the original partners, or by any past admission of the surviving partners or (2) by circumstances which would make the existence of this fact so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that such an agreement existed. Instance of such circumstances would be the conduct of the surviving partner and the heirs of the deceased. In the instant case, the proof falling under the first category was not adduced, but circumstances relating to the second category were established, from which the existence of such an agreement between the original partners can be inferred.

11. In this case, there is evidence of the conduct of the heir of the deceased

partner and the surviving partner, Kartar Singh in continuing the business of the firm in partnership till 5-2-1958. That is to say, the writings, Exhibits PA and PB, read in the light of the other circumstances, clearly showed that the firm actually continued to function till 5-2-1958. There is abundant authority for the proposition that from such conduct and circumstances, the existence of an agreement of the kind in question between the original partners can be inferred. On this point, Mr. Kaushal has referred to Lala Ram Kumar v. Kishori Lal, AIR 1946 All 259 (DB); Chaikaran Sidhakaran Oswal v. Radhakishan Vishwanath Dixit, AIR 1956 Nag 46 (DB); Punjab and Sind Bank Ltd. v. Kishen Singh Ghulab Singh, AIR 1935 Lah 350 (DB); and AIR 1959 Raj 140.

12. Grossly misconstruing the clear language of the writings, Exhibits PA and PB, and accepting the transparently ridiculous explanation furnished by Harcharan Singh defendant, the lower Court has taken such a view of the evidence that no judicial mind, guided by reason and common sense, can ever take. That perverse finding, though on a question of fact, is open to attack in second appeal as erroneous in law. For authorities on the point, reference may be made to 1956 SCR 691 : (AIR 1957 SC 49); Oriental Investment Co. Ltd. v. Commissioner of Income-tax Bombay, AIR 1957 SC 852; (1960) 62 Pun LR 29; (1965) 67 Pun LR 601; (1965) 67 Pun LR 1164; and AIR 1963 SC 302.

13. The finding of the Courts below on this question of fact being perverse, this Court is not debarred from reviewing it in second appeal and setting matters right. Wali Muhammad's case, ILR 11 Lah 199 : (AIR 1930 PC 91) does not advance the point canvassed by Mr. Goel. It rather helps the appellant, inasmuch as in the instant case the misconception by the Courts below is of writings which form the sheet-anchor of the plaintiff's case. Their Lordships of the Privy Council have clearly laid down in that case that a decision of fact by a first appellate Court, which proceeds on a misconception of documents which are instruments of title or otherwise the direct foundation of rights, does involve a question of law so as to be open to reconsideration upon second appeal under Section 100 of the Code of Civil Procedure.

14. Mr. S. C. Goyal, the learned counsel for the respondents, does not seriously dispute the principle that an agreement between the partners to continue the partnership on the death of any one of the partners by substituting the heirs of the deceased in place of the deceased, can be gathered and inferred from the

conduct of the parties, but he maintains that this general principle will not apply where the original partnership consists of only two partners. In the case of such a partnership, says Mr. Goel, the death of a partner puts an end to partnership, because one partner cannot, by his own conduct, impose a partnership upon his heirs or legal representatives, partnership being not a matter of status but a matter of contract. In support of this contention, the learned counsel relies upon the dictum of the Division Bench in *Mt. Sughra v. Babu*, AIR 1952 All 506. He has urged that the authority of AIR 1946 All 259 (DB) has been badly shaken, if not altogether exploded, by the subsequent ruling of the same Court in *Mt. Sughra's case*, AIR 1952 All 506. He has tried to distinguish the other rulings cited by Mr. Kaushal, on the ground that in all those cases the original partnership consisted of more than two partners. He has also referred to *M. S. V. Narayanan Chettiar v. S. M. Umayal Achu*, AIR 1959 Mad 283.

15. Before I discuss the rulings cited on both sides, it will be useful to refer to the provisions of Section 42 of the Partnership Act, which read as follows—

"42. Subject to contract between the partners a firm is dissolved—

- (a) if constituted for a fixed term, by the expiry of that term,
- (b) if constituted to carry out one or more adventures or undertakings by the completion thereof,
- (c) by the death of a partner; and
- (d) by the adjudication of a partner as an insolvent."

16. It will be seen that there is nothing in Section 42 that the contract to which the operation of clauses (a), (b), (c) and (d) of that section is subject, should only be an express contract, or that it should be a contract between more than two partners. Of course, it is presumed that the contract should be a valid contract recognised by law. Now is there anything in the Contract Act or any other law, which says that where the business is carried on between two partners only, they cannot lawfully enter into an agreement that on the death of either of them the heirs of the deceased would be substituted as partners of the firm? It is another matter that the heirs may or may not continue the partnership business. It, however, does not mean that the original contract between the old partners, if their number did not exceed two, was bad.

17. The first case cited by Mr. Kaushal is AIR 1935 Lah. 350. In that case, the Bank sued the firm Messrs. Kishen Singh Gulab Singh through its proprietors, Dr. Kishen Singh, Sardar Gulab Singh and Sardar Anup Singh on the footing of an equitable mortgage. One of

the original partners, Uttam Singh, died before the mortgage. An argument was advanced that on the death of Uttam Singh, the firm had been dissolved and the mortgage being executed only by Defendants 1 to 3, their 3/4th share in the factory could alone be held liable. Rejecting this argument, Bhide J., who spoke for the Division Bench, observed—

"It appears that Uttam Singh had died before the mortgage of 1925, but it does not necessarily follow that the firm was dissolved. The dissolution of a firm, in such a contingency is subject to contract between the parties, (vide Section 42, Partnership Act), and an intention to continue the business in partnership with the legal representative, may be gathered from the conduct of the parties ...

"In the present instance it appears from the conduct of the parties that they intended that there should be no dissolution and that the business of the firm should be carried in partnership with the legal representative of the deceased partner."

18. It may be noted that in that case, the original partners of the firm were more than two persons.

19. The next case is AIR 1956 Nag 46. In that case also, it was laid down that existence of an agreement between the partners to the effect that the death of a partner shall not cause dissolution of the contract of a partner, can be inferred from the conduct of the parties, and it was not necessary that there should be direct evidence of an express agreement to that effect. In that case, two out of the several old partners had died.

20. Same is the ratio decidendi of the case *Kesrimal v. Dalchand*, AIR 1959 Raj 140.

21. The most important of all the cases relied on by Mr. Kaushal is the one reported as AIR 1946 All 259. The original partnership in that case consisted of only two partners, namely, Musam and Ram Kumar. Musam died and thereafter the surviving partner, Ram Kumar, brought a suit on a bond executed in favour of the firm. The suit was brought in the name of the firm on the allegation that the partnership was not dissolved on the death of the deceased, but was continued with his wife and adopted son. The Division Bench consisting of Iqbal Ahmad C. J. and Sinha J. held that the conduct of the parties evidenced a contract between the original partners that the partnership should not be dissolved on the death of either of them. After discussing the case law on the point, the learned Judges laid down that the words "subject to the contract between the partners" at the beginning of Section 42 of the Partnership Act do

not mean that the contract must be express. Hence, a contract to continue the partnership after the death of a partner may be implied from the conduct of the parties. Though the contract must be one between the original partners, the conduct of the surviving partner and the heirs of the deceased partner after the death of partner may evidence an original contract that the partnership should not be dissolved on the death of a partner.

22. The facts of Lala Ram Kumar's case AIR 1946 All 259 are a very near parallel to the one before me. If I may say so with respect, that case correctly enunciates the law on the point.

23. The contrary view taken by another Division Bench of the same High Court in Mt. Sughra's case, AIR 1952 All 506, it is submitted, with due deference, does not lay down the law correctly. In that case, after the death of the old partner his major heirs along with the other partner continued the old partnership business with the old Partnership assets with the same rights and liabilities as before with this difference merely that in place of the old partner his heirs were substituted, the major heirs became the partners and the minor heirs became entitled to the benefits of the partnership. In that case also, the original partnership had two partners, namely, Abdul Shakur and Wali Mohammad. Abdul Shakur died and it was urged before the High Court that the partnership had dissolved on his death, though it was admitted that on the death of Abdul Shakur the partnership business was carried on by Wali Mohammad in partnership with the heirs of the deceased. Thereafter, Wali Mohammad also died but the business was carried on in partnership between the heirs of the two deceased partners. The dispute between the parties was, whether a new partnership was constituted after the death of Abdul Shakur or the old partnership continued. From the conduct of the heirs of Abdul Shakur and Wali Mohammad's son, the lower appellate Court came to the conclusion that there must have been a contract between the original partners, that the partnership would not be dissolved by the death of a partner. For this proposition, the lower Court relied, *inter alia*, on Lala Ram Kumar's case, AIR 1946 All 259.

24. The learned Judges observed:

"It appears to us that the view taken by the Court below cannot be supported. The general rule is that a partnership is dissolved after the death of a party. This rule is, however, subject to a contract to the contrary. When it is said that a partnership will not be dissolved by the death of one party, what is meant is that the partnership will continue be-

tween the surviving partners even after the death of a partner. It follows that in order that the exception to the general rule may apply, the original partnership must consist of more than two partners. In the case of a partnership consisting of only two partners, no partnership remains on the death of one of them and, therefore, it is a contradiction in terms to say that there can be a contract between two partners to the effect that on the death of one of them the partnership will not be dissolved but will continue. Nor is the position affected by bringing in the heirs of a deceased partner on the scene. One partner cannot, by his own contract, impose a partnership upon his heirs or legal representatives. Partnership is not a matter of status, it is a matter of contract. No heir can be said to become a partner with another person without his own consent, express or implied."

"When, however, there are more than two partners and when there is a contract between the partners that the partnership will not be dissolved by the death of one of them the old partnership continues as between the surviving partners and the heirs, if they come in, may come in place of the deceased partner and become partners upon the old terms. In such a case it will not be a new partnership but will be treated as the old partnership which continued without a break."

25. Discussing Lala Ram Kumar's case, AIR 1946 All 259 the learned Judges said:

"In AIR 1946 All 259, there were only two partners. It was held that since the business was carried on even after the death of one partner by the surviving partner and the heirs of the deceased partner, it must be presumed that there was an agreement between the original partners that the partnership would not be dissolved upon the death of a partner. With great respect we are unable to agree with this pronouncement. Not only can such an agreement be considered to be valid, (sic) when made in the case partnership consisting of only two partners, but also the mere fact that on one occasion only on the death of one of the partners, the heirs continued the business of partnership, will be too slender a foundation for drawing an inference about the existence of an agreement to the contrary within the meaning of section 42 between the original partners."

26. With utmost respect to the learned Judges who decided Mt. Sughra's case, AIR 1952 All 506, the validity or otherwise of a contract, viz., that on the death of a partner there will be no dissolution of the firm but the business would be continued by the surviving

partner or partners with the heirs of the deceased, does not depend on the number of the partners among or between whom such agreement exists. There is absolutely no warrant for this proposition. After expressing in a somewhat dogmatic way that such an agreement cannot be considered to be valid, the learned Judges, shifting their stand, hastened to add that the mere fact that on the death of one of the partners the heirs continued the business of partnership, will be "too slender a foundation" for drawing an inference about the existence of an agreement to the contrary within the meaning of Section 42 between the original partners.

27. As observed above, there is nothing in Section 42 of the Partnership Act or any other law which requires that only an express contract will prevent dissolution of a partnership on the death of a partner. If that were the intention of the Legislature, they would have clearly said so in S 42 that the contract referred to in this section, at the beginning, means only an express contract in writing between the partners of a firm, whose number exceeds two.

28. The fallacy of the reasoning adopted by the learned Judges in Mt. Sughra's case, AIR 1952 All 506 is demonstrated by the fact that in the ultimate analysis, the learned Judges had to arrive at substantially the same conclusion which was directly drawn on similar facts in Lala Ram Kumar's case, AIR 1946 All 259. This is how they have attempted to get over the difficulty:

"Even though, however, in our view a new partnership was created on the death of Abdul Shakoor, the right to have the accounts taken from the commencement of the old partnership is not affected. As already observed, after the death of Abdul Shakoor the major heirs along with Wali Mohammad continued the old partnership business with the old partnership assets with the same rights and liabilities as before with this difference merely that in place of Abdul Shakoor his heirs were substituted, the major heirs became the partners and the minor heirs became entitled to the benefits of the partnership. In these circumstances an agreement between the parties must be implied that rights and liabilities of the new partners will be taken to be as if Abdul Shakoor's death had created no dissolution in the partnership or in other words that they were liable on the accounts being taken from the commencement of the old partnership or from the date of the last accounting, as the case may be."

This means that the learned Judges arrived at the same conclusion, though by a circuitous route. They referred to Abdul Jaffar's case, AIR 1924 Mad 708 wherein

a similar view was taken. Thus, even if the view, (which in my opinion is not the correct view), taken in Mt. Sughra's case, AIR 1952 All 506 by Allahabad High Court, and Abdul Jaffar's case, AIR 1924 Mad 708 by the Madras High Court, is adopted, the result, so far as the plaintiff's claim is concerned, will be the same.

29. In the light of what has been said above, I would, reversing the finding of the Court below on issue no. 2, hold that there was an implied agreement between Prem Singh and Kartar Singh, the original partners, that on the death of any of them the partnership would not be dissolved, but the business would be carried on by the survivor in partnership with the heirs of the deceased. I would further hold that it was proved that, in fact, this partnership business was continued till it was finally closed on 5-2-1958. The suit was instituted on 4-2-1961, i.e. within three years of the date of the dissolution of the partnership, and was thus within time. In the result, the judgment and decree of the Court below is set aside, the plaintiff's appeal is accepted, and a preliminary decree for rendition of accounts of the dissolved firm 'Prem Singh Kartar Singh' is passed in favour of the plaintiff and against the defendants. In view of the fact that the parties are related to each other, they are left to bear their own costs throughout.

SSG/D.V.C.

Appeal allowed.

AIR 1969 PUNJAB & HARYANA 250
(V 56 C 43)

R. S. NARULA
AND S. S. SANDHAWALIA JJ.

Malkiat Singh, Petitioner v. State of Punjab through Secretary Health Dept. and others, Respondents.

Civil Writ No. 2566 of 1968, D/- 3-10-1968

(A Constitution of India, Art. 5 — 'Domicile' — Private International Law — Concept of domicile — Synthesis of factum and animus lies at root of concept.

It is impossible to lay down an absolute definition of the word domicile, nevertheless it is now established that two constituent elements are necessary in law for the existence of domicile. First there should be residence of a particular kind. This residence, however, need not be continuous but it must be indefinite not purely fleeting; secondly there should be an intention of a particular kind and this intention must be a present intention to reside for ever in the country where the residence has been taken up.

LL/LL/F747/68

It is thus a synthesis of the factum and animus which lies at the root of the concept of domicile.

A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home.

Applying this well settled test to the facts of the case where it had been averred that the permanent home of the petitioner and his ancestors before him was in a town in Punjab, that he was said to be resident therein and that almost simultaneously with the attainment of majority the petitioner had returned from Kenya with the requisite intention and commenced dwelling and continued to do so in that permanent home, the crucial test of 'domicile' can be held to be amply satisfied. Case law discussed.

(Paras 7 and 8)

(B) Constitution of India, Art. 5 — Domicile of origin — Is the country where parents were domiciled at time of person's birth.

A legitimate child born during the subsistence of the marriage of his parents, has his domicile of origin in the country in which his father was domiciled at the time of his birth.

In a case where the petitioner was born in the State of Punjab to parents who were domiciled in that State, his domicile clearly follows that of his parents and when once this is established, the burden is very heavy on the person contesting it to show that this domicile of origin has been abandoned in favour of another domicile of choice. In such cases, according to Dicey, there is a strong presumption that a domicile once established is presumed to continue. (1904) A. C. 287; AIR 1964 Ker 244; AIR 1956 Bom 729, Rel. on. (Para 8)

(C) Constitution of India, Art. 5 — Different domiciles could exist for different States of India.

Under the Constitution, the power to legislate on succession, marriage and minority has been conferred under entry 5 in the Concurrent List on both the Union and State Legislature, and it is therefore quite conceivable that until the Centre intervenes and enacts a uniform code for the whole of India, each State might have its own laws on those subjects, and thus there could be different domiciles for different States. AIR 1955 SC 334; (1801) 31 ER 839 (c), Foll.

(Para 9)

(D) Constitution of India, Art. 5 — Nationality and domicile — Two different concepts — Private International Law, Explained.

Nationality and domicile are two different concepts in private international law is now a well settled proposition. According to Prof. Cheshire, nationality represents a man's political status, by

virtue of which he owes allegiance to some particular country; domicile indicates his civil status and it provides the law by which his personal rights and obligations are determined. (1869) 1 SC & Div. 441 and AIR 1955 SC 334, Foll.

(Para 6)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 Ker 244 (V 51)= | |
| ILR (1964) 1 Ker 384, Sankaran | |
| Govindan v. Lakshmi Bharathi | 8 |
| (1956) AIR 1956 Bom 729 (V 43)= | |
| Michael Anthony Rodrigues v. | |
| State of Bombay | 8 |
| (1955) AIR 1955 SC 334 (V 42)= | |
| 1955 SCR 1215, D. P. Joshi v. | |
| State | 6, 9 |
| (1904) 1904 AC 287 = 73 LJ KB | |
| 613, Winans v. Attorney General | 7, 8 |
| (1892) 1892-3 Ch 180=67 LT 689, | |
| Craignish v. Craignish | 7 |
| (1878) 9 Ch D 441=26 WR 825, | |
| Doucet v. Geoghegan | 7 |
| (1869) 1 SC & Div 441 (HL), Udny | |
| v. Udny | 6 |
| (1858) 7 HLC 124=28 LJ Ch 396, | |
| Whicker v. Hume | 7 |
| (1801) 31 ER 839=5 Ves 750, | |
| Somerville v. Somerville (Lord) | 9 |

Manmohan Singh, for Petitioner; G. S. Chawla, for Advocate General, for Respondent No. 1.

SANDHAWALIA, J.: This petition under Article 226 of the Constitution of India was admitted to hearing by a Division Bench as on the averments made therein important issues pertaining to the nationality and the domicile of the petitioner fell for determination.

2. The facts averred by the petitioner Malkiat Singh are that the parents and the grand-parents of the petitioner were born in the territory of India and are Indian citizens. The family owns immovable property in the State of Punjab and the family home is in the town of Nakodar where they owned an ancestral dwelling house in Mohalla Bahadurpur. The father of the petitioner in the year 1942 left for Kenya but on the termination of the Second World War in 1945 he returned to India and it was on the 10th of October, 1946, that the petitioner was born to his parents at Nakodar. In the year 1947, the parents of the petitioner again went to Kenya taking the petitioner along with them. The petitioner had his education in Kenya during his stay there till May, 1965, and passed the Senior Cambridge Examination in December, 1964, in Kenya. It has been averred that for the last three years ever since his return from Kenya, the petitioner is residing in the family house at Mohalla Bahadurpur in Nakodar and a certificate to the said effect granted by the Sub-Divisional Magistrate, Nakodar, has been annexed as annexure 'A' to the

petition. The petitioner has been pursuing his studies in India and in the year 1968 he passed his first year B. Sc. (TDC) Examination by obtaining 67% of the aggregate marks thus becoming eligible for admission to the 1st year MBBS Course, 1968. It has been admitted in the petition that the petitioner travelled from Kenya to India on a British Passport but it has been expressly averred that at no stage he ever renounced or revoked his citizenship nor has he any such intention and on the principles of Dual citizenship, Indian citizens are entitled to take British passports for the purposes of travel.

3. In pursuance of a notice for admission to the 1st Year MBBS Course in the Government Medical College at Patiala and Amritsar, the petitioner had submitted his admission form to the Principal, Government College, Patiala, respondent No. 3 in his office on the 29th June, 1968. The petitioner, however, had opted his preference for admission to the Government College, Amritsar, and the interview for admission to both the colleges was held jointly by the Selection Committee at Patiala. The petitioner was duly interviewed on the 19th of July, 1968, and has averred that he was placed at serial No 146 out of the 200 selected candidates against the seats reserved for open merit under rule 5 (viii) of the Brochure for admission to the 1st Year MBBS Course 1968. Respondent No. 3, vide his letter dated the 23rd July, 1968, annexure 'C' to the petition directed the petitioner to submit his passport to the Principal, Medical College, Amritsar, by the 27th of July, 1968, and the petitioner in compliance therewith submitted the same to the said Principal at Amritsar. It has then been averred that respondent No. 2, the Principal of the Government College, Amritsar, on seeing the Passport informed the petitioner that his admission had been cancelled as he was not a citizen of India and is in India only on a British Passport. He was further told that he was not eligible for admission against the seats reserved for open merit in accordance with rule 5 (viii) of the Brochure. Respondent No. 2, however, referred this matter to respondent No. 1, The Secretary, Health Department, Punjab, Civil Secretariat, Chandigarh, for further clarification and the petitioner was directed to appear before him. In compliance therewith it has been averred that the petitioner on the 6th of August, 1968, met respondent No. 1 but the latter without applying his mind to the facts or affording any proper or reasonable opportunity to him declined to interfere in the matter. Aggrieved by the above-said, the petitioner has thus come by way of a writ petition before this Court.

4. It may be noticed forthwith that respondents Nos. 2 and 3, the Principals of the Government Medical Colleges, Amritsar and Patiala, respectively who are in fact the contesting respondents have neither filed a written statement to this petition nor have they put in an appearance despite service, in this Court. The reply on behalf of respondent No. 1 has also been filed in the shape of an affidavit by Shri Sada Nand, I. A. S. who is the Deputy Secretary to the Government, Punjab, Medical and Health Department and respondent No. 1 has not personally filed any affidavit in reply to this petition. In the affidavit of Shri Sada Nand it has been stated that the petitioner has been a student of the Nehru Memorial College, Hanumangarh, in Rajasthan since July, 1967, and thus annexure 'A' filed by the petitioner to the effect that he has been a resident in Nakodar for the last 3 years is not in consonance with the facts. It has been further denied expressly that the petitioner was ever selected or placed at serial No. 146 of the list of the admitted candidates for the MBBS Course and the said list has been annexed as annexure R-II to the affidavit. It has been further stated that the rules for admission in the State Medical Colleges enumerated in the Brochure for admission provide that only the students domiciled in the Punjab will be admitted against the open merit seats and the petitioner was not an Indian Student domiciled in the Punjab. It has then been denied that the petitioner ever met respondent No. 1 or that the case of the petitioner was specifically referred to respondent No. 1. It has been stated that only the advice was sought by respondent No. 2 with regard to the elaboration of Government policy pertaining to the admission according to rules only.

5. Mr. Manmohan Singh, the learned counsel for the petitioner at the very outset submitted that the petitioner is clearly an Indian Citizen having been born in India at Nakodar to parents both of whom were citizens of India. It is contended by the petitioner that it has never been suggested by the respondents that he abandoned this right of Indian Citizenship in favour of any other nationality. As a matter of fact it is pointed out that all indicia point to the fact that the petitioner jealously wanted to retain his original Indian Nationality. Be that as it may, the learned counsel for the petitioner submits that for the purpose of this case the nationality or the citizenship of the petitioner is not of any great significance because even students having non-Indian Nationality are entitled to be considered against the open seats for admission to the Medical Colleges on the basis of merit. The learned counsel relies

in fact on annexure R. III which has been put on the record by the respondent No. 1 and places particular reliance on paragraph 2 of the same which is in the following terms.

"It has come to the notice of the Government of India that foreign students/Indian students domiciled abroad also apply directly to the Medical Colleges in India for admission outside the approved Scholarship Schemes or similar programmes. Such applications for admission from foreign students/Indian students domiciled abroad that apply directly to the Institutions may kindly be considered against open seats on merit basis and their admissions made according to the rules and regulations of the Institution. In such cases prior permission from/consultation with the Government of India is not necessary. However, names of such students along with details, such as the country from which they are coming, their home address, local reference and the course to which they are admitted should be supplied to the Ministry of External Affairs, New Delhi."

Relying on the above contention raised on behalf of the petitioner is that, whilst it is strenuously maintained that he is an Indian citizen, even if it be held otherwise he is nevertheless entitled to be considered on the basis of merit for admission to the Medical College. Mr. G. S. Chawla the learned counsel appearing on behalf of respondent No. 1 has not controverted this proposition and has in fact conceded that apart from students of Indian nationality as regards the open merit seats even foreign students are eligible to be considered and therefore in this context the position taken on behalf of respondents regarding annexure R-IV that the petitioner is a foreign student would in no way affect the right of the petitioner to be considered.

6. The issue that, therefore, now deserves consideration pertains to the domicile of the petitioner at the relevant time when he had sought admission to the Medical Colleges in Punjab. That Nationality and domicile are two different concepts in private international law is now a well settled proposition. Professor Cheshire in his authoritative book on Private International Law, 6th edition at page 194 whilst discussing these two concepts states as follows:

"These are two different conceptions. Nationality represents a man's political status, by virtue of which he owes allegiance to some particular country; domicile indicates his civil status and it provides the law by which his personal rights and obligations are determined."

The classic statement of the law pertaining to domicile and citizenship is that of Lord Westbury in *Udny v. Udny*, (1869)

LR 1 Sc. & Div. 441 (HL) wherein it has been observed as follows:

"The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend."

This enunciation of the law has been noticed with approval by the Supreme Court in *D. P. Joshi v. State of Madhya Bharat*, AIR 1955 SC 334.

The learned counsel for the petitioner in order to substantiate his contention that the petitioner is domiciled in Punjab has pointed out to four salient facts. He submits that at the time of his birth in India both his parents were Indian citizens being domiciled in the State of Punjab in India. His domicile of origin, therefore, followed that of his parents. It is then pointed out that permanent home of the petitioner and his family is at Nakodar where he has been resident ever since his return to India and lastly it has been argued that it was always the intention of the petitioner to return to the country of his birth and as soon as he attained majority he has returned with the necessary animus and as an admitted fact is resident at Nakodar with the said intention. Relying upon these facts the learned counsel contends that the only irresistible inference that arises is that the petitioner is clearly domiciled within the State of Punjab and even if it be admitted for the sake of argument that he had gone to Rajasthan for a limited purpose and a temporary residence for the purpose of higher education, that would not denude him of his domicile within the State of Punjab.

7. It has been very aptly remarked that even authoritative writers on Private International Law are agreed that it is impossible to lay down an absolute definition of the word 'domicile'. Even as early as 1878 Sir George Jessel in *Doucet v. Geoghegan* (1878) LR 9 Ch. D. 441 had warned that an absolute definition of this concept is impossible. One of the earliest and yet the simplest definitions of this expression was attempted by Chitty J. in *Craignish v. Craignish*, (1892) 3 Ch. 180, at p. 192 (a) in the following terms:

"That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom."

However, even this definition has never been held to be an absolute one. The

fact of the matter is that the term 'domicile' lends itself to illustrations but not to definition. Nevertheless it is now established that two constituent elements are necessary in law for the existence of domicile. Firstly there should be residence of a particular kind. This residence, however, need not be continuous but it must be indefinite not purely fleeting. Secondly there should be an intention of a particular kind and this intention must be a present intention to reside for ever in the country where the residence has been taken up. It is thus a synthesis of the factum and the animus which lies at the root of the concept of domicile. Dicey in his authoritative treatise on the Conflict of Laws has enunciated as follows at page 85 of his book, 7th edition:

"A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home."

That this notion of the permanent home is the corner stone of the concept of domicile is evidenced from the earliest statements of the English Law on the subject. In Whicker v. Hume, (1858) 7 H. L. C. 124 Lord Cranworth had observed as follows

"By domicile' we mean home, the permanent home, and if you do not understand your permanent home I am afraid that no illustrations drawn from foreign writers will very much help you to it."

This statement of the law has been virtually reaffirmed by the House of Lords in Winans v. Attorney General, (1904) A. C. 287.

8 Applying this well settled test to the facts of the present case it has been averred and has not been specifically controverted that the permanent dwelling house of the petitioner and his ancestors before him is in the town of Nakodar. This is averred to be his permanent home and the petitioner is said to be resident therein. The counsel points out that almost simultaneously with the attainment of majority the petitioner had returned from Kenya with the requisite intention and commenced dwelling in this permanent home and continues to be so resident therein. This crucial test, therefore, stands amply satisfied in the case of the petitioner. Regarding the contention pertaining to the domicile of origin itself, Dicey in the treatise referred to above states the rule in the following terms:

"A legitimate child born during the subsistence of the marriage of his parents has his domicile of origin in the country in which his father was domiciled at the time of his birth."

In the case of the petitioner, therefore, he was born at Nakodar to parents who were domiciled within the State of Punjab.

His domicile, therefore, clearly followed that of his parents. Once this is established as it has been in this case the burden is very heavy on the person contesting it to show that this domicile of origin has been abandoned in favour of another domicile of choice. In determining such cases the rule laid down by Dicey is that there is a strong presumption that a domicile once established is presumed to continue. In Winans's case, 1904 AC 287 Lord Macnaghten while contrasting the domicile of origin with a domicile of choice has laid down that there is the strongest possible presumption in favour of the continuance of domicile of origin. Further it has been said regarding this domicile of origin that:

"Its character is more enduring, its hold stronger and less easily shaken off". In fact the case law on this point warrants the conclusion that almost overwhelming evidence is required to shake it off. Two authorities cited by the learned counsel for the petitioner deserve notice in this context. In Sankaran Govindan v. Lakshmi Bharathi, AIR 1964 Ker 244, a Division Bench of the said High Court was considering a case where one Dr. Krishnan had left for England in 1920 for higher studies in medicine. He belonged originally to Travancore State. While in England he qualified himself in medicine and built up a considerable practice at Sheffield where he purchased a building and housed his evening surgery therein. He was in England for about 30 years and died there in October, 1950, and during this period of 30 years he never came to India. Only from some letters received from him it could be gathered that he wanted to come back to India after his insurance policy matured and after he had made enough money to lead a comfortable life in India. Even on these facts the learned Judges held that Dr. Krishnan did not lose his domicile of origin, namely that of India and had not acquired a domicile of choice in England. Similarly in Michael Anthony Rodrigues v. State of Bombay, AIR 1956 Bom 729 a Division Bench of the said Court consisting of Chagla C. J. and Dixit J. had observed as follows:

"It has been said that the character of the domicile of origin is of enduring character and the ties that bind you to your country of origin are extremely strong, and therefore the authorities require that the intention to acquire a new domicile must be manifest and carried into execution. The authorities also require that the person acquiring the domicile of choice must show a fixed and settled purpose of residing permanently or for an indefinite time in the country where he seeks to acquire the new domicile."

cile. It is equally true that the burden cannot be discharged by merely proving residence however long the duration of the residence may be."

The above being virtually the settled view of law it is not necessary to multiply authorities or to dilate further on this aspect of the case.

9. Mr. Manmohan Singh has then submitted that the petitioner was thus clearly domiciled within the State of Punjab. It is noticeable that whilst in certain authorities doubt has been cast whether it is possible to have a domicile in a Province or a State in India, the matter seems to have been set at rest by the authoritative pronouncement in D. P. Joshi's case, AIR 1955 SC 334. In this case the learned Judges of the Supreme Court were considering the question of discrimination on account of the place of birth in violation of Article 15 (1) of the Constitution in the light of the rules relating to the admissions to the Medical College at Indore which required a capitation fee from non-Madhya Bharat student. On a consideration of the case law and the statement of law in Halsbury's Laws of England and interpreting the leading authority in (1801) 31 ER 839 (C) it was observed as follows:

"On the facts the decision was that the domicile of origin which was Scotch, governed the succession. What is of interest in this decision is that it recognises that for purposes of succession there can be within one political unit, as many domiciles as there are systems of law, and that there can be a Scotch domicile, an English domicile and even a York domicile within Great Britain. Under the constitution, the power to legislate on succession, marriage and minority has been conferred under Entry 5 in the Concurrent List on both the Union and the State Legislatures, and it is therefore quite conceivable that until the Centre intervenes and enacts a uniform code for the whole of India, each State might have its own laws on those subjects, and thus there could be different domiciles for different States. We do not, therefore, see any force in the contention that there cannot be a domicile of Madhya Bharat under the Constitution."

The learned counsel for the petitioner has, therefore, in substance submitted that the case of the petitioner satisfied every conceivable test laid down by law for the determination and ascertainment of domicile and the petitioner falls clearly within the ambit of a person domiciled within Punjab.

10. The last argument advanced by Mr. Manmohan Singh is that rule 5 of the Brochure for admission to the first year M.B.B.S. Class 1968 (annexure 'B') lays down the qualification of the Pun-

jab domicile as regards the Schedule Castes and Tribes, Backward classes only. It does not apply to the seats which are to be filled on the basis of open merit. As the petitioner is competing only for the seats on the open merit it is submitted that even this qualification of Punjab domicile would not apply to him. It has been pointed out that N.B. 3 to rule 5 is applicable only to the Scheduled Castes, Tribes and Backward Classes as is apparent from the subsequent sub-head given in the Brochure which relates to Scheduled Castes/Tribes candidates only who are required further to file a certificate of their belonging to a recognised Scheduled Caste or Tribe from the Deputy Commissioner or other authorities concerned.

11. Mr. G. S. Chawla, the learned counsel appearing on behalf of respondent No. 1 has been unable to cite any authority contrary to those cited by the petitioner in support of his case. In fact Mr. Chawla has conceded that in the absence of an express and specific denial of the averments made in the petition it cannot be controverted that the petitioner is indeed domiciled in Punjab. Mr. Chawla very fairly conceded that merely by going for a short period to Rajasthan for the purpose of prosecuting his study the petitioner would not lose his domicile of origin in the Punjab. As regards the last argument advanced on behalf of the petitioner also Mr. Chawla has clearly stated that the qualification of having the domicile in the Punjab is required only in the case of the Scheduled Castes/Tribes and Backward Classes. In any case as regards the seats which have to be filled on the basis of open merit no such qualification of domicile is at all necessary. In view of this position taken up on behalf of respondent No. 1 the issue is thus clearly in favour of the petitioner and he is wholly eligible for consideration on the basis of merit for admission to the Medical Colleges in the Punjab.

12. As already noticed in the earlier part of this judgment, respondents Nos. 2 and 3 have not chosen to put in any appearance or to file an affidavit in reply. They are in fact the contesting respondents in this case and in default of their appearance the averments in the petition pertaining to them must be deemed to be true. On that basis the petitioner is clearly being denied the right to be considered and to secure admission to the Medical Colleges on the wholly extraneous ground that he had travelled on a British Passport and was thus ineligible. This view of respondents Nos. 2 and 3 is patently erroneous and no rule or provision of law has been pointed out to us to warrant the same.

13. We, therefore, allow this petition and restrain the respondents from refus-

ing to admit Malkiat Singh petitioner to the 1st Year Class of the M.B.B.S. Course at Amritsar or Patiala on the ground that the domicile certificate produced by him is not valid or on the ground that he is holding a British Passport. Consequently we further direct that the petitioner be admitted to the present 1st Year Class of the M.B.B.S. in the Medical College at Amritsar if he is not disentitled to be so admitted on the ground of the particular percentage of marks obtained by him in the first year of B.Sc. (T. D. C.).

14. In the circumstances of the case, however, we make no order as to costs.

15. NARULA, J.: I agree.
DGB/D.V.C. Petition allowed.

AIR 1969 PUNJAB & HARYANA 256 (V 56 C 44)

P. C. PANDIT J.

Prithi Raj Mehar Chand, Petitioner v. Hans Raj Gurditta Mal, Respondent.

Civil Revn. No. 411 of 1966, D/- 22-10-1968, against decision of Appellate Authority, Ferozepur, D/- 14-4-1966.

(A) Civil P. C. (1908), O. 13, R. 4 — Endorsements on documents exhibited and admitted in evidence — Requirements — Non-compliance — Effect.

When a document is exhibited under the provisions of O. 13 R. 4 Civil P. C. the particulars mentioned in clauses (a) to (d) of sub-rule (1) of O. 13 R. 4 have to be endorsed on the document. Where the Rent Controller had merely marked the document as Exhibit P and signed the same giving the date it cannot be said that the document was exhibited in accordance with law and as such no inference can be drawn that the document was exhibited only after its execution had been established. AIR 1966 Andh Pra 184 Rel. on.

(Para 9)

(B) Houses and Rents—East Punjab Urban Rent Restriction Act (3 of 1949) S. 15 (5)—New plea in revision—Point about proof of execution of document marked as exhibit not raised either before the Rent Controller or before the Appellate authority or even in grounds of revision — Cannot be entertained at stage of arguments in revision — (Civil P. C. (1908) S. 115).

(Para 9)

Cases Referred: Chronological Paras (1966) AIR 1966 Andh Pra 184 (V 53) — (1965) 2 Andh WR 276, Kollu Eranna v. Bellamkonda Thimmiah

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H. L. Sarin with H. S. Awasthy, for Petitioner; P. C. Khungar, for Respondent.

ORDER: This is a landlord's revision petition against the decision of the Appellate Authority, reversing on appeal the order of the Rent Controller ordering the eviction of the tenant from the premises in dispute, under section 13 of the East Punjab Urban Rent Restriction Act, 1949, (hereinafter called the Act).

2. The premises in dispute is a shop situate in Muktsar, district Ferozepur. An application under section 13 of the Act was filed by Prithi Raj against Hans Raj on the ground that the latter had failed to pay the arrears of rent from 5-5-1957.

3. This application was contested by the tenant who pleaded that the landlord was not the owner of the shop in question and there was no relationship of landlord and tenant between the parties. His case was that he was in possession of the shop for more than 12 years and had become owner thereof by adverse possession. According to him, the real owners of the shop were Kishore Chand and others, who sold the same in favour of Mehar Chand, father of the landlord, more than 12 years back. It was possible that the sale had been effected benami in the name of the landlord, who was the son of Mehar Chand. Both the vendors and the vendee knew at the time of sale that the tenant was in possession of the said shop and he had become owner thereof by adverse possession. The landlord never got possession of the shop. He should have obtained its possession within time and now he had no right in it.

4. On the pleadings of the parties, the following issues were framed by the Rent Controller:

1. Whether there is a relationship of landlord and tenant between the respondent and applicant?

2. Whether the respondent has defaulted in payment of rent, in case he is a tenant and if so, what is the effect?

3. Whether the applicant has title to the property under rent and whether this Court has jurisdiction to decide the title? Under issue No. 1, he found that there was relationship of landlord and tenant between the parties, because the tenant had executed a rent note, Exhibit P-7, on 5th of May, 1957 in favour of the landlord and had agreed to pay rent at Rs. 20/- per mensem. Under issue No. 2, it was found that the tenant had not made payment of any rent to the landlord, because his own case was that he was not liable to pay rent to the landlord. So far as issue No. 3 was concerned, it was held that the question of title was for the civil court, to decide and it was not within the jurisdiction of the Rent Controller to determine that matter. On these findings, the eviction application was granted.

in this case was Jaipur-Pilani and both the termini were the same. The petitioner's contention was that the petitioner's application made in 1960 for issue of permit for the route in question, was not published and was consequently not considered along with the applications of the respondents. The learned single Judge dismissed the writ application holding that the petitioner had applied for extension of his permit on the Jaipur-Sikar amalgamated route up to Pilani and not for fresh permit on the Jaipur-Pilani route and, therefore, the principle of considering all the applications together, as laid down in the earlier decision of this Court, had no application. The Division Bench in disagreement from the learned single Judge came to the conclusion that the petitioner applied for grant of permit for the Jaipur-Pilani route and based its decision on the footing that the applications of the petitioner and the opposite party were for the permits on the same route lying between the same two termini, and in this view of the matter the learned Judges held that the principle laid down in *Brothers Transport Service, Nathdwara's case*, Civil Writ Petn. No. 199 of 1956, D/- 12-8-1957 (Raj) had full application, and, therefore, they set aside the order of the learned single Judge and directed the Regional Transport Authority to publish all the applications for grant of permit on Jaipur-Pilani route and then to decide them together. It may, thus, be noted that the finding was that the route, for which the permits had been applied for by the contesting parties lay between the same two termini, namely, Jaipur and Pilani.

12. In *Surendra Kumar Sharma v. Regional Transport Authority, Jaipur Region, Jaipur*, Civil Writ Petn. No. 460 of 1967=(AIR 1968 Raj 294) decided by one of us sitting singly on 20th Dec. 1967, the Regional Transport Authority was directed to consider the application of the petitioner for grant of permit on Beawar-Todgarh route along with the application of the opposite party Chelaram. In this case also the route was the same and it lay between the same two termini that is Beawar and Todgarh. It was held in this case that if more than one applications are pending and are ripe for consideration, then there is no reason for the Regional Transport Authority to consider only one application and postpone the rest. It was further held that this principle would apply to all such applications which are ripe for consideration even though some of them may have been made after the application of one of such applicants had been remanded by the Transport Appellate Tribunal for fresh consideration.

13. The last case on this point relied upon by Society is *Shiv Charan Lal*
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v. Regional Transport Authority, Jaipur Region, Jaipur (Civil Writ Petn. No. 657 of 1967) decided on 16th April, 1968 (Raj). The writ application filed in this case pertained to Alwar-Pahadi route and there was no dispute between the parties regarding the route and the two termini being exactly the same in respect of the permits they had sought. The grievance of the petitioner was that although his application had become ripe for consideration, the Regional Transport Authority did not consider it along with the applications of the opposite parties Nos. 2 and 3 and leaving out his application granted one permit each to the opposite parties Nos. 2 and 3. The petitioner's case was resisted on the ground that the opposite parties had made their applications earlier to those made by the petitioner and the Regional Transport Authority was, therefore, justified in taking up and disposing of the earlier applications filed by the opposite parties. The learned Single Judge, however, held that, —

"If all the applications that are ripe for hearing at the time the meeting of the Regional Transport Authority is proposed to be convened are considered together, then everyone is likely to have a fair deal."

In this view of the matter, the impugned resolution of the Regional Transport Authority granting permits to the opposite parties Nos. 2 and 3 was quashed and the Regional Transport Authority was directed to dispose of all pending applications on the Alwar-Pahadi route.

14. It may be convenient here to deal with the judgment of their Lordships of the Supreme Court in *Purshottam Bhai Punam Bhai Patel's case*, Civil Appeal No. 762 of 1963 D/- 14-4-1964 (SC) (supra) on which the learned Counsel for the appellants has mainly rested his case. The facts of this case are these: In January 1958, the Malwa etc. Co-operative Society (to which we shall refer as the 'Society'), and certain other Motor Transport operators applied to the Regional Transport Authority for grant of a permit for Burhanpur-Indore route. While these applications were pending, Purshottam Bhai Patel and Babulal also applied to the same authority on 30th May, 1958, for grant of a permit on the route Burhanpur to Ujjain via Indore. These two routes were identical upto a long distance overlapping in so far as they were between Burhanpur to Indore. The Society did not oppose the grant of permits for this route; but was granted permits on the route Burhanpur to Indore on 29th November, 1958. The applications of Purshottam Bhai Patel and Babulal for the route Burhanpur to Ujjain were dismissed by the Regional Transport Authority on 29th December, 1959. Purshottam Bhai Patel and Babulal filed appeals

before the Appellate Tribunal. While their appeals were pending the Society also filed an application on 2nd November, 1960, for extension of their route Burhanpur-Indore to Ujjain. Patel and Babulal opposed this application for extension. But before the Society's application for extension could be decided, the appeals filed by Patel and Babulal were decided by the Tribunal and their cases were remanded to the Regional Transport Authority to issue permits for the route Burhanpur to Ujjain to both Patel and Babulal, if there was scope for two, and if there was scope for one only, then one permit to be given to either Patel or Babulal whomsoever the Authority thought fit. By its order dated 28th April, 1961, the Regional Transport Authority held that one permit was sufficient on this through route and the permit was directed to be shared equally by Patel and Babulal. In making this order the Authority noted that the consideration of the applications of the operators including the Society for extension of permits on the route Burhanpur-Indore upto Ujjain be deferred. Patel and Babulal filed appeal from the order of the Regional Transport Authority and obtained an injunction from the Tribunal restraining the Transport Authority from dealing with the application of the Society for extension of the route. Then on 6th October, 1962 the Tribunal allowed the appeal filed by Patel and Babulal and granted each of them a full permit on Burhanpur-Ujjain route. It was legality of this order of the Tribunal that was challenged by the Society by a writ petition before the High Court. The High Court set aside the order of the Tribunal and hence the Society filed appeal to the Supreme Court by special leave.

15. Their Lordships of the Supreme Court held that the Tribunal cannot be said to have ignored consideration of the terms of Section 47 (1) (c) in making the impugned order. It was observed, —

"The possibility of this order (impugned order of the Tribunal) prejudging or prejudicing the consideration of the application of the society for the grant of an extension of route, ought not, in our opinion, to weigh with us in considering the legality of the impugned order of the Tribunal. The matters raised by the two sets of applications were really distinct, and we consider that there was no error of jurisdiction, or a patent error of law in the order of the Tribunal to justify interference by the High Court by the issue of a writ of certiorari."

(The underlining (here in ' ') is ours).

16. It may, here, be pointed out that two main contentions were advanced in this case before the Supreme Court. The first was, that the order of the Tribunal was correct having regard to the history

of the proceedings and in any event the Tribunal had not committed any error of jurisdiction. The second contention was that on a proper consideration of the relevant provisions of the Motor Vehicles Act the two sets of applications — the one for extension of the route from Indore to Ujjain and the other for grant of permit on the through route from Burhanpur to Ujjain — were distinct matters, which ought to be considered separately. While deciding the first contention their Lordships have observed, as would be clear from the underlined (here in ' ') sentence in the passage from their Lordships' judgment, which we have extracted above, that their Lordships came to the conclusion that the application of the Society for extension of its permit from Indore to Ujjain was a distinct matter from the applications made by Patel and Babulal for grant of fresh permits on the route Burhanpur to Ujjain. Mr. Rastogi, learned Counsel for the appellants, contends that their Lordships' decision in *Purshottam Bhai Punam Bhai Patel's case*, Civil Appeal No. 762 of 1963, D/- 14-4-1964 (SC) (supra) is on all fours with the present case.

17. It appears, that it was argued before the learned Single Judge that the view taken by this Court in the cases referred to above is no longer good law in view of the pronouncement of their Lordships of the Supreme Court in *Purshottam Bhai Punam Bhai Patel's case*, Civil Appeal No. 762 of 1963, D/- 14-4-1964 (SC). The learned Single Judge repelled this contention on two grounds, firstly that *Bhonrilal's case* 1967 Raj LW 481 (supra), was decided by a Division Bench of this Court on 17-1-67, whereas the Supreme Court judgment is dated 14th April, 1964. In the second place the learned Single Judge also held that their Lordships had declined to decide the question that applications by different parties — one for smaller portion of a route and the other for the entire route — should be considered and dealt with separately and in this connection reference was made to the following passage of their Lordships judgment:—

"The second submission of Mr. Sen was that each application for the grant of a permit constituted a separate proceeding which had to be dealt with in isolation and without regard to other applications for the same, or related routes which might be pending at the time, any one application was heard and disposed of by the Transport Authority under Section 57 (5). In other words the argument was that on the scheme of the Act, it would have been an error on the part of Transport Authorities to have considered such pending applications for permits and the possibility of their being granted, while making orders on applications being

heard and decided under Section 57 (5). In view of our conclusion on the first of the arguments we prefer not to express any final opinion on this submission and hence are not setting out the provisions of the Act on which reliance was placed by the learned Counsel as leading to the result he urged us to adopt. We might, however, observe that having regard to the terms of Section 47 (1) (c) of the Act we are unable as at present advised to accept the submission in the absolute form he presented. Without further and careful examination of the various provisions to which learned Counsel invited our attention and consideration of the various situations which might arise, it would not be possible to lay down in precise terms the degree of relevance which should attach to other applications pending at the time when another set of them is being considered. This for the reasons already stated, we do not consider it necessary to undertake to dispose of in this appeal."

18. The learned Counsel for the appellants has not argued before us that the view taken in *Bhonrilal's case*, 1967 Raj LW 481 is no longer good law in view of the pronouncement of their Lordships of the Supreme Court in *Purshottam Bhai Punam Bhai Patel's case*, Civil Appeal No. 762 of 1963, D/- 14-4-1964 (SC) (supra). We, therefore, need express no opinion on this point, as we think, that it is not necessary for us to do so for the decision of this case. All that we can say is that *Purshottam Bhai Punam Bhai Patel's case*, Civil Appeal No. 762 of 1963, D/- 14-4-1964 (SC) was not brought to the notice of the learned Judges who decided *Bhonri Lal's case*, 1967 Raj LW 481 and, therefore, the impact of *Purshottam Bhai's case*, Civil Appeal No. 762 of 1963, D/- 14-4-1964 (SC) on the earlier decisions of this Court was not examined. We would, therefore, leave this question to be decided in an appropriate case. But we cannot fail to observe that there is some similarity between the facts of the case in hand and *Purshottam Bhai Punam Bhai Patel's case*, Civil Appeal No. 762 of 1963, D/- 14-4-1964 (SC) and we are of opinion that the view expressed by their Lordships in this case has direct bearing on the point at issue before us. It does appear to us that some earlier portions of the Supreme Court's judgment escaped the notice of the learned Single Judge. At one place the learned Single Judge has observed in his judgment,—

"What is more important is: if by grant of one set of applications over the same highway the fate of the other set of applications over the same highway though for a longer or shorter distance is to be sealed or materially affected, then in such a case it will be the bounden duty of the

Regional Transport Authority to decide all such applications together at one hearing, provided of course they are all ripe. However, if the fate of the applications of one set is not likely to be affected by deciding applications of the other set, then the Regional Transport Authority may not think it proper to decide them together."

From this passage it appears that one of the foremost considerations before the learned Single Judge for taking the view which he did, was — the possibility of prejudice to some of the applicants, whose applications would be postponed. But this factor of likely prejudice, did not weigh with their Lordships of the Supreme Court as would be clear from the passage of their Lordships' judgment which we have extracted above. There is also no gain-saying the fact that according to the view expressed by their Lordships of the Supreme Court the matters raised by the two sets of applications, namely, applications of the appellants and that of the Society were really distinct, as one was for a fresh permit on Jaipur-Khetri route and the other was for extension of the existing permit by inclusion of a new route. In these circumstances the question arises whether the principle laid down in the earlier decisions of this Court referred to above should be extended to the present case also where the matters raised by the two sets of applications are distinct.

19. It is agreed by the Counsel on both the sides that the only relevant provision of law, which can be said to have bearing on the question of simultaneous consideration of applications on a particular route is Section 47 (1) (c). It would be proper at this stage to refer to the provisions of Section 47 (1) (c).

"47(1) A Regional Transport Authority shall, in considering an application for a stage carriage permit, have regard to the following matters, namely,—

(c) that adequacy of other passenger transport services operating or likely to operate in near future, whether by road or other means, between the places to be served,"

From its bare perusal, it would be clear that the section requires that in considering an application for stage carriage permit, the Regional Transport Authority shall have regard inter alia to the adequacy of the passenger services operating or likely to operate in the near future, whether by road or other means, between the places to be served. In other words the Transport Authority must be alive to adequacy of the other transport services operating or likely to operate between the places, to be served. The words "between the places to be served" in our opinion refer to the two termini which are not the same in the present case. Moreover,

In the impugned resolution the Regional Transport Authority has clearly stated that in respect of Jaipur-Jhunjhunu route, which is a through route, it would be necessary first to get a survey report before deciding the question of grant of permit on this route, and, therefore, applications of the Society and such other applicants, who are already holding permits from Jhunjhunu to Nim-ka-thana, were postponed till the survey report was received and it was further directed that this matter may be taken along with Item No. 2/107, which pertains to Jaipur-Sikar amalgamated route. Thus the Regional Transport Authority was not oblivious of the fact that it was granting permits to the appellants on a partly over-lapping intermediary route and that there were applications of the existing operators pending for extension of their permits from Nim-ka-Thana to Jaipur. This gives a clear indication that the Transport Authority considered that the grant of 18 permits to the appellants and a few others, (respondents Nos. 2 to 19, in the writ application), would not shut out the due and proper consideration of the application of the Society and those of other applicants like the Society for extension of the route. Thus the view of the Transport Authority cannot be said to be patently erroneous, because in the case of extension of permits or in other words, inclusion of a new route in permits, different considerations may apply and the survey of traffic may be necessary. For instance in the present case it was decided as far back as in 1965 that the route between Jhunjhunu and Jaipur should be surveyed. We are also of the view that different considerations may apply at the time of granting permits for through or direct service from Jhunjhunu to Jaipur by different vias. In these circumstances the postponement of the applications by way of extension so as to provide a direct service from Jhunjhunu to Jaipur by whichever vias, cannot be said to be a patent illegality nor can it be said that the Transport Authority exceeded its jurisdiction in deciding the applications for permits from Khetri to Jaipur, while postponing consideration of applications of the Society and other applicants like the Society. We are, therefore, of opinion that the Regional Transport Authority did not commit any error of jurisdiction nor did it commit any patent illegality in granting permits to the appellants for Jaipur-Khetri route while postponing the decision of the Society's application for extension of its permit from Nim-ka-Thana to Jaipur.

20. Learned Counsel for the Society was at pains to submit that the route for which the Society as well as the appellants had applied was the same route and

in this connection our attention was invited to a few authorities, viz., Nilkanth Prasad v. State of Bihar, AIR 1962 SC 1135 and C. P. C. Motor Service, Mysore v. State of Mysore, AIR 1966 SC 1661. He also made reference to words "Area", "Route", or "Portion of the routes" in Ss. 58-C (68-C7), 68-D, 68-F (2) and Section 45. The learned Single Judge was of the opinion that "it is not the two termini of the routes that alone would be determinative of certain routes being the same or being different and distinct from each other." We do not think it necessary to enter into the discussion of the question as to what are the implications of the term "route" and whether the application of the Society and the applications of the appellants were for the same route or different routes. It cannot be denied that all the cases of this Court relied upon by the learned Counsel for the Society relate to the same route in the sense that the applicants wanted permits for the routes falling between the same two termini on the same highway. Even according to the learned Single Judge this distinguishing feature in the present case was there, but in his opinion "the rationale of those decisions and the thought underlying them" would apply to the present case also, because to hold otherwise, according to him, would result in prejudice to the Society and to adopt any other course would not be in consonance with justice and fair-play. As we have already observed above the question of prejudice according to the view taken by their Lordships of the Supreme Court is not at all a material consideration.

21. True, it is, that their Lordships of the Supreme Court declined to decide the second submission made on behalf of the petitioner in that case that each application for the grant of a permit constituted a separate proceeding which had to be dealt with in isolation and without regard to the other applications for the same or related routes, which might be pending at the time any one application was heard and disposed of by the Transport Authority under Section 57 (5). In other words a very broad argument was made before their Lordships that it would be an error on the part of Transport Authorities to consider such pending applications for permits and the possibility of their being granted, while making orders on applications which are being heard and decided under Section 57 (5). Such a broad proposition is not being pressed upon us by Mr. Rastogi. The passage from their Lordships' judgment extracted by the learned Single Judge, however, does not lead to the conclusion that their Lordships were of the view that applications for grant of new permits overlapping intermediary existing route and for ex-

tension of the existing route of certain persons must be decided together. On the other hand their Lordships were pleased to hold that the matters raised by such two sets of applications are really distinct. In this connection their Lordships were further pleased to observe,—

"If it were held that immediately an application is made for a permit on a route which is the same as that for which applications are being considered by the Transport Authority under Section 57 (5) or which might have a material bearing on the grant of permits on that route, the Transport Authority would have to hold its hands and wait till all the applications could be considered together, then it would be apparent that if there are successive applications at intervals for these permits, the stage might never be reached when the applications could be considered and a permit granted. Once it is recognised that the grant of permits to transport operators to ply their carriages on specified route is primarily for the benefit of the travelling public, it would be seen that such a result would mean that the public would be deprived of a transport service for appreciable length of time and this could not have been contemplated by the Act."

In our humble opinion, the learned Single Judge was in error in not considering the effect of the judgment of their Lordships as a whole and in holding that this judgment of their Lordships had no application to the present case merely because their Lordships refrained from deciding the second submission, made by Mr. Sen, the learned Counsel for the petitioner.

22. In *Purshottam Bhai Punam Bhai Patel's case*, Civil Appeal No. 762 of 1963 D/- 14-4-1964 (SC) (*supra*) in the words of their Lordships of the Supreme Court,—

"The learned Judges (of the High Court) had quashed the order of the Tribunal for the reasons that the Tribunal had dealt with the applications of Patel and Babulal without considering the possibility of the application of the Society for extension of its route from Indore to Ujjain being granted and that such an order was, therefore, calculated to prejudice the grant of the extension under an application which was still pending." Their Lordships expressed their dissent from this view of the High Court.

23. Thus a careful study of the judgment of their Lordships of the Supreme Court leads us to the conclusion that the permits granted to the appellants in the present case cannot be quashed on the ground that the Society's application and applications of other applicants for extension of their routes were postponed till the receipt of the survey report.

24. It was also argued on behalf of the Society that having once decided to

consider all the applications together, vide its resolution dated 16-9-67, 20-10-67 and 19-11-67, the Regional Transport Authority acted mala fide in granting permits to the appellants and postponing the consideration of the Society's application as well as the applications of the other applicants for extension of their routes to Jaipur. This argument has no substance firstly because no allegations of fact, so as to enable us to draw inference of mala fides, were made by the Society in the writ application, and secondly because no case of mala fides has been made out even in the course of arguments. Decision for surveying the routes between Jhunjhunu to Jaipur had been taken by the Regional Transport Authority as far back as in 1965 and, therefore, if at the time of examining the matter more closely the Regional Transport Authority came to the decision that the Society's application could not be disposed of before getting the route surveyed, it cannot be said that the Regional Transport Authority acted mala fide.

25. A lot of argument was addressed from both the sides on the question whether the Society had locus standi to challenge the permits granted to the appellants by a writ application in view of the fact that the Society had not filed any objections to the applications submitted by the appellants. Reference was made in this connection to *Shyam Singh v. The Regional Transport Authority, Udaipur Region, Udaipur*, (*supra*), *Ram Gopal v. Anant Prasad*, AIR 1959 SC 851, *Sashi Kant Rai v. Regional Transport Authority, Allahabad Region, Allahabad*, AIR 1968 All 229, *Bhagsingh v. Transport Appellate Tribunal, Rajasthan*, 1966 Raj LW 66 and *Sharma Roadways v. Sohanlal Soni*, ILR (1965) 15 Raj 804. The learned Single Judge held that it was not necessary for the Society to have filed a separate representation against the appellants and in this connection reliance was placed on *Bhonrilal's case*, 1967 Raj LW 481. It was held by him that "the Society was not entering into a competition with the several respondents individually though as a group it was contending that no permits be granted on Jaipur-Khetri route to any of the appellants, but its own permits be extended as applied for." It was observed in *Bhonrilal's case*, 1967 Raj LW 481 that candidates for permits who were already in the arena and are competing against one another need not always file separate representations against the other rival applicants. It was further observed that once the applications of the candidates are published, it is sufficient notice for everybody including the rival applicants to be forewarned. They ought to bear in mind that the other applicants would plead as to how they deserve consideration in comparison to other appli-

cants. In these circumstances in our opinion the learned Single Judge was correct in not throwing out the writ application filed by the Society merely on the ground that the society had not filed objections to the applications of the appellants.

26. Learned Counsel for the Society also directed his attack against four appellants individually. It was urged that the appellants Mohammed Yusuf and Sayed Ahmed in Appeal No. 34 of 1968, have applied for a different route namely Jaipur to Khetri Copper Mines via Chomu-Sikar route. It is contended that this action on the part of the Regional Transport Authority was manifestly in breach of proviso to Section 48 (1) of the Motor Vehicles Act. This position is not controverted by Shri R. R. Vyas on behalf of Sayed Ahmed and Mohammed Yusuf. But all that is contended is that the Society is not entitled to raise such pleas inasmuch as it was neither a co-applicant on Jaipur-Khetri route nor did it file any objection against these appellants. Proviso to Section 48 sub-section (1) runs as under,—

"Provided that no such permit shall be granted in respect of any route or area not specified in the application."

27. Thus the Regional Transport Authority had no jurisdiction to grant permit to the appellants Mohammed Yusuf and Sayed Ahmed in respect of a route which they had not specified in their applications (Ex. 11 and Ex. 12). It has already been held above that the mere fact that no separate objection had been filed by the Society to the applications filed by the appellants is no ground for non-suiting the Society. Consequently there is no escape from the conclusion that the permits granted to the appellants Mohammed Yusuf and Sayed Ahmed in Appeal No. 34 of 1968 are without jurisdiction and are liable to be quashed.

28. Similar attack was directed against appellant Madan Singh in Appeal No. 33 of 1968 on the ground that one Man Singh had signed the application on behalf of Madan Singh, appellant No. 5. In case of M/s. Gram Transport Service, appellants in Appeal No. 33 of 1968, it is alleged that they got issued permit for vehicle No. RSL 6180, which was already employed by them on a different route namely Jaipur-Sikar amalgamated route. It is contended that this appellant got a permit by fraud and misrepresentation. The reply on behalf of M/s. Gram Transport Service is that they had got the permit issued on Jaipur-Khetri route after withdrawing the vehicle No. RSL 6180 from Jaipur-Sikar amalgamated route of which they had intimated the Regional Transport Authority in writing before obtaining the permit. In case of Madan Singh

it is pleaded that the signature on the application was authenticated and a power of attorney in favour of Man Singh had been filed. It is urged on their behalf that such grounds cannot be taken in this Court and if the society feels aggrieved of grant of permits to the said appellants on account of any fraud or misrepresentation, the remedy is provided by Section 60 (1) (c) of the Motor Vehicles Act under which it is open to the Society to approach the Transport Authority for cancelling or suspending the permits. The contention raised on behalf of the appellants is not without force. It is correct that under Section 60 (1) (d) of the Motor Vehicles Act, the Transport Authority which granted the permit may cancel the permit or may suspend it for such period as it thinks fit, if the holder of the permit has obtained the permit by fraud or misrepresentation. We are, therefore, not prepared to entertain this objection of the Society and leave it to pursue the remedy provided under Section 60 of the Act if so advised.

29. The net result of our findings is that the Appeals Nos. 33 of 1968 and 35 of 1968 are allowed and the judgment of the learned Single Judge dated 11-7-1968 is set aside qua these appellants and the writ application filed by the Society against these appellants is dismissed. The Appeal No. 34 of 1968 filed by the appellants Sayed Ahmed and Mohammed Yusuf is dismissed and the order of the learned Single Judge cancelling the permits granted to these appellants is maintained, though for different reasons.

30. Appeal No. 36 of 1968 filed by the Regional Transport Authority, Jaipur Region, Jaipur is partly allowed and the judgment of the learned Single Judge is set aside except to the extent that the order of cancellation of the permits granted to Sayed Ahmed and Mohammed Yusuf be maintained.

31. All the four appeals are disposed of accordingly. In the circumstances of the case we leave all the parties to bear their own costs.

BNP/D.V.C.

Appeal partly allowed.

AIR 1969 RAJASTHAN 182 (V 56 C 37)

L. S. MEHTA AND C. M. LODHA, JJ.

Surendrakumar and others, Petitioners v. State of Rajasthan and others, Respondents.

Civil Writ Petns. Nos. 751, 753, 775 and 758 of 1968, D/- 31-10-1968.

(A) Constitution of India, Art. 14 — Discrimination — Reservation of seats in Medical Colleges — Reasonableness — Tests.

LL/BM/G283/68

The reservations of seats in the Medical Colleges in the State of Rajasthan for the children of (i) Doctors, Vaid, Hakims and para-medical staff; (ii) Political sufferers; (iii) Members of Parliament and Legislative Assembly and the reservation of seats to be filled by the Government in its discretion in special cases in particular circumstances, are invalid, unreasonable and unconstitutional. They amount to discrimination and offend Art. 14 of the Constitution. Case law discussed. (Para 23)

The object of the classification or reservation can only be to obtain the best material for medical profession and this object cannot be achieved by the reservation. (Para 14)

However, while judging the reasonableness of the classification not only the abstract proposition of reasonableness but also the circumstances prevailing in the country and the larger national interests which are supreme, are to be kept in mind. Thus considered, the State of Rajasthan being a border State the reservation of seats for the children of the Defence Personnel is in the larger interest of the nation. Such reservation in their favour has to be upheld. AIR 1968 SC 1012, Disting. (Para 17)

(B) Education — Rajasthan University Act, Statute 26 (4) — Powers of Government to prescribe conditions for admission.

The State Government of Rajasthan which runs the Medical Colleges in the State has power to prescribe conditions for admission of students to the Colleges. It is not correct to say that it is only the Principal who is appointed by the Government who can prescribe the conditions. Thus where the Government by notification alters the age limit, viz., raises the upper age limit from 21 to 22 years after the date prescribed for submission of applications for admission it cannot be struck down as being without jurisdiction. (Para 21)

It is true that a few individuals get the benefit out of this relaxation in age but that by itself cannot be sufficient to brandish the order as mala fide. The presumption is that the Government has acted honestly unless the contrary is shown. The notification cannot also be adjudged invalid merely on the ground that the chance of admission of the petitioners became bleak on account of raising of the upper age limit. (Paras 20, 22)

(C) Constitution of India, Art. 226 — Order of Executive Authority — Justiciability.

If a notification passed by the Government in exercise of its executive powers comes in conflict with any of the Fundamental rights guaranteed under the Constitution or any other legal rights of the

subjects, it will be struck down by the High Court under Art. 226 of the Constitution. (Para 22)

(D) Constitution of India, Art. 226 — Consequential order — Reservation of seats in Medical Colleges for particular classes — Reservation held invalid — It would not be proper to non-seat the candidates against the reserved quota who had already been admitted and had paid fees. Case law discussed. (Para 24)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 1012 (V 55)=
(1968) 2 SCR 786, P. Rajendran
v. State of Madras 11, 16, 21

(1968) AIR 1968 Pat 3 (V 55)=
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Chandra v. V. N. Singh 11, 12, 24

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The State of Kerala 24

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1966 Cri LJ 904, Lalita Shuri
v. State of Jammu & Kashmir 24

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(1965) 2 Mys LJ 571, Subhashini
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V. Raghuramulu v. State of Andhra
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(1952) AIR 1952 SC 196 (V 39)=
1952 Cri LJ 966, State of Madras
v. V. G. Row 16

(1950) 1950 Raj LW 19, Deonarain
v. Principal Jaswant College 19, 21

Narendra Kumar Kasliwal, for Petitioner (Surendra Kumar); Marudhar Mridul, for Petitioners (Shivratan Joshi, Gopal Bihari and Shivprakash); Gulabchand Kasliwal, Advocate-General and Raj Narain Munshi, Addl. Govt. Advocate, for the State of Rajasthan and (Respondents Nos. 2 to 7); Dwarka Prasad Gupta, for Respondents, (Rahulkumar Ravindra Prasad, Budhi Prakash and Vijendra Narain); A. L. Mehta, for Respondents, (Prafull Kumar and Suresh Kumar); K. C. Gaur, for Respondent No. 21, (Dulesingh); S. K. Keshote, for Respondent No. 36, (Rajendra Singh Chaudhary); S. R. Surana, for Respondent (Devendra Singh).

LODHA, J.:— By these writ petitions, the petitioners have challenged reservation of certain seats made by the Government of Rajasthan in the Medical Colleges run by it in the State. The petitioners have also challenged the notification No. F.5(1)ME/68 dated 30th August, 1968, (Exhibit 3) by which the Government of Rajasthan raised the upper age limit for admission to Medical Colleges in Rajasthan from 21 years to 22 years. Since all these writ petitions raise identical questions, we consider it convenient to dispose them of by a single judgment.

2. All the petitioners passed the First Year of the Three Years Degree Course (Science) Examination in the year 1968 and applied for admission to the various Medical Colleges of Rajasthan for the session commencing from July 1968. It may be stated here that there are five Medical Colleges in the State of Rajasthan run by the Government, and they are located at Jaipur, Bikaner, Udaipur, Jodhpur and Ajmer and all of them are affiliated to the University of Rajasthan. The last date for submission of applications for admission to the M. B. B. S. Classes of the said Medical Colleges was 25th June, 1968 and all the petitioners submitted their applications in the prescribed form before this date. They were all called for interview but were not admitted and therefore they have filed these writ applications before this Court praying that the reservations of certain seats made by the Government of Rajasthan in respect of certain classes of persons and the notification issued by the Government relaxing the upper age limit from 21 years to 22 years be struck down and further a direction be issued to the Government and the Principals of various Colleges to consider the applications of the petitioners for admission on the basis of merit after quashing the admissions of those candidates who have been admitted in pursuance of the reservations made by the Government and also in pursuance of the notification raising the upper age limit.

3. For a correct appraisal of the arguments advanced on behalf of the petitioners, it would be necessary to narrate in brief the circumstances in which reservations were made by the Government and the notification regarding raising the upper age limit was issued. It is common ground between the parties that each Medical College in Rajasthan had issued a prospectus containing conditions of admission and other ancillary matters. We have referred to the Prospectus for the year 1968-69 issued by Sawai Mansingh Medical College, Jaipur and it is urged that similar prospectuses were issued by other Colleges also. Part I of the Prospectus issued by Sawai Mansingh Medical College deals with conditions of ad-

mission. Para 3 of this Prospectus prescribes the order of preference in which the candidates will be admitted. It reads as follows:—

"3. Admission of candidates will be made in the following order of preference:—

(a) Candidates will be admitted in order of merit judged on the percentage of marks obtained either at the Intermediate Examination or the first year University Examination of the Three Years Degree Course or at the B. Sc. Examination whichever is more advantageous to the candidates provided that at the B. Sc. Examination marks in which the Division is awarded shall be considered.

(b) (i) Candidates securing less than 45 per cent of the aggregate marks will not be eligible for admission to the College.

(ii) Candidates passing in a supplementary examination shall not be eligible if they secure less than 48 per cent marks in aggregate.

The candidates, who have passed the 1st Year T. D. C. Examination in Supplementary and have been awarded a pass class at the Final Year T. D. C. (B. Sc.) Examination, are required to submit the marks-sheet of 1st Year T. D. C. (Main and Supplementary Examinations) together with the marks-sheet of final year T. D. C. Examination failing which their application will be rejected without making any reference.

(c) Candidates eligible under clauses (a) and (b) above shall be called by the Principal S. M. S. Medical College, Jaipur, to appear before the Admission Board constituted by the Government for interview. Bad stammerers and/or those found unsuitable by the Admission Board shall be rejected.

(d) The Government reserves the right to admit or reject admission of any candidate without showing any cause."

4. Para 4 (a) prescribes the age limit and lays down that candidates must have completed the age of 17 years at the time of admission or before 1st October of the year of admission and should not be more than 21 years age. Special provision has been made regarding candidates belonging to Scheduled Castes, and Scheduled Tribes of Rajasthan in the matter of age and the maximum age limit prescribed for them is 24 years at the time of admission. Similar special conditions have been prescribed in the case of Para-Medical Personnel, who are in service of the Government of Rajasthan but we do not consider it necessary to refer to them for the disposal of these writ petitions.

5. Para 2 of Part II of the Prospectus provides reservation of seats for different categories and the reservation is as below:—

(a) Two seats for foreign private students cultural scholars and private students of Indian Origin domiciled abroad.

(b) One seat for the student migrating from Burma.

(c) Three seats for candidates of Scheduled Castes and Scheduled Tribes belonging to the State of Rajasthan.

(d) Two seats are reserved for children of Defence Service personnel belonging to Rajasthan.

(e) Two seats for children of such a political sufferer who is or was a bona fide resident of Rajasthan and had been in Jail in any part of India.

6. There are similar reservations in other Medical Colleges in Rajasthan also, though with slight modifications both in the categories as well as in the number of seats. It may also be relevant here to state that initially the number of admissions were limited to 100 seats in Jaipur, Bikaner and Udaipur and 50 each in Jodhpur and Ajmer. Subsequently 50 seats were increased in the four Colleges at Bikaner, Udaipur, Jodhpur and Ajmer by an order of the Government dated 14-8-1968 thereby increasing the total seats by 200. Keeping in view the rush of admissions for Medical study, the Rajasthan Government further increased 40 seats in the Jaipur College by its order dated 30th August, '68. By a subsequent notification dated 2-9-1968 which has been placed on record by the State of Rajasthan and marked Ex. R. 1 it was notified that there were in all 640 seats in the various Medical Colleges of Rajasthan as under:—

| | | |
|------------|---|-----|
| 1. Jaipur | — | 140 |
| 2. Bikaner | — | 150 |
| 3. Udaipur | — | 150 |
| 4. Ajmer | — | 100 |
| 5. Jodhpur | — | 100 |
| | | 640 |

It was also specified in this notification that 40 seats had been reserved for the following categories:—

| | |
|--|----|
| 1. Candidates of Scheduled Castes and Scheduled Tribes | 12 |
| 2. Children of Doctors, Vaidas, Hakims and para-medical Staff | 10 |
| 3. Children of political sufferers | 5 |
| 4. Children of Members of Parliament and Members of Legislative Assembly | 5 |
| 5. Foreign students and students from other States | 5 |
| 6. Students at the discretion of the State Government in special circumstances | 3 |
| | 40 |

Before issuing this notification the Government of Rajasthan had issued two notifications No. F.5(1)ME/68 dated 30-8-1968 and No.F.5(1)ME/68 dated 30-8-1968. The first notification provides for

reservation of 40 seats as already mentioned above in connection with Ex. R.1. The other notification provides for relaxation of the upper age limit for admission to Medical Colleges in Rajasthan from 21 years to 22 years. Copies of these notifications have been placed on the record and marked Ex. 2 and Ex. 3 respectively. The petitioners have directed their attack not only against these two notifications Ex. 2 and Ex. 3 but also against the reservations made in the Prospectus in respect of certain categories.

7. At this stage it would be proper to give the number of total reservations as they exist to-day out of 640 seats:

| | |
|---|----|
| 1. For children of Defence Personnel. | 32 |
| 2. For children of political sufferers. | 15 |
| 3. For children of Scheduled Castes and Scheduled Tribes. | 30 |
| 4. For children of para-medical staff. | 10 |
| 5. For children of Members of Parliament and Legislative Assembly. | 5 |
| 6. For Foreign students from other States. | 5 |
| 7. For special cases in particular circumstances at the discretion of the Government. | 3 |
| 8. Foreign students to be nominated by the Central Government. | 6 |
| 9. Displaced persons from Burma | 5 |

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(Out of the General Seats 20% are reserved for girl candidates, so also 20% for girls in reserved seats).

8. Mr. Narendra Mohan Kasliwal, learned counsel for the petitioner Surendra Kumar Bardar in writ petition No. 751 of 1968 has challenged the following reservations:—

| | |
|---|----|
| (1) Children of Doctors, Vaidas, Hakims and para-medical staff. | 10 |
| (2) Children of political sufferers. | 15 |
| (3) Children of Members of Parliament and Legislative Assembly. | 5 |

He has also challenged the validity of the notification raising of the upper age limit from 21 years to 22 years.

9. Mr. Marudhar Mridul appearing for the petitioners in the rest of the three writ petitions while adopting all the arguments advanced by Mr. Narendra Mohan Kasliwal has further challenged the validity of following two more reservations:—

| | |
|---|----|
| (1) Children of Defence Personnel. | 32 |
| (2) Seats at the discretion of the State Government in special circumstances. | 3 |

10. All the writ petitions were opposed by the State. The arguments in these cases commenced on 19-9-1968. During the course of arguments on 20-9-1968 an

objection was raised by the learned Advocate-General that the relief asked for by the petitioners for setting aside the admissions of those candidates, who had been admitted under the reservation quota and in pursuance of the relaxation of the age limit cannot be considered unless those candidates were impleaded in the writ applications. Realising the force of objection the petitioners amended the writ petitions by impleading those candidates as respondents. All those candidates whose admissions have been challenged have been served and some of them are actually represented before us and they too have joined the State in opposing the writ applications. They have adopted the arguments advanced on behalf of the State by the learned Advocate-General.

11. We may now consider the objections raised by the petitioners with respect of the reservations for various categories in the same order in which they have been set out above.

First we shall take up the reservations for the children of Doctors, Vaidis, Hakims and para-medical staff. Learned Counsel for the petitioners have contended that there is no reasonable basis for making such a classification and such reservation is hit by Article 14 of the Constitution being unlawfully discriminatory. Reliance in this connection is placed on P. Rajendran v. State of Madras, AIR 1968 SC 1012, Umesh Chandra v. V. N. Singh, AIR 1968 Pat 3 and State of Kerala v. R. Jacob, AIR 1964 Ker 316. The learned Advocate-General has, however, submitted that such a reservation has been made by the State to afford a reasonable facility for the children of persons in the medical profession.

The only point for our determination is whether this reservation can be justified on the ground of reasonable classification or is liable to be struck down as unlawfully discriminatory being violative of Article 14 of the Constitution? Before we embark on the consideration of this question it would be proper to note the rationale of the decisions which have been relied upon by the learned Counsel for the petitioners.

In AIR 1968 SC 1012 districtwise allocation of seats for selection of candidates for admission to the first year Integrated M. B. B. S. Course in the State of Madras was challenged before their Lordships of the Supreme Court on the ground that there was no nexus between classification and object to be achieved and therefore such a classification was violative of Article 14 of the Constitution. It was urged before their Lordships that districtwise distribution violates Article 14 of the Constitution because it denies equality before the law and the equal protection of the laws inasmuch as such allocation

of seats may result in candidates of inferior caliber being selected in one District while candidates of superior caliber cannot be selected in another District.

This contention found favour with their Lordships, and it was observed,

"The object of selection can only be to secure the best possible material for admission to colleges subject to the provision for socially and educationally backward classes. Further whether selection is from the socially and educationally backward classes or from the general pool, the object of selection must be to secure the best possible talent from the two sources. If that is the object, it must necessarily follow that that object would be defeated if seats are allocated district by district It is true that Article 14 does not forbid classification, but the classification has to be justified on the basis of the nexus between the classification and the object to be achieved even assuming that territorial classification may be a reasonable classification. The fact however that the classification by itself is reasonable is not enough to support it unless there is nexus between the classification and the object to be achieved. Therefore, as the object to be achieved in a case of the kind with which we are concerned is to get the best talent for admission to professional colleges, the allocation of seats districtwise has no reasonable relation with the object to be achieved. If anything such allocation will result in many cases in the object being destroyed, and if that is so, the classification, even if reasonable would result in discrimination, inasmuch as better qualified candidates from one district may be rejected while less qualified candidates from other district may be admitted from either of the two sources."

12. In AIR 1968 Pat 3, there was provision in the Ordinance which authorised giving of special preference in the matter of admission to the Patna Medical College to the children of the employees of the University, who had rendered meritorious service to the University, and it was argued that there was no rational nexus between securing of admission of candidates to the Medical College on the one hand and the conferring of special concession or benefit to meritorious services of members of the University on the other. The learned Judges of the Patna High Court accepted this contention and held that a provision like this which would lead to favouritism and patronage amounted to unlawful discrimination and was unreasonable.

13. The last case on which strong reliance has been placed by the learned Counsel for the petitioners is AIR 1964 Ker 316. Here was a case in which two seats were reserved for admission of children of Registered Medical Practi-

tioners in Modern Medicine of the State. This was held to be not a proper classification on the ground that the classification had no reasonable relation to the objects sought to be achieved. The object sought to be achieved, it was observed, is to get the best amongst the student population for admission into the professional colleges. It was held that

"the classification itself cannot be said to be rational and had no reasonable relation to the object, namely that of admitting the best students in the professional colleges."

This is a case on the point and fully supports the contentions advanced on behalf of the petitioners.

We have given our due consideration to the arguments advanced from both the sides. It is not denied that the object of classification is to get the best material for training in medical profession. The only justification in respect of this reservation is the policy of the State to afford facility to the children of Doctors, Vaidas, Hakims and para-medical-staff, who are engaged in the medical profession. We are clearly of the opinion that this classification has been made to give concession to a class of people solely on the ground of profession and that in our view will amount to discrimination and will offend Article 14 of the Constitution. If the argument of the learned Advocate-General is accepted as correct, the State Government may as well say that some seats should be reserved for the children of a particular group of Government servants or Government servants generally as a matter of policy to afford facility to the Government servants. This is bound to lead in the very nature of things to a sort of patronage and favouritism which our Constitution does not afford. This sort of classification would not in any way advance the cause of medical study or would not contribute to the efficiency of the medical profession. The argument that the children of Doctors, Vaidas and Hakims may prove to be more efficient, in view of the environment in their family is to be stated only to be rejected (sic). We are firmly of the opinion that this reservation of 10 seats for children of Doctors, Vaidas and Hakims and para-medical-staff is an unreasonable discrimination and must be struck down and we accordingly do so.

14. Then we come to the second item — reservation for children of political sufferers. In the reply filed on behalf of the State it has been submitted that it has been the policy not only of this State but also of all State Governments as well as of the Union Government to afford reasonable facilities to the persons who had been political sufferers during the Independence Movement of the country and who have made personal

sacrifice. In the Prospectus to which we have referred above the reservation of two seats was made for children of such political sufferers who is or was a bona fide resident of Rajasthan and had been in jail in any part of India. The number of reserved seats against this category has been increased to 5. In the notification Ex. 2 no description of a political sufferer has been given. In the Prospectus the reservation was confined to the children of such political sufferer who was a bona fide resident of Rajasthan. If the object of the Government was to afford facilities to those political sufferers who had suffered during the Independence Movement, we do not see any reason why the benefit was restricted to bona fide residents of Rajasthan only. The word 'political sufferer' if we may say so is not a term of art and opinions may honestly differ as to what sacrifices would be sufficient to clothe a person with the status of a "political sufferer". Moreover the Independence Movement came to an end as far back as 1947 A. D. and 21 years have gone by since then. That apart as we have already observed above the object of the classification or reservation can only be to obtain the best material for medical profession and we fail to see how that object can be achieved by this reservation.

We are fortified in this view of ours by the observations made in *Ramchandra v. State of Madhya Pradesh*, AIR 1961 Madh Pra 247 relied upon by Mr. Narendra Moman Kasliwal learned Counsel for the petitioners. It was observed in that case:

"In regard to the seats reserved for the sons and daughters of political sufferers, it would appear that the preferential treatment accorded to them based upon irrelevant and wholly extraneous considerations because there is no rational relation between the political suffering of any person and the education imparted to his descendants in a Medical College with the object of promoting efficiency in the medical profession". It was further observed by the learned Judges of the Madhya Pradesh High Court:—

"After all "political suffering" however, commendable can be rewarded only once in an appropriate field. It cannot be exploited for securing benefits of all kinds whenever an occasion arises. If that happens, then the sacrifice involved in "political suffering" ceases to be a "sweet sacrifice" deserving any recognition."

Our conclusion therefore is that this reservation cannot be upheld and must be set aside being unreasonably discriminatory and violative of Article 14 of the Constitution.

15. Then we come to the reservation for the children of Members of Parlia-

ment and Legislative Assembly. The reply of the State on this point is that the Legislators take upon themselves a very onerous duty to perform. In the discharge of their duties, it is asserted the Legislators are called upon to spend much valuable time and in recognition of such onerous duty the Government have thought fit to make reservation of seats in Medical Colleges for their children. It does not need a long argument to strike down this reservation. In our view it cannot stand on a better footing than the reservation for children of Members of Medical Profession and political sufferers. There is no gainsaying the fact that there is no rational relation between the duties to be performed by Members of Parliament and Legislative Assembly and the object of promoting efficiency in the medical profession. This reservation, therefore, cannot be at all justified as a reasonable classification and must be quashed.

16. Before we come to the contention of Mr. Narendra Mohan Kasliwal in respect of raising of upper age limit for admission to Medical Colleges from 21 years to 22 years we consider it proper to deal with the other two categories of reservations which have been challenged by Mr. Mridul in addition to those attacked by Mr. Narendra Mohan Kasliwal. Mr. Mridul has argued that the reservation of 32 seats for children of Defence Personnel is also not based on any reasonable classification and militates against the fundamental rights of the petitioners to be treated at par with the sons of Defence Personnel in the matter of admission to Medical Colleges. The stand taken by the State in this connection is that the State of Rajasthan has a very large border and in the national interest it is the policy of the State Government to encourage the residents of this State to enter Defence Services under this policy. It is urged that since our conflict with Pakistan in 1965 it has become all the more necessary to encourage our Defence Personnel, and give them all reasonable facilities and concessions so that the Defence Personnel may think that the Nation as a whole is duly recognising their services in safeguarding the independence of the country.

Learned Counsel for the petitioners has argued that as observed by their Lordships in AIR 1968 SC 1012 the object to be achieved in a case of this kind is to get the best talent for admission to the Medical College and there is no nexus between this sort of reservation for children of Defence Personnel and the said object to be achieved. On the other hand the learned Advocate-General has placed strong reliance on *Subhashini v. State of Mysore*, AIR 1966 Mys 40. Similar reservation made in favour of children or

wards of the men in Armed Services and Ex-Servicemen including those who are in the Armed Services during the second world war to Medical Colleges in the Mysore State was called into question, and Hon'ble Justice Hegde of the Mysore High Court as he then was observed as follows:—

"Reservations made in favour of children or wards of the men in armed services, and ex-servicemen including those who were in the armed services during the second world war were challenged as being discriminative in character. The classification made is a valid one. The said reservation is clearly in national interest. The criticism about that reservation shows how short-sighted one could be when blinded by selfishness. The petitioners were not well advised in taking up such extreme positions."

No doubt in AIR 1968 SC 1012 their Lordships of the Supreme Court were pleased to observe that the object of selection can only be to secure the best possible material for admission to Colleges subject to the provision for socially and educationally backward classes. But it must be recollected that this observation was made in view of the facts and circumstances of that case and their Lordships have themselves observed at another place in that judgment that the object to be achieved in a case of the kind with which we are concerned is to get the best talent for admission to the Medical College." A situation like the present in which the question of a national interest has cropped up was not at all present before their Lordships while dealing with the question of districtwise allocation of seats in the matter of admission to Colleges. While judging the reasonableness of any law or executive act of the Government we cannot ignore the demand of the times and the interest of the nation as a whole. National interest in our humble opinion is the paramount consideration and has an important bearing on the question of constitutionality and validity of law which we may be called upon to consider.

In this connection we cannot do better than reproduce the observations of Patanjali Sastri, C. J., in *State of Madras v. V. G. Row*, AIR 1962 SC 196:—

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the pre-

vailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered to be reasonable."

17. While judging the reasonableness of this classification therefore we have to keep in mind not only the abstract proposition of reasonableness but also the circumstances prevailing in the country and our larger national interests which are supreme. The contention on behalf of the State that ours is a border State and that the reservation for the children of the Defence Personnel is in the larger interest of the nation, is not without substance, and is in our view a reasonable classification and we accordingly uphold it.

18. Then we come to the three seats reserved for being filled in by the State at its discretion in special cases in the particular circumstances. The reply on behalf of the State is that these reservations have been kept for the purpose of exchange of students with the Jammu and Kashmir Government with the object of maintaining cordial relations with that State. Learned Advocate-General has also invited our attention to telegrams Ex. R. 1 and Ex. A. 2 which go to show that these three seats were filled in by students from Jammu and Kashmir as a result of reciprocal arrangement, and, therefore, no exception can be taken to this reservation. It is also urged that the three students from Jammu and Kashmir who have been admitted against this reserved quota have not been impleaded as parties to the writ application. We have duly considered the arguments advanced on both the sides. If the language of this reservation was so worded as not to leave any margin for the power being misused there may have been force in the contention of the learned Advocate-General that the classification is reasonable.

But the language used in respect of this reservation is in our opinion much too wide capable of being so interpreted as to authorise the Government to show favour to particular individuals and admit them. This reservation is therefore like-

ly to create mischief even though for this particular year no serious objection can be taken as the power has been exercised validly and properly, but the reservation as it stands in the notification, in our opinion, gives an unbridled power to the Government to make three nominations depending on their discretion. This reservation therefore cannot be considered as reasonable and we find it difficult to uphold the same and therefore declare it as invalid.

19. This brings us to the question of validity of the notification Ex. 3 whereby the Government raised the upper age limit of students for admission to Medical Colleges from 21 years to 22 years. At one stage Mr. Mridul attempted to argue that this notification was law as defined in Article 13 of the Constitution and Section 32, Item 41 of the Rajasthan General Clauses Act, but he did not press this point, and argued that even though it was an executive act of the Government, it was without any authority and was mala fide and had resulted in an unreasonable discrimination between his clients and other students who were 21 years or less than 21 years old on the one hand and those who were above 21 years of age and have been admitted in the Medical Colleges as a result of this relaxation in age. He has placed reliance on *Deonarain v. Principal, Jaswant College, 1950 Raj LW 19*. On the other hand the learned Advocate-General pressed upon us that the Government had full authority to prescribe the upper age limit and that the petitioners had no such right that no candidate above 21 years of age should be admitted. The only right, it is urged by the learned Advocate-General, which the petitioners can claim is the right to be considered for admission to the Medical College and in this connection he has placed reliance on *Chitralekha v. State of Mysore, AIR 1964 SC 1823*.

It is argued by the learned Advocate-General that there is no discrimination in raising upper age limit from 21 years to 22 years and the Government has the power to change the conditions of admission even after the Prospectus is issued to suit the altered conditions when the number of seats has increased. It is urged that the Government neither acted arbitrarily nor capriciously nor with the object of accommodating any individual but have made out categories in pursuance of its policy. Reliance has also been placed on *G. J. Fernandez v. State of Mysore, AIR 1967 Mys 1753* and it is argued that the impugned order raising age limit is not justiciable.

20. We may first dispose of the question regarding mala fides. The mala fide is sought to be proved in two ways: firstly it is submitted on behalf of the petitioners that the last date for submission

of application was 25-6-1968, and, therefore, on this date only those persons who were not of more than 21 years age could apply. Certain persons who were above 21 years of age and were not eligible applied and they were not entitled to be considered at all but by virtue of the impugned notification they were made eligible and their candidature was considered. It is argued that on account of this notification the chances of the petitioners receded. The other argument is that there might be many more candidates between 21 years and 22 years of age who may have applied for admission but did not do so in view of the prescribed age limit being not more than 21 years. Apart from these conditions it was frankly conceded by the learned Counsel for the petitioners that they were not in possession of any data to show that this age limit had been altered for the benefit of particular individuals, who were objects of special favour of the Government. Mr. Mridul, therefore, argued that even though malice in fact may not have been established, a case of malice in law was made out.

We, however, find ourselves unable to accept the petitioners' contention on the score of malice. The language of the notification shows that the age limit was raised for all candidates without any consideration of caste, creed, religion or profession. It is further clear from the marks-sheet of the candidates above 21 years of age, who have been admitted that out of 13 such candidates who have been given admission, 10 have got more than 58% of marks and the lowest percentage of marks secured by them is 56.97. On the other hand the lowest percentage of marks of candidates of not more than 21 years of age who have been admitted is 56.80. There is obviously no question of malice in law. It is not the case of the petitioners that the impugned notification regarding age was issued by the Government without applying its mind or on any extraneous consideration or on irrelevant grounds. The presumption is that unless the contrary is shown the Government has acted honestly. The learned Advocate-General has submitted that the age limit had been increased in order to raise the standard of medical education by providing scope for candidates above the age of 21 years and there was no other ulterior purpose or corrupt motive behind raising the upper age limit. It is submitted that in all other States no upper age limit is prescribed nor is it prescribed in the Rajasthan University Act. It is true that a few individuals have got the benefit out of this relaxation in age but that by itself cannot be sufficient to brandish the order as mala fide. There is, therefore, no force in the contention of the petitioners that the order is mala fide.

21. As regards the authority of the Government to alter the age limit after the date prescribed for submission of applications for admission, it is argued that the power of prescribing conditions for admission vests in the Principal and the Government cannot have any say in the matter. In this connection reliance was placed on Statute 26 (4) of the Rajasthan University Act and the observations of this Court in 1950 Raj LW 19. Strong reliance has been placed in this connection on the observations made in Deonarain's case in 1950 Raj LW 19 in paras 40 and 44. We might state at once that it has nowhere been held in Deonarain's case 1950 Raj LW 19 that the Government has no power to prescribe conditions for admission in Colleges owned and run by it. On the other hand a question directly arose in Chitralekha's case, AIR 1964 SC 1823 (Supra). While considering the provisions of the Mysore University Act their Lordships were pleased to observe that the power to prescribe rules for admission to Colleges were conferred on the University and that power was to be exercised by the Academic Council. In exercise of its power the Academic Council prescribed the percentage of marks which a student had obtained for getting admission in a Medical College or an Engineering College. The Government, however, passed orders prescribing criteria for making admissions to Colleges to those who secured the minimum qualifying marks prescribed by the University. This power was challenged and their Lordships held that this is a power which every private owner of a College will have and the Government which runs its own Colleges cannot be denied that power. This point again came up to be considered by their Lordships of the Supreme Court in the case of AIR 1968 SC 1012 and their Lordships observed;

"In these circumstances, the Government was entitled to frame rules for admission to medical colleges controlled by it subject to the rules of the University as to eligibility and qualifications."

It would, therefore, be not correct to say that even though the Colleges in Rajasthan are run by the Government, the Government has no power to prescribe conditions for admission of students to the Colleges. It is difficult to accept that it is only the Principal who is appointed by the Government who can prescribe the conditions for admission and the Government has none. The question then arises even though the Government had such a power to alter the upper age limit for admission, was the power exercised validly in the present case? It cannot be denied that if this power had been so exercised as to infringe any fundamental right or legal right of any of the petitioners, it would (not) have been reco-

gnised as a valid exercise of power. But the petitioners have failed to show how any fundamental or legal right vested in them has been infringed by the impugned notification. One argument advanced on behalf of the petitioners in this connection is that the candidates who were above 21 years of age but had not applied on account of the age limit then prescribed have been discriminated against those who actually applied for admission even though they were above 21 years of age in disregard of the conditions prescribed for admission. It may be true, but none of the petitioners fall in that category and none has come forward to challenge this notification on that ground. The argument is therefore only of academic interest and we cannot strike down this notification on that ground.

22. Another ground which no doubt concerns the petitioners is that if this age limit had not been raised and the percentage of marks for admission had not gone up on account of consideration of the candidates above 21 years of age, the petitioners would have got their admission and thus they have been unlawfully discriminated. We have carefully examined this contention and are of the view that there has been no discrimination against the petitioners. The petitioners no doubt had a right to be considered for admission but they cannot claim a right to be admitted merely because they fulfil the conditions prescribed by the University or prescribed by the Prospectus. If the Government thought that it would add to the efficiency of the medical profession by casting the net for admission wider and by providing scope for students securing better percentage of marks for admission even though the upper age limit may be changed by one year, it cannot be said that the Government had no power to do so. In the circumstances of the present case when no case of mala fides has been made out we find ourselves unable to adjudge the impugned notification Ex. 3 as invalid merely on the ground that the chances of admission of the petitioners became bleak on account of raising of this upper age limit. We are, therefore, of the view that the notification Ex. 3 does not transgress any fundamental rights or any other legal rights of the petitioners.

We are also unable to hold that the raising of upper age limit in the facts and circumstances of the present case is unreasonable. Of course we do not see any force in the contention of the Government that since the notification Ex. 3 has been passed in exercise of its executive powers it is not justiciable. We are of the view that if this notification had come in conflict with any of the fundamental rights guaranteed under the Con-

stitution or any other legal rights of the petitioners we would not have had the slightest hesitation in striking it down. But for the view which we have taken with regard to its reasonableness and validity we have no alternative but to uphold it.

23. The last question is as to what order should be passed in view of the findings arrived at by us. So far as the validity of reservations of seats made for children of Doctors, Vaidas, Hakims and para-medical staff, for children of political sufferers and for children of Members of Parliament and Legislative Assembly are concerned they must be struck down as invalid, unreasonable and unconstitutional and we accordingly do so. So far as the reservation of three seats to be filled by the Government in its discretion in special cases in particular circumstances is concerned, that reservation is also bad and must go. We accordingly strike it down. As regards the candidates who have been admitted against the above mentioned four categories of reservation which we have struck down, it is argued by the learned Advocate-General that these candidates have already joined the classes and have paid the fee and purchased the books and now if their admissions are cancelled their career would be ruined. The learned Advocate-General also submitted that there are a few States against the reserved quota still lying vacant, and it would be possible to admit some candidates out of the general category according to merit.

24. Mr. Dwarka Prasad Gupta representing respondents Nos. 11, 14, 17 and 18 in the writ petition No. 751 of 1968 placed before us a few authorities where certain reservations made by the Government in respect of admission to Colleges were struck down yet the admissions already made against those reservations were not disturbed. These cases are *Lalita Shuri v. State of Jammu and Kashmir*, AIR 1966 J & K 101, *V. Raghuramulu v. State of Andhra Pradesh*, AIR 1958 Andh Pra 129, *Ramakrishna Singh v. State of Mysore*, AIR 1960 Mys 338, and also *Laila Chacko v. State of Kerala*, AIR 1967 Ker 124 and AIR 1968 Pat 3 which we have already referred above in connection with other points.

We have given our due consideration to this matter and are of opinion that it would not be proper at this stage to non-seat the candidates who have already been admitted against the reserved quota which has been adjudged by us to be invalid. But these observations which we have adjudged as invalid will not hold good when selection is made thereafter. We further direct the Government and the Officers of the Colleges concerned to reconsider the applications of the peti-

tioners for admission on merit after ignoring the reservation of those categories which we have struck down as invalid.

If on such reconsideration it is ultimately found that these petitioners or any of them are entitled to be admitted steps may be taken to admit them within three weeks from today. Learned Counsel for the petitioners have submitted that direction should be given to the Government to create additional seats, if necessary to accommodate the petitioners. Learned Advocate-General, however, submits that the Government would do its best to accommodate the petitioners as far as possible. In the circumstances, we do not consider it necessary or proper to give any such direction.

25. The result is that these writ applications are partly allowed as mentioned above. Since the petitioners have succeeded in part, we consider it proper to leave the parties to bear their own costs.

MVJ/D.V.C. Petitions partly allowed.

AIR 1969 RAJASTHAN 192 (V 56 C 38) FULL BENCH

D. S. DAVE, C. J., D. M. BHANDARI
AND V. P. TYAGI, JJ.

Jeevraj and another, Plaintiffs v. Lalchand and others, Defendants.

Second Appeal No. 237 of 1958, D/- 26-8-68, against judgment of Dist. J., Pali, D/- 14-5-1958.

(A) Limitation Act (1963), S. 19 — Acknowledgment — An acknowledgment which contains a promise to pay even by implication in an agreement creates a new right of action on which a suit can be founded. AIR 1951 Raj 74 & AIR 1956 Raj 12, Overruled; AIR 1952 Raj 7 (FB), Dissented, AIR 1935 All 129 held overruled by AIR 1953 SC 225.

Per Majority (Dave, C. J., Contra).—

The Supreme Court in AIR 1953 SC 225 has laid down the proposition that an acknowledgment if it implies a promise to pay can give rise to fresh cause of action and can be made the basis of a suit. AIR 1968 Pat 203, Rel. on; AIR 1935 All 129 held overruled by AIR 1953 SC 225; AIR 1951 Raj 74 & AIR 1956 Raj 12, Overruled; AIR 1952 Raj 7 (FB), Dissented from. Case law discussed.

(Paras 49, 51, 64 and 28)

(B) Constitution of India, Art. 141 — Obiter dicta of Supreme Court is also the law declared by Supreme Court.

After the coming into force of the Constitution, the principle of law enunciated by the Supreme Court, even by way of obiter dicta must be taken to be the law

declared by the Supreme Court even if the pronouncement of such principle was not necessary for the decision of the case. What is to be determined is whether the Supreme Court intended to lay down any principle of law. If any principle of law has been laid down after consideration by the Supreme Court, it amounts to declaration of law for the purpose of Art. 141 even though such principle has been laid down by way of obiter dicta. AIR 1953 All 613, Rel. on; AIR 1931 All 162 (FB) & AIR 1940 All 544, Ref. (Para 48)

(C) Contract Act (1872), S. 25 (3) — Applicability — Provisions apply only if there is express promise to pay.

In order that a case may fall under S. 25 (3) there must be an express promise to pay though the word "express" is not used in S. 25 (3) because otherwise there will be no promise to pay in writing as required under that provision. AIR 1938 Nag 180 & AIR 1941 Nag 100, Ref. (Para 56)

(D) Stamp Act (1899), Sch. 1, Art. 1 — Acknowledgment must be stamped.

An acknowledgment of debt even though it contains an implied promise to pay must be stamped under Art. 1, Sch. I of the Stamp Act. The proviso further makes it clear as it says that if an acknowledgment is not to fall under Art. 1, Schedule I, such an acknowledgment must not contain any promise to pay a debt or any stipulation to pay interest or to deliver any goods or other property. It only means that so long as the acknowledgment does not contain any of these things expressly, it will remain an acknowledgment though by implication there may be contained in it a promise to pay a debt or to pay interest. AIR 1942 Lah 50 & AIR 1951 Mad 605 & AIR 1959 Madh Pra 327, Foll. (Para 58)

(E) Limitation Act (1963), S. 19 — Acknowledgment — Essentials.

An acknowledgment under S. 19 may be a unilateral transaction. It may be an act on the part of the defendant to which the plaintiff had not signified his assent. Such a unilateral act may be good acknowledgment if conditions of S. 19 are satisfied. But such acts do not amount to an agreement and on the basis of such a document no suit can be filed. But a document may be bilateral in nature under which the defendant acknowledges his liability to pay a certain amount to the creditor. If such a document contains an express promise to pay, there will be little room for the contention that it cannot form the basis of the suit. In order that an acknowledgment should form the basis of the suit there must be bilateral acts which give rise to an agreement enforceable at law.

(Paras 35 and 53)

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| (1922) AIR 1922 Bom 183 (V 9)= ILR 46 Bom 24, Chunilal Rattan Chandra Gujrathi v. Laxman Govind Dube | 43 |
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| (1892) 2 QB 484=61 LJQB 696, Carlill v. Carbolic Smoke Ball Co. | 57 |
| (1871) LR 6 Ch App 822=19 WR 1130, In re, Rivers Steam Co. Mit- chell's Claim | 11 |
| (1827) 6 B & C 603=108 ER 573, Tanner v. Smart | 37 |

M. M. Vyas, for Appellants; Hastimal,
for Respondents.

DAVE, C. J.:— This is a second appeal
by the plaintiffs whose money suit was
decreed by the trial court, viz., Civil
Judge, Sojat, but dismissed by the Dis-
trict Judge, Pali, on the defendants' ap-
peal.

2. The suit was based on a Khata-
entry Ex. 1 appearing in the plaintiffs'
account books. The said entry was in the
following language:—

[Original in Marwadi Omitted — Ed.]

Rendered in English, it would read as follows:—

"Account of Shah Kumanmalji Lalchandji of Marwar Junction of the year S. 2009.

6022/- Balance to be received as per account given above. Rs. 6022/- in figures Rupees six thousand and twenty-two only. Kati Sudi 1 Smt. 2009.

Signed Bhandari Jeevraj.

Balance struck in the presence of Kumanmal Lalchand.

Signed Lalchand

For Kumanmal Lalchand.

Rs. 6022/- in figures Rupees six thousand and twenty-two are to be paid.

Signed Misrimal Kumanmal.

Signed Premraj.

Witness — Sewag Pukhraj of Ranawas at the instance of Mishri Mal of Marwar Junction in his presence."

The defendants contested the suit on several grounds, one of them being that the entry Ex. 1 was merely an acknowledgment and that it could not be made the basis of the suit. The trial Court repelled this contention, dismissed other objections and passed a decree for Rs. 6215/- with costs and future interest. On the defendants' appeal, the District Judge came to the conclusion that the entry on which the suit was founded was nothing more than a mere acknowledgment and as such, the suit could not be based thereon. Accordingly, he allowed the appeal, set aside the trial Court's decree and dismissed the suit with costs.

He relied on the decisions of this Court in *Hastimal v. Shankerdan*, ILR (1951) 1 Raj 297=(AIR 1952 Raj 7 (FB)), and *Ramdayal v. Maji Deodiji of Rivan*, ILR (1955) 5 Raj 85=(AIR 1956 Raj 12). Aggrieved by that judgment and decree dated 14-5-58, the plaintiffs filed a second appeal which came before a learned single Judge of this Court. It was argued before him that the Full Bench decision of this Court in ILR (1951) 1 Raj 297=(AIR 1952 Raj 7 (FB) (supra)) must be taken to be overruled by the decision of their Lordships of the Supreme Court in *Hiralal v. Badkulal*, AIR 1953 SC 225. He, therefore, considered it proper that the case be referred to a Division Bench. When the case went to the Division Bench, it was observed by the learned Judges that in ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) (supra), it was held by a Division Bench of this Court that the Full Bench decision in *Hastimal's case*, ILR (1951) 1 Raj 297=(AIR 1952 Raj 7 (FB) (supra)) was not overruled by the decision of their Lordships of the Supreme Court in *Hiralal's case* (supra)

and that if that view required re-consideration, the case should be referred to a Full Bench. It is in these circumstances that the present case has come before us.

3. The short question which arises for our determination is, whether the suit could be founded on the basis of the document Ex. 1.

4. Now, the bare perusal of the document Ex. 1 would show that although it was noted therein that the balance of Rs. 6022/- was struck "on the basis of account noted above", it is common ground between the parties that the previous account did not appear on the leaf on which Ex. 1 was executed. The words "as per account given above" appearing in Ex. 1 are, therefore, misleading. There was no account stated above the said entry. If the previous account were stated on the same leaf or this entry were made in continuation of an account appearing on the preceding page, perhaps it might have been possible for the plaintiffs to argue that it was an "account stated". The document Ex. 1 does not disclose what kind of transaction or transactions took place between the parties and how the figure of Rs. 6022/- was arrived at. It is settled law that a suit can be based on "account stated" and this view has been taken by this Court also in *Ramdayal's case*, ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) (supra). The term "account stated", however, is to be understood in the sense explained by their Lordships of the Privy Council in *Bishunchand v. Girdharilal*, AIR 1934 PC 147. In that case, it was observed by their Lordships as follows:—

"Indeed, the essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side pro tanto, go on to agree that the balance only is payable. Such a transaction is in truth bilateral, and creates a new debt and a new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true (because there must in such cases be, at least in the end, a creditor to whom the balance is due) and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such extent, so that there will be complete satisfaction on payment of the agreed balance. Hence, there is mutual consideration to support the promises on either side and to constitute the new cause of action. The account stated is accordingly binding, save that it may be reopened on any ground — for instance,

fraud or mistake — which would justify setting aside any other agreement." It is obvious that there being no cross-items in Ex. 1, it cannot stand the test laid down by their Lordships of the Privy Council in the above passage and hence the entry does not fall within the ambit of the term "account stated".

5. It was next argued by the appellants' learned Counsel that the words "Dena Chhe" appearing after the signature of defendant Mishrimal Kunanmal indicate that the defendants had made an express promise to pay the amount of Rs. 6022/-, but, in my opinion, there is no force in this argument. These words only meant that Rs. 6022/- were payable. In *Phoolchand v. Mangilal*, 1961 Raj LW 634, it was held by a learned Single Judge of this Court after referring to a number of authorities, that expressions like "Lena Dena, Baki Lena, Baki Dena or Baki rahe" do not import a distinct promise to pay and merely amount to an acknowledgment.

Both the Courts below have treated the entry Ex. 1 as an acknowledgment and, in my opinion, they rightly held it to be so. The only difference of opinion between the two Courts below was that while, according to the trial Court, Ex. 1 being an unconditional acknowledgment, the suit could be founded thereon, the first appellate Court was of opinion that even if the acknowledgment was unconditional, it could not, as such, become the basis of the suit. In its view, such an acknowledgment could only extend the period of limitation and the suit should have been based on the original cause of action. The real question for our determination therefore is, whether the suit could be based on the conditional acknowledgment contained in Ex. 1.

6. Unfortunately, there has been a sharp difference of opinion on this subject between different judges of different High Courts as also between different Judges of the same High Court. So far as this Court is concerned, it has been consistently taking the view ever since it decided in 1950, *Kanraj v. Vijaisingh*, 1950 Raj LW 284=(AIR 1951 Raj 74) that an acknowledgment of liability only extends the period of limitation, if it is made before the expiry of the period of limitation, but it does not create a new right and consequently, it cannot form an independent cause of action for a suit. In the said case, two learned Judges of this Court arrived at the above conclusion after reviewing a number of cases decided by different High Courts.

The correctness of this view was doubted later on, in another case, because the former Chief Court of Jodhpur had taken a different view and, therefore, the same question was referred to a Full Bench in ILR (1951) 1 Raj 297=(AIR 1952 Raj 7

FB) (supra). All the learned Judges (although two of them were not parties to the first case) again held the view that "a mere acknowledgment of debt did not operate as a new contract and could not be made the basis of a suit. It could only keep alive the original cause of action and the suit must be founded on such original cause of action. The acknowledgment of debt would enure to the benefit of the creditor for the purpose of saving limitation if it is made before the original debt became barred by time."

7. In ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) (supra), this question was raised again and it was urged that the Full Bench decision of this Court in ILR (1951) 1 Raj 297=(AIR 1952 Raj 7 FB) (supra) stood overruled by the decision of their Lordships of the Supreme Court in AIR 1953 SC 225 (supra). While dealing with this question, it was observed by Wanchoo C. J. of this Court, as he then was, that the decision of the Supreme Court in *Heeralal's case* AIR 1953 SC 225 could not be said clearly to overrule the view that a mere acknowledgment as distinguished from an acknowledgment in which there are words from which an implied promise to pay may be inferred, cannot be the basis of a suit. Strictly speaking, this question did not arise in the said case because the entries on which the suit was founded clearly fell within the term "account stated", but the learned Chief Justice made these remarks in order to remove the cloud of doubt which was sought to be cast on the correctness of the view taken in ILR (1951) 1 Raj 297=(AIR 1952 Raj 7 FB) (supra).

It was pointed out that in AIR 1953 SC 225 (supra), the suit was based on "account stated" and the observations of their Lordships of the Supreme Court on the question whether a suit could be founded on an unconditional acknowledgment were obiter. I agreed with the view of Wanchoo, C. J., that the observations of their Lordships in *Heeralal's case*, AIR 1953 SC 225 did not clearly overrule the decision of this Court in ILR (1951) 1 Raj 297=(AIR 1952 Raj 7 FB). In 1961 Raj LW 634 (supra), this view again found support from another learned Single Judge of this Court.

8. Learned Counsel for the appellants has now again strenuously urged that the view expressed in ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) (supra) is not correct and that, according to the observations of their Lordships of the Supreme Court in AIR 1953 SC 225 (supra), a suit can be founded on an unconditional acknowledgment. It is pointed out that in the said case their Lordships had approved the view taken by their Lordships of the Privy Council in *Maniram Seth v. Seth Rupchand*, (1906) ILR 33 Cal 1047 (PC),

Kahanchand Dularam v. Dayaram Amritlal, AIR 1929 Lah 263 and Fateh Mahomed v. Gangasingh, AIR 1929 Lah 264 and that the only conclusion deducible from their Lordships' remarks is, that a suit can be based on an unconditional acknowledgment since it implies a promise to pay the debt. It is urged that the view taken by the first appellate Court is incorrect, that the judgment and decree of that Court should therefore be set aside and that of the trial Court should be restored.

9. I have given anxious consideration to this argument. It may be observed that the sheet-anchor of the view that a suit can be founded on an unconditional acknowledgment because it implies a promise to pay, is the observation made by their Lordships of the Privy Council in Maniram Seth's case, (1906) ILR 33 Cal 1047 (PC) (supra). In almost all the later cases in which this view has been taken by the learned Judges of other High Courts, great stress is laid on the observations of their Lordships to the effect that "an unqualified acknowledgment has always been held to imply a promise to pay because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do."

10. Now, it may be pointed out that their Lordships of the Privy Council have themselves observed in Punjab Co-operative Bank Ltd. v. Commissioner of Income-tax, Lahore, AIR 1940 PC 230 that "every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found". It, therefore, becomes necessary to see in what connection their Lordships made the said observation and whether it would be proper to make use of it after it is severed from its context.

11. In (1906) ILR 33 Cal 1047 (PC) (supra), Maniram was an adopted son of one Motiram. There were regular dealings between Motiram and Seth Rupchand from July 21, 1895 to May 12, 1898; and at the close of dealings Seth Rupchand owed to Motiram Rs. 5841/9/1 on account of principal, and Rs. 2801/2/- for interest. There was no dispute between the parties about the correctness of these amounts. The only dispute between the contending parties was whether the action brought by Maniram after the death of his adoptive father was filed within the prescribed period of limitation.

The suit was brought on 5-9-1901 and the only defence raised by Seth Rupchand was that the action was barred by lapse of time. It appears from the perusal of

their Lordships' judgment that when Motiram died, he had left a will and therein he had appointed Seth Rupchand as one of the five trustees to administer his estate. Three of the trustees of whom Seth Rupchand was one, applied for probate. That application was opposed by the other two trustees and also by one Kishandas who was natural father of Maniram. The said application for probate failed on certain grounds which need not be enumerated here. One Rambordas, as next friend of Maniram, had instituted the suit. Later on, he was substituted by Maniram's natural father Kishandas. When Seth Rupchand raised the question of limitation, it was pointed out on behalf of the plaintiff Maniram that in the probate proceedings one of the objections against grant of probate in favour of Seth Rupchand was, that he owed money to Motiram's estate and that, in his examination during those proceedings, Seth Rupchand had made a statement to the effect that "for the last five years he had open and current accounts with the deceased."

This part of his statement was sought to be used as an acknowledgment for extending the period of limitation. After referring to this statement, it was observed by their Lordships that "it was a clear admission that there were open and current accounts between the parties at the time of the death of Motiram. The legal consequence would be that at that date either of them had a right as against the other to an account. It follows equally that, whoever on the account should be shown to be the debtor to the other, was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative if the balance should be ascertained to be against him."

The question raised before their Lordships was whether this much admission was sufficient in Indian Law to extend the period of limitation. While dealing with this question, their Lordships referred to the provisions of Section 19 of the Indian Limitation Act, as it stood at that time, and then posed the question "whether an acknowledgment of liability, if the balance on investigation should turn out to be against the person making the acknowledgment, is sufficient". While discussing this question, their Lordships referred to the following observations of Lord Justice Mellich in *In re Rivers Steam Company, Mitchell's claim* (1871) LR 6 Ch App 822:—

"An acknowledgment to take the case out of the Statute of Limitations, must be either one from which an absolute promise to pay can be inferred, or, secondly, an unconditional promise to pay the

specific debt, or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

Thereafter, their Lordships proceeded to observe that—

"an unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do. There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that, whoever is the creditor shall be paid, when the condition is performed by the ascertainment of a balance in favour of the claimant. It is a case of the third proposition of Lord Justice Mellish, a conditional promise to pay and the condition performed".

It is crystal clear from what has been narrated above that Lord Justice Mellish had made the above observation while dealing with the question as to what kind of acknowledgment was sufficient to take the case out of the Statute of Limitations and their Lordships of the Privy Council also made the above observation only to stress that not only an unconditional but even a conditional promise to pay the debt could extend the period of limitation. Their Lordships only meant to point out the utility of an unconditional acknowledgment for saving the bar of limitation, and in that connection, it was observed that an unconditional acknowledgment always implies a promise to pay because that is the natural inference if nothing is said to the contrary. It was also observed by their Lordships that if there is a conditional promise to pay and if on the condition being performed a debtor is found liable to pay to the creditor, such an acknowledgment would extend the period of limitation.

In short, the observations of their Lordships were made only in connection with the question of limitation. There was no question before their Lordships whether in Indian Law a suit could be founded on an unconditional acknowledgment and, therefore, there was no decision to that effect. It is significant that even after the said observations of their Lordships of the Privy Council, there continued to remain a sharp difference of opinion between the learned Judges of different High Courts and even amongst the learned Judges of the same High Court as to whether a suit could be founded on an unconditional acknowledgment.

12. In Abdul Rafiq v. Bhajan, AIR 1932 All 199, Sulaiman, Ag. C. J., as he then was, examined the observations of their Lordships of the Privy Council in Maniram Seth's case, (1906) ILR 33 Cal

1047 (PC) (supra) at great length and took pains to show that their Lordships could not have meant to lay down that every unconditional acknowledgment which implies promise to pay, should be made the basis of the suit. It does not appear from Heeralal's case, AIR 1953 SC 225 (supra), if the views of Sulaiman, Ag. C. J., expressed in this case, were brought to the notice of their Lordships of the Supreme Court.

13. In Balkrishna v. Debsingh, AIR 1934 All 76, two other learned Judges of the same High Court agreed with the views of Sulaiman, C. J.

14. In Mt. Janaka v. Sheocharan, AIR 1932 Oudh 49, Wazir Hasan, C. J. and Srivastava, J., also expressed the same opinion that, according to the Indian Law, acknowledgment does not operate as a new contract, but only keeps alive the original cause of action.

15. In Ramprasad Jagbandhoo v. Anandi Brindawan Rawat, AIR 1938 Nag 180 also the observations of their Lordships made in Maniram Seth's case, (1906) ILR 33 Cal 1047 (PC) (supra) were pointed out to the Court and yet Vivian Bose, J., (who later on adorned the Supreme Court as a Judge) held the view that "an acknowledgment under Section 19 of the Limitation Act cannot operate to save limitation unless it has been executed within time; 'also in such a case the suit must be founded on the original cause of action,' (underlining (here in ' ') is ours).

16. In AIR 1953 SC 225 (supra), their Lordships of the Supreme Court, no doubt, referred to the observations of their Lordships of the Privy Council in (1906) ILR 33 Cal 1047 (PC) (supra), to point out what their Lordships of the Privy Council had observed in that case, but did not offer their own comments about it. Their Lordships also referred to earlier decisions of the Lahore High Court. Out of them, AIR 1929 Lah 263 (supra), was obviously a suit founded on "account stated". The facts of the case AIR 1929 Lah 264 (supra), have not been stated in detail and, therefore, it cannot be said whether the suit in that case was based on an unconditional acknowledgment and no more. It is noteworthy that at the end of the paragraph 11 of their judgment, it was observed by their Lordships as follows:

"The acknowledgment which forms the basis of the suit was made in the ledger of the plaintiffs in which earlier mutual accounts had been entered and truly speaking, the suit was not based merely on this acknowledgment but was based on the mutual dealings and the accounts stated between them and was thus clearly maintainable."

It is obvious from the said observation that the suit in that case was based on

"account stated" and not on a mere unconditional acknowledgment.

17. Learned Counsel for the appellants has mainly stressed on what their Lordships further observed in paragraph 12 of their judgment as below:—

"Mr. Bindra drew our attention to a decision of the Allahabad High Court in *Ghulam Murtuza v. Mt. Fasihunnissa Bibi*, AIR 1935 All 129 wherein it was held that even if an acknowledgment implies a promise to pay it cannot be made the basis of the suit and treated as giving rise to a fresh cause of action. We have examined the decision and we are satisfied that it does not lay down good law."

It is undoubtedly true that their Lordships did not approve of all that was observed by the learned Judges of the Allahabad High Court in AIR 1935 All 129. In that case, Sulaiman, C. J., had observed as follows:—

"But there is no doubt that a receipt containing an acknowledgment of a previous debt may not be a mere acknowledgment, i. e., a bare admission of the existing liability, but it may contain words indicating an implied promise to pay the earlier debt. 'Whether it is a mere acknowledgment or it is more than an acknowledgment and contains an implied promise to pay will of course depend on the terms of the particular document. But assuming that it amounts to an implied promise to pay, it does not follow that they can be made the basis of a suit' and treated as giving rise to a fresh cause of action. 'If the debt had not become barred by time then even an express promise to pay it is nothing more than a promise to do what a person is, under the law, bound to do. It cannot be treated as a fresh contract or a novation of the old contract and is on no higher footing than mere acknowledgment'. On the other hand, if the debt had become barred by time, then an implied promise to pay it would be of no avail because under Section 25 (3), Contract Act. It cannot be treated as a promise, made in writing, to pay a time-barred debt. When there is no express promise to pay but the intention is inferred only indirectly, it cannot be treated as a promise in writing to pay the time-barred debt. The plaintiff therefore would not be entitled to take advantage of such an implied promise to pay a time-barred debt.

On the other hand, if there is a fresh consideration proceeding from the promisee and the parties enter into a new contract which replaces the previous contract and supersedes it, then it certainly becomes the basis of a new cause of action and a suit would lie upon it because the contract is binding on the parties, being for consideration. But where there is

no fresh consideration proceeding from the promisee, the transaction cannot be treated as an agreement between two parties as it is only a one-sided promise to pay a debt which was due". (underlining (here in ' ') is ours).

It would appear from the above passage that Sulaiman, C. J., made a number of observations and it would be difficult to hold that their Lordships of the Supreme Court had disapproved all of them. For instance, it was observed by Sulaiman, C. J., that if the debt had become barred by time, then an implied promise to pay would be of no avail because under Section 25 (3) of the Indian Contract Act, it cannot be treated as a promise made in writing to pay a time-barred debt. It is well settled that if there is a contract for paying time-barred debts under Sec. 25 (3) of the Contract Act, the promise must be in writing and so there must be an express promise to pay. An implied promise to pay time-barred debts would not be covered by Section 25 (3) of the said Act.

It cannot be said that their Lordships of the Supreme Court were disapproving this expression of the view. What their Lordships appeared to have disapproved was perhaps the observations which preceded the remarks relating to Section 25 (3) of the Contract Act. Sulaiman, C. J., had gone to the extent of saying that "if the debt had not become time-barred, then even an express promise to pay it, is nothing more than a promise to do what a person is, under the law, bound to do. It cannot be treated as a fresh contract or a novation of the old contract and is on no higher footing than mere acknowledgment." He also observed that even if a document was more than an acknowledgment and contained a further implied promise to pay, it could not be made the basis of a suit. This was an extreme view which did not appeal to us also because an express promise to pay a debt which was within limitation could not be placed on a worse footing than an express promise to pay the time-barred debt. Similarly, if, over and above the existing debt, there is some fresh consideration from the side of the creditor and on account of that consideration, there is an implied promise by the debtor to pay the debt, it can, as a new agreement, form the basis of the suit.

Therefore, while deciding ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) (supra), it was thought that their Lordships of the Supreme Court had perhaps disapproved this extreme view when they observed that the decision in AIR 1935 All 129 (supra), did not lay down good law. In the absence of detailed comments of their Lordships about this case, it is extremely difficult to say which observations were considered to be laying down bad law. At

any rate, their Lordships did not lay down firmly in positive terms that since an unconditional acknowledgment implies a promise to pay, it can, in every case, be made the basis of a suit.

18. In *Shapoor Freedom Mazda v. Durga Prosad Chamaria*, AIR 1961 SC 1236, their Lordships of the Supreme Court, after referring to Section 19 of the Indian Limitation Act and explaining its provisions, proceeded to observe that "it is thus clear that acknowledgment as prescribed by Section 19 'merely renews debt; it does not create a new right of action'" (underlining (here in ' ') is ours). It is noteworthy that Section 19 refers both to conditional and unconditional acknowledgments and yet their Lordships observed that an acknowledgment merely renews debt. The use of the word "merely" is significant and shows that in their Lordships' opinion the only utility of an acknowledgment was to renew the debt. Their Lordships further observed in clear words that it did not create a new right of action. It is also noteworthy that their Lordships, while observing that an acknowledgment does not create a new right of action, did not add that this would not apply if the acknowledgment is unconditional. It is true that their Lordships made no reference in that case to the observations made in AIR 1953 SC 225 (supra), nor there was a pointed question before their Lordships to decide whether an unconditional acknowledgment could be made the basis of the suit. But, one cannot lose sight of the fact that one of the learned Judges deciding this case was the same who had considered *Heeralal's case*, AIR 1953 SC 225 in ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) (supra).

19. I have referred to these observations only to show that counsel for either parties have not been able to refer to us any case wherein their Lordships of the Supreme Court might have clearly and firmly laid down that every unconditional acknowledgment can be made the basis of a suit. So long as their Lordships of the Supreme Court do not take a different view, I see no reason to make a departure from the view which this Court has consistently held so far and according to which an acknowledgment, whether it is conditional or unconditional, cannot form the basis of a suit and it can only serve the purpose of extending the period of limitation.

20. Moreover, in my humble view, it would be a very dangerous proposition of law to lay down under the conditions prevailing in this country that an unconditional acknowledgment should form the basis of the suit. The capacity of the majority of persons carrying on money-lending business in our country is not

unknown. The Legislature is bringing out laws to relieve the debtors of usurious loans and excessive interest. In the case of agriculturist, under the Rajasthan Relief of Agricultural Indebtedness Act even the decrees of the courts are required to be reopened to find out the actual amount of principal and interest to provide relief to the poor debtors. Similar laws are in force in many other States. Even a decree obtained on an unconditional acknowledgment against the agriculturist would be of no avail to the creditor because the court will have to see all the previous accounts.

Thus, so far as agriculturists are concerned, even if it be held that a suit can be based on an unconditional acknowledgment, it would not serve the creditor's purpose. Apart from agriculturists, there are a large number of poor people including labourers and if the view that a suit can be based on the unconditional acknowledgment, is held it would bring untold misery to the poor debtors. I cannot do better than to reproduce here the following observations of Weston, C. J., in *Shadiram v. Prabhu*, AIR 1953 Punj 28:—

"The whole difficulty in these matters has arisen from the importation into India considered to be required by observations of the Privy Council, particularly in *Maniram v. Seth Rupchand*, 33 IA 165, (PC) of the rules of English Law now considered well established, namely that an unconditional acknowledgment by a debtor contains an implied promise to pay and further furnishes to the creditor a fresh cause of action. These rules did not spring from any fundamental principle of law but were judge-made to avoid a rigid rule of limitation imposed by the Statute of James I. In India, a signed acknowledgment of liability made in writing before the expiration of the period of limitation is enough to start a fresh period of limitation, and it is enough not only when the acknowledgment is unconditional but even when the acknowledgment is coupled with a refusal to pay. When the debt has become barred by limitation there is Section 25 (3) of the Contract Act and there can be no doubt under the section itself that the written promise to pay falling within this furnishes a fresh cause of action. The doctrine that an acknowledgment without written promise made before the expiry of the period of limitation should furnish a fresh cause of action is for India quite unnecessary. In *Maniram's case*, the question was only whether the particular document amounted to an acknowledgment for the purposes of Section 19 of the Limitation Act and it is not easy to understand why reference to English principles was made. I have had some experience of the unfortunate results of the impor-

tation of the rule of fresh cause of action. In places where the ignorant and illiterate debtor is not protected by legislation which not only enables but requires the Courts to go behind transactions and ascertain their true nature, the debtor having given successive acknowledgments of amounts rising in rapid progression has often found himself ruined by a suit based on the latest acknowledgment without the Court having inquired into the true nature of the transaction. The general law contained in the Usurious Loans Act is not always enough to afford protection. Conditions in India are by no means the same as in England."

The above passage shows how distressed even an English Judge felt over the view which prevailed in Punjab about an unconditional acknowledgment.

21. Even apart from considerations of justice and equity, I see a formidable legal difficulty in subscribing to the view that the suit can be based on an unconditional acknowledgment. The language of Section 19 of the old Limitation Act and Section 18 of the new Indian Limitation Act shows that if a creditor brings a suit which is time-barred if computed from the date of the original cause of action and wants to avail of an acknowledgment in order to save limitation, that acknowledgment must have been obtained before the date of expiry of the period of limitation. If the plaintiff brings the suit on the original cause of action and seeks to extend the period of limitation on the basis of conditional or unconditional acknowledgment, he will have to show that the acknowledgment was obtained by him before the period of limitation had expired. In other words, the section itself envisages that the burden of proving that the acknowledgment was made within the period of limitation is on the creditor.

Now, if it is held that a suit could be based on an unconditional acknowledgment, the creditor would be relieved of the necessity of proving that it was obtained within the period of limitation and the burden would shift to the debtor to show that it was time-barred. It would be an anomalous position that the person who brings the suit on the original cause of action will have to show even in the case of an unconditional acknowledgment that it was obtained within the period of limitation, while if he bases his suit on an unconditional acknowledgment he would be in a better position. The net result of holding that a suit can be based on an unconditional acknowledgment would be that even if the acknowledgment has been obtained in respect of time-barred debts, the burden would lie on the debtor to prove that the debt which was acknowledged was time-barred on the date of its execution.

It is well known that debtors generally belong to poorer classes and, in most cases, they are even illiterate. The accounts always remain with the creditors. If the creditor bases his suit on the original cause of action and uses the acknowledgment, conditional or unconditional, for purposes of saving limitation, he would not be deprived of justice for that reason alone. His only botheration may be to first disclose his original cause of action and then show how the acknowledgment had saved the debt from being time-barred. It was urged that a debtor on whom burden is cast may as well ask the creditor to produce his account books. In my opinion, this argument may not help the debtor because the creditor may say that his account books are lost or destroyed or he may put forward any other excuse. The provisions of Section 25 (3) of the Contract Act would be rendered nugatory in many cases. On the contrary, the creditor stands nothing to lose if he bases his suit on the original cause of action and uses the acknowledgment, conditional or unconditional, for extending the period of limitation.

22. A question may also arise as to which Article of the Indian Limitation Act would apply for computing the period of limitation in case the suit is based on an acknowledgment. In the Limitation Act of 1908, which will hereinafter be referred to as the old Act, there was no specific Article to indicate that a particular period of limitation would apply in case the suit is founded on acknowledgment. Similarly, in the Limitation Act of 1963, which will hereinafter be referred to as the new Act, no such specific Article has been provided. Article 1 of the new Act, which corresponds to Article 85 of the old Act, provides that a suit for the balance due on mutual, open and current account, may be brought within three years from the close of the year in which the last item, admitted or proved, is entered in the account.

Article 19 of the new Act, which corresponds to Article 57 of the old Act, provides three years' limitation for a suit regarding money payable for money lent and the period of limitation is to be computed from the date when the loan is made. Article 20 of the new Act, which corresponds to Article 58 of the old Act, contemplates suits similar to the one envisaged in Article 59 when the lender has given a cheque for the money. In this case, three years' period is to be computed from the date when the cheque is paid.

Article 21 of the new Act, which corresponds to Article 49 of the old Act, contemplates a suit for money lent under an agreement that it shall be payable on demand. In this case, three years' period is to be computed from the date when the loan is made. Article 22 of the new

Act, which corresponds to Article 60 of the old Act, contemplates a suit for money deposited under an agreement that it shall be payable on demand. In this case, three years' period of limitation would begin to run from the date when the demand is made. Article 23 of the new Act, which corresponds to Article 61 of the old Act, envisages a suit for money payable to the plaintiff for the money paid for the defendant. Here, three years' period of limitation would run from the date when the money was paid. Article 24 of the new Act, which corresponds to Article 62 of the old Act, relates to a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. Here, the period of limitation runs from the date when the money was received. Article 25, which corresponds to Article 63 of the old Act, relates to a suit for money payable for interest upon money due from the defendant to the plaintiff. In this case, three years' period of limitation would run from the date when the interest becomes due.

23. Article 26 of the new Act, which corresponds to Article 64 of the old Act, relates to a suit for money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. In this case, three years' period of limitation begins to run from the date the accounts are stated in writing and signed by the defendant or his agent duly authorised. Similarly Article 28 of the new Act, which corresponds to Article 66 of the old Act, relates to a suit based on a single bond where a day is specified for the payment. In this case, three years' period of limitation would be computed from the day so specified.

24. It would not be proper to burden the judgment by reproducing the remaining Articles from 29 to 39. It would suffice to say that they contemplate suits based on bonds subject to conditions, suits founded on Bills of Exchange of different types and suits based on promissory notes containing different conditions, but there is no Article relating to a suit based on an acknowledgment. This again shows that an acknowledgment can only be used for purposes of extending the period of limitation of suits about which different Articles are provided but a suit based on mere acknowledgment, conditional or unconditional, is not contemplated by the Indian Limitation Act.

An unconditional acknowledgment in respect of a certain amount of money may not show whether the creditor's original claim was based on bond or promissory note or bill of exchange or account stated. Which Article would apply in such a case? Was it meant that a creditor basing his suit on mere acknowledgment should be in a better position than a per-

son who files his suit on the original cause of action within the period of limitation? If it be urged that for a suit based on acknowledgment the new residuary Article 113 corresponding to old Article 120 may be applied, it would again create anomalous position. If the suit is based on the original cause of action, the period from which the limitation is to run would differ from suits to suits covered by different Articles, but if the suit is based on acknowledgment, all those distinctions would disappear. The old residuary Article 120 prescribed six years' limitation whereas for a suit on a bond only three years' limitation was prescribed. It was never the intention of the law that a longer period of limitation would be available to a suitor who bases his suit on acknowledgment as compared to a suitor who files it on the original cause of action. To my mind, therefore, an acknowledgment can only serve the purpose of extending the period of limitation in favour of a suitor but it cannot form the basis of a suit.

25. In the present case, it is clear from Ex. 1 that the creditor first wrote out the balance, made the entry that the amount of Rs. 6022/- was to be obtained from the judgment-debtor and placed his signature therein. He further wrote that this balance was found according to the account given above. In fact, there was no account given above the balance. The statement of the plaintiff Jeevraj recorded by the trial Court shows that no account was in fact taken on the date Ex. 1 was executed. He says that only interest was added but there is no mention about addition of interest either in the said document. It is interesting to point out that although the plaintiff has claimed interest, there is no stipulation to pay any interest in Ex. 1. It is thus clear how unwary debtors are persuaded to sign the entries which on the very face are not correct. In the present case, the defendant was a businessman and it may be urged that he should have taken care to understand the entry before signing it.

But suppose in place of the defendants, there was another illiterate person whose thumb-mark was obtained on the said entry. Could this unconditional acknowledgment alone be sufficient to give a decree against him? The legal position would not change whether the debtor is a literate person or an illiterate person. What is meant to point out is that if unconditional acknowledgments are allowed to be made the basis of the suit, then there would be great possibility of the creditors realising even time-barred debts from the debtors if the debtors happen to be poor and illiterate. They would not be able to prove that the acknowledgment was made beyond time in the absence of any document in their possession.

26. It was next argued that even though the observations of their Lordships of the Supreme Court in AIR 1953 SC 225 (supra), were obiter, this Court is bound to follow the view because even the obiter remarks of their Lordships are entitled to great respect. Reference in this connection was also made to Article 141 of the Constitution of India. It would suffice to say that if their Lordships of the Supreme Court had declared the law clearly, then it would have been certainly binding on all Courts within the territory of India. Even the obiter observations of their Lordships are entitled to great respect and we would have certainly followed them without any reservation in ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) (supra). The judgment in that case was prepared by the then Chief Justice of this Court who later adorned the Bench of the Supreme Court as a Judge and Chief Justice. There was not the slightest idea of not following the dictum of their Lordships of the Supreme Court because of their being obiter. It was after long consideration that we decided ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) and I still hold that the observations of their Lordships of the Supreme Court in AIR 1953 SC 225 (supra), do not necessarily overrule the view of the Full Bench of this Court in ILR (1951) 1 Raj 297=(AIR 1952 Raj 7 FB) (supra).

27. Learned Counsel for the appellants has referred to Brij Behari Prasad v. Bir Bahadur Rai, AIR 1968 Pat 203 in which the learned Judges of the Patna High Court have not agreed with this Court's observations in ILR (1955) 5 Raj 85=(AIR 1956 Raj 12). With great respect, I still differ with the view they have taken. It appears that their attention was not invited to the later observations of their Lordships of the Supreme Court in AIR 1961 SC 1236 (supra), because there is no reference to them in their judgment. It cannot be said what their Lordships' opinion would have been if the said case would have been pointed out to them.

28. It was also urged that Ex. I amounts to an agreement and, therefore, a suit could be based thereon. It was pointed out that both the debtor and creditor appeared to have met on the day the document was executed and since the acknowledgment was bilateral, it can be used as an agreement. To my mind, this argument is also without any force. An acknowledgment would remain an acknowledgment whether it is unilateral or bilateral. A unilateral acknowledgment would, in most cases, be more reliable and convincing, because if the debtor makes a conditional or unconditional acknowledgment in the absence of a creditor, it cannot be urged by him as in the case of a bilateral agreement that it was

obtained by any kind of fraud, coercion, threat, inducement or promise.

A perusal of the document Ex. I would show that there was no fresh consideration coming from the side of the creditor and therefore essentially it is nothing but an acknowledgment pure and simple. The learned Appellate Judge was, in my opinion, correct in holding that a suit could not be based on such an acknowledgment. An unconditional acknowledgment may amount to an agreement if there is an express promise to pay or if there is some new consideration proceeding from the creditor's side and in view of that consideration, the debtor makes an implied promise to pay the debt.

In the present case, there is no implied promise to pay over and above the acknowledgment. The first Appellate Court was therefore not wrong in holding that the suit could not be based thereon. The learned Appellate Judge was, however, not fair with the appellants in not permitting them to amend the plaint when a specific request was made before him. The only reason given by him was that the suit was brought two years after this Court decided Ramdayal's case, ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) (supra). He has not pointed out if that case was in the know of the appellants or their Counsel. The conduct of the appellants in this case was also not free from blame. They also did not come out honestly to disclose the circumstances in which the document Ex. I was executed. It is well known that in districts, proper legal help is not always available. The defendant could be compensated with costs for the trouble to which he was put. In my opinion, in a case like the present one, where a suit is filed by a plaintiff on the basis of an unconditional acknowledgment if he wants to amend the suit so as to base it on the original cause of action, the Court should not be harsh with him. After all, this is a matter of procedure which is to serve as a hand-maid of justice.

29. I would, therefore, allow the appeal and set aside the judgment and decree of the learned District Judge, but remand the case to the trial Court with permission to allow the plaintiffs to amend their suit so as to base it on the original cause of action and then try the case afresh.

30. BHANDARI, J.:—Two points arise for decision in this appeal. The first is whether on the proper construction of the language of Ex. 1, it should be held that it contains an express promise to pay by the defendants 2 to 4 and the second is whether Ex. 1 could be made the basis of the suit.

31. I take the first contention first. The Khata Ex. 1 mentions at the outset that the creditors had to take Rs. 6022/-

on the basis of the previous khata. This entry is signed by one of the plaintiffs Jeevraj. It is further mentioned that this balance had been struck in the presence of Kunanmal Lalchand. Then the entry is signed by the defendants Nos. 2 to 4, defendant No. 2 mentioning with his signature that Rs. 6022/- are to be paid. The argument addressed on behalf of the plaintiffs appellants is that in Ex. 1 there is not merely admission that Rs. 6022/- are due but it further contains that this amount is to be paid "Dena Chhe" that is, "Dena Hai" and that these words must be construed as a promise on the part of the defendants to pay the aforesaid amount.

It is contended that when a debtor states in an acknowledgment that a particular amount is to be paid, it must be construed as containing an express promise that that particular amount shall be paid and that such a case must be distinguished from a case in which it is only mentioned that a particular amount is due.

32. After careful consideration of the matter, I am of the view that no such distinction can be drawn. In both the cases, there is a mere admission of liability to pay. When a debtor says that a particular amount is to be paid, it cannot be held that he has said in so many words that he shall pay it. As I shall point out presently, in such a case there is an implied promise to pay. But it cannot be held that there is an express promise to pay. The case in which there is a mention that particular amount is to be paid stands on the same footing as the case when there is mere mention that a particular amount is due. This disposes of the first contention.

33. The second contention deserves serious consideration. I regret I am unable to agree with the view of my Lord the Chief Justice on this point.

34. When the suit was filed, the Indian Limitation Act, 1908, was in force and reference to sections and articles in this judgment is to the provisions contained in that Act. Section 19 of that Act was as follows:—

"19. Effect of acknowledgment in writing.

(1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of

the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.

Explanation I. For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

.....

Now an acknowledgment will be effective under Section 19 even if it does not contain a promise to pay whether express or implied. It will be effective even when it is accompanied by a refusal to pay or even when it is coupled with a claim to a set-off. It may be addressed to a person other than a person entitled to the property or right. An acknowledgment under Section 19 does not create any contract. It merely extends the period of limitation for a suit or application in respect of any property or right so acknowledged. It is for this reason that it is said that an acknowledgment cannot form the basis of the suit because the suit must disclose the facts constituting the basis of the claim of the plaintiff. It may, however, be mentioned that there is a specific provision in Art. 64 which provides for three years' limitation from the date when the accounts are stated between the parties. Such a suit is called a "suit based on accounts stated". As explained by their Lordships of the Privy Council in *Siqueira v. Noronha*, AIR 1934 PC 144 and AIR 1934 PC 147, the essence of an account stated is that there are cross-items of account and that the parties mutually agree the several amounts of each and by treating the items so agreed on the one side as discharging the items on the other side pro tanto, go on to agree that the balance only is payable. As pointed out in *Bishun Chand's case*, AIR 1934 PC 147 (supra):

"Such a transaction is in truth bilateral, and creates a new debt and a new cause of action there is mutual consideration to support the promises on either side and to constitute the new cause of action."

This is technically the real account stated to which Article 64 is applicable and the law has treated such an account stated as bilateral agreement arrived at between the parties by which the person who signs the entry showing the balance due must be deemed to have promised to pay the balance due to the other party. Such account stated is to be distinguished from an account stated in which there is merely an acknowledgment of the balance without the statement of account.

The trial Court when it held that Ex. 1 amounted to account stated, did not take the correct view.

35. Now, let us examine the circumstances under which a mere acknowledgment can form the basis of the suit. Obviously such a document in order to form the basis of the suit must be an agreement under which the defendant has to pay a particular sum of money to the plaintiff. An acknowledgment under Section 19 may be a unilateral transaction. It may be an act on the part of the defendant to which the plaintiff had not signified his assent. Such a unilateral act may be good acknowledgment if conditions of Section 19 are satisfied. For example, the debtor may send a letter to the creditor acknowledging his liability or the debtor may make a statement in a Court acknowledging that he is liable to pay a certain amount or that he may make a mention in any other document that he is liable to pay a certain amount to the creditors.

All these acts are of the result of unilateral acts of the defendant but they become an acknowledgment if the conditions under Section 19 are satisfied. These acts do not amount to an agreement and on the basis of such a document no suit can be filed. But a document may be bilateral in nature under which the defendant acknowledges his liability to pay a certain amount to the creditor. If such a document contains an express promise to pay, there will be little room for the contention that it cannot form the basis of the suit. We have, however, to examine a case in which there is no express promise to pay but there is an unconditional acknowledgment that a particular amount is due. There are two views possible to take in such a case. The one is that mere admission of liability does not contain even an implied promise to pay, and, therefore, it cannot be any agreement under the provisions of the Indian Contract Act. The other view is that it imports an implied promise to pay, and, therefore, it is as good an agreement under the Indian Contract Act as any other agreement, and if such an agreement is enforceable at law under the provisions of the Contract Act, a suit can be founded on it.

36. The controversy on this point took a serious turn after their Lordships of the Privy Council made the following observations in (1906) ILR 33 Cal 1047 (PC):

"An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do."

These observations were no doubt made in a case in which the respondent Roop-

chand who was the defendant in that case had filed a written reply setting out that "for the last five years he had open and current accounts with the deceased." The question before their Lordships to decide was whether it was a sufficient acknowledgment under Section 19 of the Limitation Act. Their Lordships held that it was a case of a conditional promise to pay in which condition had been performed and it was a good acknowledgment under Section 19 of the Limitation Act.

The observation that an unconditional acknowledgment always implied a promise to pay was, therefore, clearly obiter dicta, and the question before the High Courts in India was what weight should be attached to this observation. In some cases it was pointed out that this observation was based on the English law and their Lordships of the Privy Council never meant that the principle of English law should be applied in India specially in view of the Indian provisions contained in Section 19 of the Indian Limitation Act, Section 25 of the Indian Contract Act and Article I, Schedule I of the Indian Stamp Act, while the other High Courts have held that this observation has to be given effect to and there was nothing in the Indian Law which made it necessary to take a different view.

37. Before I deal with this matter, I may refer to the origin of the doctrine that an unconditional acknowledgment implies a promise to pay in England. In this connection I may refer to Chitty on Contracts Vol. I paragraph 1498 which runs as follows:

"Origin of the doctrine. The Jacobean statute of 1623 contained no provision that an acknowledgment of a debt or part payment thereof should extend the period of limitation. At least as early as 1699, however, the Judges held that if the defendant made a fresh promise to pay the debt, time began to run anew from the date of the promise. From this it followed that an acknowledgment or part payment had the same effect if, but only if, a fresh promise to pay could thereby be inferred. This judicial process was described by Lord Sumner as "the task of decorously disregarding an Act of Parliament. The judge-made doctrine was recognised by two statutes, one of which required that the acknowledgment should be in writing and signed by the person chargeable, while the other made the signature of his duly authorised agent sufficient. For specialty debt the Civil Procedure Act, 1833, abolished the requirement (productive of so much litigation) that there must be an implied promise to pay; but this requirement continued to exist for simple contract debts until 1940. These statutes have all been repealed by the Limitation Act, 1939."

I may further refer to the observations of Viscount Cave in *Spencer v. Hemmerde*, (1922) 2 AC 507:

"My Lords, the law relating to matters of this kind is not in doubt. The statute (21, Jac. 1, c. 16, s.3) enacted that all actions of debt grounded upon any lending or contract without specialty shall be commenced and sued within six years next after the cause of such actions and not after, and made no reference to any acknowledgment; but it was held in a series of cases that a promise by the debtor to pay the debt, if given within six years before action brought, was sufficient to create a new contract and so to take the case out of the operation of the statute, the existing debt being a sufficient consideration to support the promise. It was also held that a simple acknowledgment of the debt, without any express promise, was sufficient for the purpose, an acknowledgment implying a promise to pay. Some of the earlier cases went so far as to decide that an acknowledgment was sufficient, though coupled with a promise to pay at some future time which had not arrived or upon some condition that had not been performed, or even with an absolute refusal to pay; but this was set right by the decision of the Court of King's Bench in *Tanner v. Smart*, ((1827) 6 B. & C. 603,609) where Lord Tenterden in giving the judgment of the Court, said: 'Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule 'expressum facit cessare tacitum' apply?'"

"No doubt the doctrine so established was originally judge-made law; but it has stood unchallenged for nearly a century, and indeed it has received statutory recognition."

"Since the case of *Tanner v. Smart* the law as there laid down has been uniformly accepted, and it must be held to be settled law (1) that a written promise to pay a debt given within six years before action is sufficient to take the case out of the operation of the statute of James I; (2) that such a promise is implied in a simple acknowledgment of the debt; but (3) that where an acknowledgment is coupled with other expressions, such as a promise to pay at a future time or on a condition or an absolute refusal to pay, it is for the Court to say whether those other expressions are sufficient to qualify or negative the implied promise to pay."

It has been urged before us that the doctrine that an acknowledgment implies a promise to pay is peculiar to English law and should not be imported in India.

I need not refer to the other aspects of this doctrine; but so far as the proposition that an unconditional acknowledgment implies a promise to pay is concerned, there is nothing peculiar in it as their Lordships of the Privy Council observed in *Mani Ram's case*, (1906) ILR 33 Cal 1047 (PC) (supra), that "this is what every honest man would mean to do" when he makes an unconditional acknowledgment. Their Lordships of the Privy Council again reiterated the same proposition in AIR 1934 PC 144 when they tried to distinguish real account stated from a mere acknowledgment and they observed as follows:

"Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise."

In the aforesaid observations, it has been laid down that a mere acknowledgment amounts to a promise. This means that there is implied promise to pay even in a mere acknowledgment. Of course such acknowledgment must be unconditional.

38. Then again in *Surendra Prasad v. Gajadhar Prasad*, AIR 1940 FC 10, their Lordships of the Federal Court, while construing the word 'bond' in Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939) observed as follows:—

"If the promise to pay is to be inferred by implication, then the document may amount to acknowledgment of liability or adjustment, or even account stated

Thus the view that an unconditional acknowledgment implies a promise to pay cannot be considered to be peculiar to England. If the presumption that a debtor intends to pay what he acknowledges unconditionally can be drawn in England, there is much more ground for drawing such a presumption in India for the reason that an Indian not only considers payment of debt a part of his legal duty but also of his religious obligation.

39. Having said so, I proceed to refer to some of the decisions of the Indian High Courts in which this controversy has been referred. It is not my purpose to review all the cases on the subject because the point under consideration is to determine the effect of the observations of their Lordships of the Supreme Court in *Hiralal's case*, AIR 1953 SC 225 (supra).

40-41. I may, however, refer to AIR 1932 All 199 in which all the contentions that arise in such a case have been summed

up. In that case, Niamatullah, J., took the view that an unconditional acknowledgment implied a promise to pay and could be made the basis of the suit. Sulaiman, Ag. C. J., expressed the contrary view. Niamatullah, J., relied on the observations in (1906) ILR 33 Cal 1047 (PC) (supra) and then proceeded, to observe as follows:

"This rule is based on a principle of universal application and common-sense, and is not peculiar to any particular system of law. Where two persons examine their mutual dealings and one of them formally acknowledges his indebtedness to the other to a certain extent in a document which complies with all the formalities of the law for example, the Stamp Act, no other explanation than that he promised to pay the amount is conceivable. If in making the acknowledgment he has included time barred debts which he might have well repudiated it may still be open to him to plead failure of consideration to that extent. The creditor places himself in a disadvantageous position in this respect by omitting to take a bond containing an express promise to pay which alone can successfully meet the plea of want of consideration."

Sulaiman, Ag. C. J., after noticing Section 19 of the Indian Limitation Act, observed that mere acknowledgment is not sufficient under Section 19 unless it is shown that it has been made before the expiration of the prescribed period and further observed as follows:

"It follows that it is not sufficient for the plaintiff to merely prove the acknowledgment of liability to pay a money debt and throw the burden of showing that the acknowledgment was made beyond time on the debtor by invoking the aid of a general principle of common law that an acknowledgment necessarily implies a promise to pay it. The aid of any such principle cannot be sought to override the express provisions of the statute of limitation and be made the excuse for casting the onus of proof on the defendant. If such an indirect evasion of the law were permitted it would have the effect of nullifying the express provisions of Section 19 so far as any rate as acknowledgments of money debts are concerned."

Another difficulty that was pointed out was that under Section 25 of the Contract Act, the mere implied promise to pay involved in a mere acknowledgment would not be sufficient under Section 25 of the Contract Act and to avoid such a result, recourse must be had to reading Section 25 as if the word "express" were interpolated before the word "promise" so as to exclude implied promise.

42. In AIR 1935 All 129, Sulaiman, C. J., adhered to the view expressed by

him earlier and further pointed out that if a receipt containing acknowledgment indicated an implied promise to pay an earlier debt, it would not form the basis of the suit and observed as follows:—

"But assuming that it amounts to an implied promise to pay, it does not follow that they can be made the basis of a suit and treated as giving rise to a fresh cause of action. If the debt had not become barred by time then even an express promise to pay it is nothing more than a promise to do what a person is, under the law, bound to do. It cannot be treated as a fresh contract or a novation of the old contract and is on no higher footing than mere acknowledgment. On the other hand, if the debt had become barred by time, then an implied promise to pay it would be of no avail because under Section 25 (3), Contract Act, it cannot be treated as a promise, made in writing, to pay a time-barred debt. When there is no express promise to pay but the intention is inferred only indirectly it cannot be treated as a promise in writing to pay the time barred debt. The plaintiff, therefore, would not be entitled to take advantage of such an implied promise to pay a time-barred debt."

I may also refer to the state of law which prevailed in the Lahore High Court. In Ganpat v. Daulat Ram, 68 Pun Re 1904, it was held that a transaction between two parties which results in the striking of a balance may, according to the particular facts and the nature of the entry, amount to one or other of two things. If it amounted merely to an acknowledgment of an existing debt due from one of the parties to the other, it was an acknowledgment and could not furnish a cause of action. If the striking of a balance may mean something more than a mere admission of a liability in respect of an existing debt, that is if it amounted to a fresh contract for the old contract, it would be made the basis of suit on that document.

43. The principle enunciated in 68 Pun Re 1904 (supra), was accepted by a Division Bench of the Lahore High Court in Pala Mal v. Tula Ram, 119 Pun Re 1908. But in AIR 1929 Lah 264, Shadi Lal, C. J., and Skemp, J., took the view that an unconditional acknowledgment implied a promise to pay and could support a suit. They relied on the Privy Council case in (1906) ILR 33 Cal 1047 (PC) (supra) and pointed out that the decision in Pala Mal's case, 119 Pun Re 1908 (supra), could not be held as good law after the decision in Maniram's case, (1906) ILR 33 Cal 1047 (PC). Their Lordships also referred to a decision of the Bombay High Court in Chuni Lal Rattan Chandra Gujarathi v. Laxman Govind Dube, AIR 1922 Bom 183 in which the same view was taken.

44. The Full Bench of this Court in *Hasti Mal's case*, ILR (1951) 1 Raj 297= (AIR 1952 Raj 7 FB) (supra), has taken the view that a suit could not be founded on a mere acknowledgment as a mere acknowledgment of debt does not operate as a new contract and cannot be made a basis of the suit. For this the Full Bench relied on 1950 Raj LW 284= (AIR 1951 Raj 74) and accepted the view of law taken in that case.

45. Now, I proceed to consider the decision of their Lordships of the Supreme Court in AIR 1953 SC 225 (supra). The suit in that case was based on the following entry in the plaintiff's books which was signed by the defendant in that case:

"Rs. 34000/- balance due to be received upto Bhadon Sudi 11 Smt. 2006 made by check and understanding of accounts with Hiralal's books."

This was a case on the basis of account stated falling under Article 64 of the Indian Limitation Act. It was contended before the Supreme Court that the suit could not be maintained merely on the basis of acknowledgment of liability. Their Lordships proceeded to observe as follows:

"Mr. Bindra next urged that the plaintiffs' suit should have been dismissed because it could not be maintained merely on the basis of an acknowledgment of liability, that such an acknowledgment could only save limitation but could not furnish a cause of action on which a suit could be maintained. The Judicial Commissioner took the view that an unqualified acknowledgment like the one in the suit, and the statement of the account under which the entry had been made, were sufficient to furnish a cause of action to the plaintiffs for maintaining the present suit. We are satisfied that no exception can be taken to this conclusion. It was held by the Privy Council in *Maniram v. Seth Rupchand*, 33 Ind App 165 (PC) that an unconditional acknowledgment implies a promise to pay because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do. In *Fateh Mahomed v. Ganga Singh*, AIR 1929 Lah 264 the same view was taken. It was held that a suit on the basis of a balance was competent. In *Kahanchand Dularam v. Dayaram Amritlal*, AIR 1929 Lah 263, the same view was expressed and it was observed that the three expressions 'balance due', 'account adjusted' and 'balance struck' must mean that the parties had been through the account. The defendant there accepted the statement of account contained in the plaintiffs' account book, and made it his own by signing it and it thus amounted to an 'account stated between them' in the language of Article 64, Limitation Act. The same happened in the present

case. The acknowledgment which forms the basis of the suit was made in the ledger of the plaintiffs in which earlier mutual accounts had been entered and truly speaking, the suit was not based merely on this acknowledgment but was based on the mutual dealings and the accounts stated between them and was thus clearly maintainable.

Mr. Bindra drew our attention to a decision of the Allahabad High Court in *Ghulam Murtuza v. Mt. Fasihunnissa Bibi*, AIR 1935 All 129 wherein it was held that even if an acknowledgment implies a promise to pay it cannot be made the basis of suit and treated as giving rise to a fresh cause of action. We have examined the decision and we are satisfied that it does not lay down good law."

46. The question before us is how far the aforesaid observations of their Lordships of the Supreme Court overruled the view taken by the Full Bench of this Court in *Hastimal's case*, ILR (1951) 1 Raj 297= (AIR 1952 Raj 7 FB) (supra). On behalf of the plaintiff-appellants it is contended that the decision of their Lordships of the Supreme Court approved the observations made by their Lordships of the Privy Council in *Maniram's case*, (1906) ILR 33 Cal 1047 (PC) (supra), that an unconditional acknowledgment implied a promise to pay and further approved the decision of the Lahore High Court in AIR 1929 Lah 264 (supra). It was further pointed out by the Supreme Court that the observations of Sulaiman C. J. in AIR 1935 All 129 (supra) that even if an acknowledgment implied a promise to pay it could not be made the basis of the suit did not lay down a good law.

On behalf of the defendants-respondents it is however contended that the case before the Supreme Court was on accounts stated falling under Art. 64 of the Limitation Act and in that case the point whether a mere conditional acknowledgment could form the basis of the suit or not was not fully considered, nor did it arise for consideration. Then it is pointed out that the aforesaid observations of their Lordships of the Supreme Court do not contain a definite approval of the observations in *Maniram's case* (1906) ILR 33 Cal 1047 (PC) (supra) that an unconditional acknowledgment implied a promise to pay. *Fateh Mohammed's case* AIR 1929 Lah 264 of the Lahore High Court was also not definitely approved. It was also contended that the view taken by the Allahabad High Court in *Gulam Murtuza's case* AIR 1935 All 129 (supra) was overruled only to the extent that a receipt which contained a mere acknowledgment could not be made the basis of the suit.

Learned Counsel for the defendants-respondents has strongly relied on the

Division Bench judgment of this Court in Ram Dayal's case ILR (1955) 5 Raj 85=(AIR 1956 Raj 12) (supra) and has urged that the view taken in that case is correct. That was again a case of accounts stated and it was held that the case fell under Article 64 of the Limitation Act. The question whether Hiralal's case AIR 1953 SC 225 (supra) has overruled the Full Bench decision in Hastimal's case ILR (1951) 1 Raj 297=(AIR 1952 Raj 7 (FB)) (supra) was also examined and it was pointed out that the case before the Supreme Court was not on the basis of mere acknowledgment and that the disapproval of the decision in Gulam Murtuza's case, AIR 1935 All 129 was only of the observations that a receipt which contained a mere acknowledgment could not be made the basis of the suit. It was also pointed out that of the two Lahore cases referred to by the Supreme Court, 68 Pun Re 1904 (supra) was of accounts stated and the facts of the other case were not mentioned in detail and it could not be said that the suit in that case was based only on an acknowledgment.

47. At the outset, I may point out that the observations of their Lordships of the Supreme Court, as far as they are material for the purposes of the appeal, were obiter dicta inasmuch as their Lordships were deciding a case which fell under Article 64 of the Indian Limitation Act and were not dealing with the question whether a mere acknowledgment could form the basis of the suit. But even the obiter dicta of the Supreme Court is entitled to the highest respect. Their Lordships of the Supreme Court in *I. T. Commr. v. Vazir Sultan & Sons*, AIR 1959 SC 814 observed that:

"It is no doubt true that this Court was not concerned with any agency agreement in the last mentioned case ((1927) 12 Tax Cas 927) and the observations made by this Court there were by way of obiter dicta. The obiter dicta of this Court, however, are entitled to considerable weight and we on our part fully endorse the same."

Before coming into force of the Constitution, the view taken in some cases was that the courts in India must not depart from the long consistent course of decisions simply on the basis of a dictum or a supposed dictum of their Lordships of the Privy Council on a matter on which it was not directly necessary for their Lordships to decide in the case. Reference in this connection may be made to *Anand Prakash v. Narain Das* AIR 1931 All 162 (FB), but in other cases the view taken was that the decision of their Lordships of the Privy Council though it was obiter dicta was entitled to the highest respect from all the Indian Courts, and must be followed by the

High Courts. Reference in this connection may be made to *In re Benaras Bank Ltd.*, AIR 1940 All 544, *State of Bombay v. Chhaganlal*, AIR 1955 Bom 1 (FB) and *In re Tushar Kanti Ghosh*, AIR 1935 Cal 419.

48. After the coming into force of the Constitution, the position is that the law declared by the Supreme Court is binding on all courts within the territory of India. This is what Article 141 has laid down. The principle of law enunciated by the Supreme Court, even by way of obiter dicta must be taken to be the law declared by the Supreme Court even if the pronouncement of such principle was not necessary for the decision of the case. What is to be determined is whether the Supreme Court intended to lay down any principle of law. If any principle of law has been laid down after consideration by the Supreme Court, it amounts to declaration of law for the purpose of Article 141 even though such principle has been laid down by way of obiter dicta. In this connection we may refer to *Bimla Devi v. Chaturvedi* AIR 1953 All 613 a Division Bench of the Allahabad High Court in which it is observed as follows:

"Article 141 mentions that 'the law declared by the Supreme Court shall be binding on all Courts within the territory of India'. Where the Supreme Court deliberately with the intention of settling the law pronounces upon a question, the pronouncement is the law declared by the Supreme Court within the meaning of Article 141 and is binding on all courts in India.

It is true that where a point has not been argued and certain general observations have been made which may seem to cover points not argued before the Court, they may not be considered to be binding, and in such cases the binding nature of the observation of the Court may be limited to the points specifically raised and decided by the Court. It is also true that pronouncements made on concessions of counsel, where a point is not argued, are not binding — *Venkanna v. Laxmi Sanappa*, AIR 1951 Bom. 57 at p. 63 but otherwise even what is generally called an 'obiter dictum' provided it is upon a point raised and argued, is binding upon the Courts in India." The above passages correctly sum up the position in law after coming into force of the Constitution which incorporated Article 141 in it.

49. In my view, in *Hiralal's case*, AIR 1953 SC 225 their Lordships of the Supreme Court laid down that the proposition that an acknowledgment cannot form the basis of suit is not a good law. The whole trend of the judgment is that their Lordships approved the aforesaid observations contained in the Privy Council judgment

of the C. M. S. and was responsible for the cash and maintenance of correct accounts of the society. But, contrary to the Bye-laws of the Society he got false entries made in the Cash Book showing that a sum of Rs. 700/- was disbursed on 9-9-1958 to the 5th respondent (Dhirendra Chandra Roy), a sum of Rs. 3,500/- disbursed to the 6th respondent (Ajit Chakraborty) on 6-9-1958, a sum of Rs. 3,000/- disbursed to the 2nd respondent (Haradhan Dey) on 21-3-1959, another sum of Rs. 2,000/- disbursed to the said respondent on 31-3-1959, a sum of Rs. 3,000/- disbursed to one A. Majumdar on 20-2-1959 and a sum of Rs. 6,000/- to the 4th respondent (C. C. Das Gupta) towards "dadan". Thus, the 1st respondent (Shri S. K. Gupta) misappropriated a sum of Rs. 18,200/- and brought into existence false accounts, vouchers etc. in their names.

(b) The 1st respondent (S. K. Gupta) brought into existence entries in the Cash Book to show that the amounts were recovered from them. A sum of Rs. 3,500/- was said to have been recovered from the 6th respondent (Ajit Chakraborty) on 27-6-1959, a sum of Rs. 3,000/- from A. Majumdar on 28-6-1959, a sum of Rs. 700/- from the 5th respondent (Dhirendra Chandra Roy) on 27-6-1959, a sum of Rs. 5,000/- from the 2nd respondent (Haradhan Dey) on 29-6-1959 and a sum of Rs. 6,000/- from the 4th respondent (C. C. Das Gupta). In fact, no money was collected from them and the transactions were mere paper transactions.

(c) Again, at the beginning of the next Co-operative year the 1st respondent (S. K. Gupta) made false entries in the account books and brought into existence vouchers etc. to show that the sum of Rs. 18,200/- was disbursed to three persons. A sum of Rs. 2,200/- was said to have been paid on 2-7-1959 to the 2nd respondent (Haradhan Dey). A sum of Rs. 8,000/- was said to have been advanced to the 3rd respondent (Sudhir Ranjan Roy) on 3-7-1959 and a sum of Rs. 8,000/- was said to have been advanced to the 4th respondent (C. C. Das Gupta) on 6-7-1959. The alleged disbursements were, in fact, fictitious. The 1st respondent falsified the accounts and brought into existence the documents with the help of the other respondents.

(d) P. Ws. 2 (Amar Nath Chakraborty, Co-operative Extension Officer of Khowai Block) and 3 (Sourindra Mohan Biswas, District Auditor in the Co-operative Department, Tripura) audited the accounts of the Society and prepared Exts. P-33 and P-36, reports; Exts. P-37 and P-38 are the statements of accounts and Balance-sheets. Both of them mentioned in their reports that the entries mentioned in the above Sub-Paras (a) to (c) were fictitious.

(e) P. W. 6 (Nihar Ranjan Roy) who was the Ex-Accountant of the C. M. S. filed Ext. P-54 complaint petition, dated 8-1-1960

before the Registrar of the Co-operative Societies on 9-1-1960 alleging that the 1st respondent (S. K. Gupta) committed criminal breach of trust and misappropriated the said sum of Rs. 18,200/-. P. Ws. 4 and 7 (Sailesh Ranjan Dutta and Manoranjan Deb) who were some of the members and Directors of the C. M. S. filed Ext. P-52, on 11-1-1960, complaint before the Registrar of Co-operative Societies making similar allegations as those in Ext. P-54. The Registrar of Co-operative Societies passed Ext. P-55 order on 9-1-1960 and directed P. W. 5 (Ramendra Narayan Bhattacharjee), the then Deputy Collector of Tripura and the Assistant Registrar of Co-operative Societies to make an enquiry. P. W. 5 (Ramendra Narayan Bhattacharjee) made an enquiry and sent his report Ext. P-57, dated 16-1-1960, to the Registrar explaining the conditions of the Society and alleging that with the help of the respondents 2 to 5 the 1st respondent misappropriated a sum of Rs. 18,200/- by falsifying the accounts.

(f) The Chief Commissioner, Tripura, dissolved the Board of Directors of the C. M. S. by an order dated 10-8-1960 and appointed P. W. 1 (Joy Sankar Bhattacharjee) as Administrator of the C. M. S. Ext. P-2 dated 17-8-1960 is the Gazette Notification. P. W. 1 (Joy Sankar Bhattacharjee) took charge on 31-8-1960 as can be seen from Ext. P-3. He finished the scrutiny of the accounts before 1-9-1960, and filed the criminal case against the respondents on 7-11-1960, which was committed to the Sessions.

3. The learned Assistant Sessions Judge framed charges against the 1st respondent under Sections 408 and 477-A I. P. C. and framed charges against the other respondents under the same Sections read with Section 109 I. P. C. for abetment. After trial, he held that though the 1st respondent was entrusted with a sum of Rs. 18,200/- of the C. M. S., the prosecution failed to prove that the 1st respondent misappropriated the money or that he disbursed the money in violation of the Bye-laws and that the prosecution also failed to prove that the 1st respondent got false entries made in the account books and brought into existence false documents. So, he acquitted the respondents.

4. Being aggrieved with the judgment of acquittal, the complainant filed the appeal with the leave of this Court under Section 417 (3) Cr. P. C.

5. Before entering into the merits of the case, it has to be mentioned that the C. M. S. was registered as a Co-operative Society No. 209 on 25-3-1957 under Tripura Co-operative Societies Act. But the Bombay Co-operative Societies Act (Bombay Act No. VII of 1925) was extended to the Union Territory of Tripura on 1-5-1959. Section 72 is the saving section, which shows that the Co-operative Societies which were in existence and which were registered under

the Tripura Co-operative Societies Act of 1958 T. E. should be deemed to be registered under the Bombay Co-operative Societies Act, though their bye-laws should, so far as the same are not inconsistent with the express provisions of this Act, continue to be in force until altered or rescinded.

So, the C. M. S. in question is governed by the Bombay Co-operative Societies Act (Bombay Act No. VII of 1925). The Tripura Administration also framed Tripura Co-operative Societies Rules on 1-10-1959. The C. M. S. in question had at first 33 members as can be seen from the evidence of P. W. 4. Now it has 77 members, as can be seen from Ext. P-53 (Members' Register). The C. M. S. passed a resolution on 13-4-1957 as can be seen from Ext. P-1 (a) appointing the 1st respondent as the Secretary of the C. M. S. Accordingly, the 1st respondent Shri S. K. Gupta worked as Secretary of the C. M. S. from that date up to 10-8-1960.

6. Ext. P-41 is the Bye-laws of the C. M. S. in question. Rule 2 therein lays down the objects for which the Society was formed. It runs as follows:—

"(i) To arrange for the sale of products of the members or purchase by the Society, to the best advantage;

(ii) To advance loans to members on the security of their produce, raw or processed;

(iii) To rent or own godowns and processing yards to facilitate storage, processing and sale of goods;

(iv) To process raw material belonging to the members or purchased by the society;

(v) To arrange packing and grading of the produce of the members;

(vi) To supply to members through their local society or otherwise manure, seed, implements, raw materials etc. required for their business, and also essential domestic requirements;

(vii) To sell to its members as well as to other consumers all articles of consumption, bought by it either by itself or in combination with other societies;

(viii) To encourage thrift, self-help and co-operation among its members;

(ix) To undertake all other activities calculated to further the objects mentioned in (i) to (viii) above."

7. Rule 3 shows how the funds can be raised by the C. M. S. It also shows that, when the funds are not utilised in business of the society, then they should be invested or deposited as required by Section 33 of the Bombay Co-operative Societies Act, but that no investment should be made under Section 20 (e) of the Indian Trusts Act.

8. Rule 41 lays down the duties of the Secretary. They are:—

"(1) To summon and attend all General and Board meetings of the Society.

(2) To record the proceedings of such meeting in the Minute Book.

(3) To make disbursement and to obtain vouchers and to receive payments and pass receipts, under the general or special orders of the Board of Directors on this behalf from time to time.

(4) To keep all accounts and registers required by the rules.

(5) To prepare all the registers, vouchers, balance sheets and other documents required for the transaction of the business of the society.

(6) To conduct correspondence and to supply all needful information to the members.

(7) To see that the audit memo is placed before the Board of Directors, for consideration, without delay and to take further steps in regard to rectifications and submission of an audit rectification report to the Auditor in time.

(8) To guide, supervise and control the work of the salaried staff of the society and its branches and do all other work which may be entrusted to him by the Board.

(9) To receive agricultural produce and other goods in the Society's godowns and to be responsible for their safety while they are there.

(10) To realise the sale proceeds.

(11) To conduct the sales and supervise weighments etc.

(12) To purchase and sell the articles of domestic needs and agricultural requisites at reasonable rates, subject to the approval of general or specific instructions of the Board of Directors.

(13) To countersign cash book in token of the balance being correct and to produce the cash balance whenever called upon to do so by the Chairman or any person authorised to do so.

In the absence of the Secretary the Board of Directors may authorise the Manager to perform the duties of the Secretary.

The Board of Directors may also authorise the Manager to perform any of the duties of the Secretary to facilitate the working of the Society.

Receipts passed on behalf of the Society shall be signed by the Secretary. Share certificates and other documents shall be signed by the Secretary and one member of Board of Directors jointly."

9. Rule 42 lays down the conditions when loans may be advanced on the security of produce or goods. As the decision in the case depends upon the enforcement of Rule 42, it is advantageous to reproduce the same. It runs as follows:—

"(1) The Board of Directors shall, at the beginning of the season, fix the amount of advance, indicating the percentage of the market price of produce or goods pledged with the society, that may be granted to a member. Such limits may be fixed for different commodities and varied from time to time according to fluctuation in markets or otherwise.

It shall also be competent for the Board of Directors to call on a borrower at any time before the due date to repay a portion of the loan or advance issued or produce additional security for the outstanding loan or advance within a time fixed by them, if in their opinion, there is fall or likely to be a fall in the market value of the produce or goods pledged.

(2) No advance shall be granted until the produce is deposited in a godown or a building approved by the Society and is completely under Society's control.

(3) The goods stored will be insured at reasonable market rates against theft at the cost of the members concerned.

(4) The period of advance shall be restricted to a maximum term of six months. Renewal for a further period of six months may be granted by the Board of Directors on such terms and conditions as it thinks fit.

(5) The rate of interest on such advance shall not exceed $1\frac{1}{2}$ pies per rupee per month. But it should not be less than one pie per rupee per month.

(6) The Society is not responsible for any damage or deterioration of the goods, but will store the goods in such a way as not to make themselves to deteriorate."

10. Thus, under Rule 41 the 1st respondent was bound to make disbursement and

to obtain vouchers and to receive payments and pass receipts under the general and special orders of the Board of Directors in that behalf from time to time. He was put in charge of the accounts, vouchers, registers and other documents of the society and was bound to maintain them properly. Under Rule 42 firstly he could advance moneys only to members of the society. Secondly, he could grant advance only on security of produce to be deposited in a godown or a building approved by the society, which should be completely under the control of the society. Thirdly he could not advance any loan for a period exceeding 6 months. Renewal for a further period of 6 months could be granted only by the Board of Directors. Fourthly interest was also to be collected.

11. The case of the prosecution is that the 1st respondent, however, purported to advance a sum of Rs. 18,200/- to 6 persons (out of whom there were two members of the society), that he did not obtain the prior sanction of the Board of Directors to make the advances, that he committed criminal breach of trust and disregarded the bye-laws, that he manipulated the accounts regarding the said amount and that he misappropriated the money.

12. The following are the particulars relating to the said disbursements:

| Date | Amount | Name of the loanee | Ext. Nos. in the accounts etc. |
|---------------|-------------|---|--------------------------------|
| (1) 6-9-1958 | Rs. 3,500/- | Ajit Chakraborty (6th respondent) | P 45 (a) P 17.b, P 18a |
| (2) 9-9-1958 | Rs. 700 | Dhirendra Chandra Roy (5th respondent) | P 42 (a) P 17a, P 18 |
| (3) 20-2-1959 | Rs. 3,000/- | A. Majumdar | P 51, P 17e, P 18d |
| (4) 10-3-1959 | Rs. 6,000/- | O. C. Das Gupta (4th respondent) | P 46, P 17f, P 18e |
| (5) 21-3-1959 | Rs. 3,000/- | Haradhan Deb. (2nd respondent) | P 48, P 17c, P 18b |
| (6) 31-3-1959 | Rs. 2,000/- | Haradhan Deb. (2nd respondent) | P 48, P 17d, P 18c |

Regarding the above entries it is to be noticed that the 4th respondent accused (C. C. Das Gupta) and the 2nd respondent accused (Haradhan Deb) alone were members of the society as can be seen from the Sl. Nos. 19, 20 of Ex. P-53 Members Register. The others were not members of the society. So the 1st respondent purported to lend moneys to 3 non-members. The evidence of P. W. 1 (Joy Sankar Bhattacharjee) and P. W. 6 (Nihar Ranjan Roy) shows that the 4th respondent is the maternal uncle of the 1st respondent. The 4th respondent also admitted in Ext. P-56 that he is related to the 1st respondent. He was also an employee of the C. M. S. The evidence of P. W. 1 shows that the 2nd respondent was an employee under C. T. S., of which the 1st respondent was the chairman and that the 2nd respondent was also an employee of

the C. M. S. Their evidence shows that the other loanees are the friends of the 1st respondent. So, the disbursements were alleged to have been made to 2 members employees and 3 non-members. The evidence also shows that none of them was a Jute grower. No jute was taken as security.

The Vouchers Nos. were not noted in Exts. P-17c, P-17d and P-17f. There is over-writing of the date of 20-2-59 in Ext. P-18d Vouchers. P. W. 6 (Ex-Accountant of the C. M. S.) stated that the debit entries were bogus and that therefore he did not sign Exts. P-18 to P-18e. P. W. 8 (Ex-Cashier of the C. M. S.) deposed that he wrote Exts. P-18 to P-18d but that the endorsements of receipt on their reverse were not signed before him. He further deposed that the five alleged loanees were not present when the vouchers were prepared and

that no disbursement was made by him under any voucher. It is the evidence of P. Ws. 1 and 6 that the Offices of C. M. S. and C. T. S. were situated in the same building and that both the respondents 1 and 2 were connected with both. So, the 1st respondent got up some entries and vouchers in the names of his relations, friends and employees to show that a sum of Rs. 18,200/- was disbursed to them. As can be seen from Ext. P-1, there was no resolution authorising the 1st respondent to make any advance towards "Dadan" for jute to the above persons. As such, there was flagrant violation of Rules 41 and 42 of Ext. P-41 by the 1st respondent.

13. The case of the 1st respondent is that he was in Calcutta from 1-8-1958 to 14-9-1958 and that therefore he did not make any disbursement on 6-9-58 and 9-9-1958. He let in the evidence of D. W. 2 (Anil Chand Bhattacharjee) Traffic Assistant of Indian Air Lines at Agartala Office and D. W. 3 Sushil Kumar Maity, Manager of the Palace Hotel in Calcutta to prove his case. The evidence of D. W. 2 is that Ticket No. B-745811 was issued to the 1st respondent on 30-7-1958, that the 1st respondent performed the journey on 1-8-1958 and that he returned from Calcutta to Agartala on 14-9-1958 by Ticket No. 395235.

The evidence of D. W. 3 is that the 1st respondent stayed in the Palace Hotel in Calcutta from 1-8-1958 to 14-9-1958, as can be seen from Ext. D-12 Boarder Register. Exts. D-13 and D-13a show that the 1st respondent was in the said Hotel on 6-9-58

and 9-9-1958. Though there is some mistake regarding the number of the return Air Lines ticket, P. W. 6 (Nihar Ranjan Roy) admitted in his cross-examination that the 1st respondent stayed in Calcutta for about one month. P. W. 8 (Sukendu Bhattacharjee) also stated that the 1st respondent stayed in Calcutta for about 7/8 days. So, the 1st respondent did not actually make the payments on 6-9-1958 and 9-9-1958 to the loanees.

The evidence of P. Ws. 6 and 8 shows that the 1st respondent was signing blank cheques and keeping them with P. W. 8. Their evidence also shows that P. W. 8 was having the cash with him and dealing with it in the absence of the 1st respondent and that the 1st respondent was verifying the vouchers and signing the accounts after he returned back. So, P. W. 8 must have made the payments on 6-9-1958 and 9-9-1958; but the 1st respondent is not absolved from his liability since he is the person in charge of the cash, accounts etc. according to the Bye-laws. So, as rightly held by the learned Assistant Sessions Judge, the 1st respondent (S. K. Gupta) must be held to be responsible for the above payments also.

14. That the above transactions were shady is clear from the fact that the amounts were said to have been collected towards the end of the Co-operative year of 1959 and that an identical sum of Rs. 18,200/- was shown once again to have been disbursed (but this time to 3 persons). The following are the particulars about the collections said to have been made:—

| Sl. No. | Date. | Amount. | Name of the person alleged to have paid. | Ext. Marks. |
|---------|-----------|-------------|--|-------------------------|
| 1. | 27-6-1959 | Ra. 700/- | Dhirendra Chandra Roy. | Exts. P-19 & P-21. |
| 2. | 27-6-1959 | Ra. 8,500/- | Ajit Chakraborty. | Exts. P-19 (b), P- 21. |
| 8. | 28-6-1959 | Ra. 8,000/- | A. Majumdar. | Exts. P-19 (c), P. 21a. |
| 4. | 29-6-1959 | Ra. 5,000/- | Haradhan Dey. | Exts. P-20, P-21f. |
| 5. | 30-6-1959 | Ra. 6,000/- | O. O. Das Gupta. | Exts. P-19 (a), P-21a. |

15. The said amount of Rs. 18,200/- was again shown to have been disbursed within a few days and at the commencement of the next Co-operative year as under:—

| Sl. No. | Date. | Amount. | Name of the loanee. | Ext. Marks. |
|---------|----------|-------------|--|------------------------|
| 1. | 2-7-1959 | Ra. 2,200/- | Haradhan Deb (2nd respondent). | Exts. P-26 & P-25. |
| 2. | 8-7-1959 | Ra. 8,000/- | Sudhir Ranjan Roy (8rd respondent). | Exts. P-26 (a), P-25a. |
| 8. | 6-7-1959 | Ra. 8,000/- | O. O. Das Gupta (4th respondent). | Exts. P-26 (b), P-25f. |

16. Thus, the amount of Rs. 18,200/- covered by the earliest entries was shown to have been collected towards the end of the Co-operative year and again disbursed in the beginning of the next Co-operative year, within a few days.

17. P. W. 6 (Ex-Accountant) stated that no money was collected under Exts. P-19, P-19(a), P-19 (b), P-19 (c) and P-20. To the same effect is the evidence of P. W. 8 (the Ex-Cashier). There is clinching evi-

dence to show that the alleged collections covered by Exts. P-19, P-19 (a), P-19 (b), P-19 (c) and P-20 were never made and that no amount, in fact, was collected from the loanees. Ext. P-56 is the statement of the 4th respondent C. C. Das Gupta before P. W. 5 (Asstt. Registrar of Co-operative Societies) which runs as follows:—

"I am a member of the Tripura Central Marketing Co-operative Society. I

have been taking advance from this Society and purchasing jute on its behalf and depositing the jute to the society. I was a paid employee of this society from 1st November, 1957 to 28th February, 1959 on a monthly pay of Rs. 100/- only. I took an advance of Rs. 6000/- from the society on 10th March, and gave it as dadan to 25 or 30 tribals of Kulai, Kanchanpur area. I do not exactly remember whether I took further sum of Rs. 2,000/-. I executed a document for Rs. 8,000/- on condition that I will deliver jute up to that amount to the society at a rate prevailing in Agartala market per maund less one rupee on 6th July, 1959 A. D. The last date of delivery of jute was 15th October, 1959. I gave dadan of Rupees 2,000/- to 5 or 6 tribals of Kulai Kanchanpur area. I every now and then enquired from the society (Secretary of the Society) whether jute is to be delivered to the godown and the Secretary of the society told me that he could not say anything about purchase of jute before audit is complete. Secretary Sri S. K. Gupta is my relative. The persons to whom I issued dadan had learnt that society will not transact in jute this year and they did not give to me. I have not got any document for the dadan issued to the tribals. I have heard that the tribals had disposed of the jute I advanced for. I have asked them to refund my money. They are willing as they have expressed to me that they will give more quantity of jute next year for the money advanced. Thus, I believed that I shall be able to realise this amount, advanced so far, by 31st Chaitra next (Approximately middle of April, 1960) and repay back to the society. If they do not refund the money I promise to repay the amount by the 31st Chaitra even though I do not get this amount from the parties after borrowing the amount from my friends and relatives."

Therein the 4th respondent stated that he received only Rs. 6,000/- as advance on 10-3-1959, but that he did not remember exactly whether he took any further sum of Rs. 2,000/- and that he executed a document for Rs. 8,000/- agreeing to deliver jute to the society by 15-10-1959. So, the 4th respondent did not state that he repaid Rs. 6,000/-. But the learned Asstt. Sessions Judge misappreciated Ext. P-56 and stated in para 43 of his judgment that Ext. P-56 is vague and does not show that the 4th respondent did not pay off Rs. 6,000/- and that he did not borrow Rs. 8,000/- afresh.

18. That the judgment of the learned Asstt. Sessions Judge regarding the construction of Ext. P-56 is incorrect is further clear from Ext. P-59. The Registrar of Co-operative Societies called upon the 1st respondent by his letter Ext. P-58, dated 18-3-1960, to explain the discrepancy in the annual return submitted

by the 1st respondent regarding the cash balance. The Co-operative Registrar stated in his letter Ext. P-58 that according to the Annual Return sent by the 1st respondent, there was a cash balance of Rs. 19,337.50 N. P. on 30-6-1959, but that from Ext. P-56 it was clear that the 4th respondent did not refund Rs. 6,000, and that he did not borrow a further loan of Rs. 6,000/- on 6-7-1959, that the 1st respondent however mentioned in the cash book that the 4th respondent refunded a sum of Rs. 6,000/- on 30-6-1959, that thus the 1st respondent furnished a wilful false return and committed an offence under section 60 of the Bombay Co-operative Societies Act and that 1st respondent should explain the discrepancy.

In reply to that, the 1st respondent sent Ext. P-59 letter which runs as follows:

"With reference to your letter No. 2407/2-209/COOP/59 dt. 18-3-60 I beg to state that the amount was taken in to cash on good faith according to a practice followed by commercial firm where accounts are closed even non-receiving amount in hard cash on the date of closing, and the amount was again been debited in the next year's account. This practice was followed due to ignorance which may not be correct procedure in co-operative accounting.

However, I assure you that all possible measures have been adopted so that this may not recur.

Taking all these circumstances into consideration you will be able to realise that this has been done simply in good faith".

19. Thus, the 1st respondent admitted that the 4th respondent did not pay off Rs. 6,000/- in cash, but that on account of good faith and according to the practice followed by commercial firms the amount was shown to have been collected in cash and debited in the next Co-operative year's account. So, Ext. P-59 is proof positive that credit items covered by Exts. P-19, P-19 (a), P-19 (b), P-19 (c) and P-20 are mere paper transactions.

The learned Asstt. Sessions Judge, however, rejected Ext. P-59 on the ground that it is hit by section 24 of the Indian Evidence Act. His reasoning is that Ext. P-58 contains a threat by the Co-operative Registrar that he would take action against the 1st respondent and that therefore Ext. P-59 reply could not be said to have been voluntarily made and that it is not admissible in evidence. In support of this contention he relied on State of Orissa v. Bhaurilal Agarwal, (1962) 1 Cri LJ 835 (Ori). In that case an accused made a statement before the Asstt. Sales Tax Officer under the Orissa Sales-Tax Act. It was held that the Asstt. Sales-Tax Officer, who was conducting inspec-

tion, search and seizure of accounts, was a person in authority according to the Section 24 of Indian Evidence Act, that the statement of the accused made to him could not be said to be voluntary and that it was inadmissible in evidence. Sections 54 and 60 (b) of the Bombay Co-operative Societies Act entitle the Co-operative Registrar to call for any information. So, the Registrar of Co-operative Societies brought to the notice of the 1st respondent the provisions of Section 60 (c) of the Act and the 1st respondent sent Ext. P-59 in reply to it. As such the provisions of Section 17 and not of Section 24 of the Indian Evidence Act are attracted.

In *In re, P. Narayana Murti*, AIR 1942 Mad 654, it was held that a confessional statement made on oath by an accused person before the Assistant Registrar of Co-operative Societies in an inquiry held by him in regard to certain forged cheques is not necessarily inadmissible under section 24 of the Indian Evidence Act. In *Ram Singh v. State*, AIR 1959 All 518 it was held that to distinguish between a confession and an admission a simple test can be applied, that if the statement by itself is sufficient to prove the guilt of the accused, it is a confession, but that if, on the other hand, the statement falls short of it, it amounts to an admission. It was further held that the acid test which distinguishes a confession from an admission is that where a conviction can be based upon that statement alone, it is a confession and that where supplementary evidence is needed to authorise a conviction, then it is an admission. The 1st respondent gave Ext. P-59 explanation in reply to Ext. P-58. So it is not hit by section 24 of the Indian Evidence Act. Thus, Ext. P-59 supports Ext. P-56 and shows that the alleged repayments said to have been made by the loanees as per Exts. P-19, P-19 (a), P-19 (b), P-19 (c) and P-20 are all paper transactions.

(After considering the other circumstances and evidence of P. Ws. 1, 6, 8 and DW-1 in paras 20 to 22 and confirming the falsity of the transactions, the judgment proceeds.)

23. With regard to the 3 disbursements covered by Exts. P-26, P-26 (a) and P-26 (b) it is seen, firstly, that there was no resolution of the Board of Directors authorising the disbursements under Exts. P-26, P-26 (a) and P-26 (b). Secondly, the 3rd respondent was not a member of the society. Thirdly, the loanees were not Jute growers. They did not deliver any jute to the C. M. S. and the 1st respondent did not advance the alleged loans on the security of any jute. Fourthly, Exts. P-26, P-26 (a) and P-26 (b) came into existence within a few days after the alleged recoveries were

made. Fifthly, the amount throughout had been identical viz. Rs. 18,200/-. Sixthly, as can be seen from Exts. P-42 (a), P-45, P-46, P-48 and P-51 the amounts said to have been advanced as mentioned in para 12 of this judgment, only were found to be outstanding, though the other amounts due from the loanees were adjusted, and the same amount of Rupees 18,200/- had been shown to be the subject matter of a series of transactions of collections and disbursements. So, the 1st respondent continued and persisted in committing breach of trust and in acting contrary to the Rules 41 and 42 of Ext. P-41 bye-laws of the C. M. S.

24. The overall picture is, therefore, as follows:

(1) A sum of Rs. 18,200/- was said to have been disbursed in 1958 and 1959.

(2) It was said to have been repaid in the last week of June, 1959 towards the end of the Co-operative year of 1959 and long after the maximum period of 6 months allowed by R. 42 (4) of the Bye-laws.

(3) The same amount was again said to have been disbursed in a few days in the first week of July commencing with the next Co-operative year (1959-60).

(4) Except the 2nd & 4th respondents, the others were not members of the Co-operative society and in this regard the 1st respondent disregarded sub-rule (1) of Rule 42 of the Bye-laws.

(5) The 1st respondent did not obtain any general or special orders of the Board of Directors to make the disbursements and violated sub-rule (1) of R. 42 of Ext. P-41.

(6) Exts. P-56 and P-59 show that the alleged collection of the monies in June 1959 was false and that the accounts were got up.

(7) The fact that a discount of Rupees 10/- was paid to cash a cheque on 29-6-1959 shows that the society had no funds on that day.

(8) None of the alleged loanees was a Jute grower and no jute was deposited in the godowns of the society before the advances were made and in this regard the mandatory provisions of sub-rule (2) of Rule 42 were also disregarded by the 1st respondent.

(9) A number of adjustments were made in the accounts to show that the sum of Rs. 18,200/- was disbursed.

(10) The three persons to whom ultimately the amounts were said to have been disbursed are interested in the 1st respondent. The 4th respondent C. C. Das Gupta is a relation of the 1st respondent as proved by P. Ws. 1, 6 and 8 and as admitted by the 4th respondent himself in Ext. P-56. The 3rd respondent Sudhir Ranjan Roy is a servant of D. W. 1 who is a Co-Director of the Match Factory

and a friend of the 1st respondent. The 3rd respondent Haradhan Deb was appointed by the 1st respondent in the C. M. S. The 3rd respondent was also an employee of the C. T. S. of which the 1st respondent was a Director.

25. As such the 1st respondent could bring into existence Exts. P-26, P-26 (a) and P-26 (b) in favour of his relation and friends. He committed criminal breach of trust and either misappropriated or misapplied the funds of the society dishonestly to benefit himself or his relation and friends.

26. To get over the fact that there was no order of the Board of Directors to make the earlier disbursements of Rs. 18,200/- or the later disbursement of the same amount under Exts. P-26, P-26 (a) and P-26 (b), the 1st respondent appears to have made frantic efforts to get a resolution passed by the Board of Directors to ratify his action. The evidence of P. Ws. 4 and 7 shows that after P. W. 6 filed Ext. P-54 complaint on 9-1-1960 a meeting of the Board of Directors under the Chairmanship of J. K. Choudhury was convened on 10-1-1960 as per Ext. P-27. Earlier on 31-12-1959 a General Body meeting was called. But, on account of lack of quorum it was adjourned to 1-1-1960 as can be seen from Ext. P-28. On 1-1-1960 some of the members of the Board of Directors left the meeting as can be seen from Ext. P-29.

The last meeting of the society was held on 6-5-1960 as per Ext. P-30 in which the resolutions passed as per Ext. P-27 were approved. Ext. P-27 shows that a resolution was passed approving the disbursements made by the 1st respondent. The resolution mentions that in spite of several irregularities, admitted to have been committed by the 1st respondent, it ratified the same Ex-Post-facto. The fact that the meeting was held after P. W. 6 filed the complaint on 9-1-1960 throws suspicion about the manner in which the meeting was convened by the 1st respondent. However, it has to be noted that there is no Bye-law in Ext. P-41 which authorises the Board of Directors to ratify the transactions subsequently. Sub-rule (3) of Rule 41 and sub-rule (1) of Rule 42 are mandatory and provide for disbursements to be made only under the specific prior orders of the Board of Directors to be passed at the beginning of the season. Besides, the Board of Directors itself has no power to advance loans to non-members or to act contrary to the Bye-laws. So the resolution is illegal and could not validate the illegal and criminal acts of breach of trust committed by the 1st respondent.

27. The contention of the learned Counsel for the respondents is that, as

the 1st respondent obtained Exts. D-1 (a), D-1 (b) and D-1 (c) and some arbitration proceedings are pending, the liability of the 1st respondent is a civil one and that no prosecution can be maintained. It was also pointed out that P. W. 1 issued registered notices as can be seen from Ext. D-2 series calling upon the three respondents 2 to 4 to pay up the amounts outstanding against them, that P. W. 1 himself made some advances after he was appointed as Administrator without the security of goods and that therefore the liability is a civil liability. He relied on *Mt. Sudeshara v. Emperor*, AIR 1933 All 818, where it was held that Criminal Courts should not be used for enforcing a civil claim. In *Gopal Krishna Majumdar v. State of Tripura*, AIR 1955 Tri 35 it was held that every breach of trust is not criminal, that it may be intentional without being dishonest or that it may appear to be dishonest without being really so and that the Court should be slow to move because there is a tendency to secure speedy results by having recourse to criminal law. It was also held that it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement becomes an offence punishable as criminal breach of trust and that it is this mental act of fraudulent misappropriation that distinguishes an embezzlement amounting to a civil wrong or tort from the offence of criminal breach of trust punishable under section 406 I. P. C.

These cases are distinguishable on the facts. In the present case the 1st respondent acted dishonestly in total violation of the Bye-laws of the C. M. S. and made an attempt to get over the criminal liability by finally trying to show that the amount of Rs. 18,200/- was disbursed to 3 persons viz. respondents 2 to 4 under Exts. P-26, P-26 (a) and P-26 (b). The evidence, already discussed, clearly shows that the 1st respondent did not act honestly, but that he acted dishonestly and violated the Rules 41 and 42 of the Bye-laws covered by Ext. P-41 and that he caused loss to the C. M. S. The amounts have not been so far recovered, though a period of about 8 years has elapsed. Even if Exts. D-1 (a), D-1 (b) and D-1 (c) are held to be true, still there was dishonest total violation of the Bye-laws of the C. M. S., as already pointed out. It is difficult to find that the 1st respondent had good faith in getting entries made that monies were collected in cash, though there was no collection in fact. It is equally difficult to believe that the 1st respondent was actuated by good faith in lending monies to non-members, as though the C. M. S. was a money-lending corporation.

The decision in the *State of Kerala v. Kunhikannan Nair*, AIR 1958 Ker 103

relied on by the learned Counsel for the appellant is to the point. In that case it was proved that the Secretary of a Co-operative Society converted the money of the society in his hands to his own use or expended the same for purposes other than those of the society. It was held that he was guilty of criminal breach of trust, inasmuch as the conversion or the expenditure must be necessarily dishonest. It follows that the 1st respondent is guilty of criminal breach of trust, since the conversion or the expenditure made by him was necessarily dishonest.

28. Another contention of the learned Counsel for the respondents is that the 1st respondent could not be held liable because he was handing over signed blank cheques to P. W. 8 (Sukhendu Bhattacharjee) and that the 1st respondent was inexperienced. The decisions relied on by him in this regard have no application to the facts of this case. In *R. K. Dalmia v. Delhi Administration*, 1962 (2) Cri LJ 805: (AIR 1962 SC 1821), one R and the accused could operate jointly on the accounts of an Insurance Company with a bank under the powers given by the Board of Directors. It was held that the effect of delivery of blank cheques by R signed by him to the accused might amount to putting the accused to sole control over the funds of the Insurance Company in the Bank and that there would not remain any question of the accused's having joint dominion with R, over those funds and that the accused could alone commit criminal breach of trust in respect of the funds. In *Anwarul Hasan v. State*, 1953 Cri LJ 385 : (AIR 1953 All 142) a person who had been acting as an honorary Secretary of a Co-operative Society was found to have deposited amounts less than what he received from the members in respect of the share money. Upon being threatened by the President of the Society with criminal proceedings if he did not make a clean breast of the matter, he wrote a letter stating that owing to inexperience he had committed mistake in totalling and that a sum of Rs. 17/- was due from him which he deposited. It was held that the letter contained only an explanation and not any admission of guilty intention or any confession that he had misappropriated the money.

It is no valid excuse for the 1st respondent, who entered upon the management of the C. M. S. and knew fully well the Bye-laws as per Ext. P-41, to state that he was negligent in issuing blank cheques to P. W. 8 or that he was inexperienced. He had no business to take up the responsibility as the Secretary if he was inexperienced or if he was negligent in sign-

ing blank cheques and to cause loss to a public body like the C. M. S.

29. Yet another contention of the learned Counsel for the respondents is that proof of mere retention of money or entrustment is not enough to prove the offence under section 409 and he relied on *Robert Stuart Wauchope v. Emperor*, AIR 1933 Cal 800 where it was held that in cases of criminal misappropriation, the prosecution must always prove misappropriation and that it is not enough if it is proved that the accused had received the money and that the onus of proof never shifts from the prosecution. In the present case the prosecution proved criminal misappropriation and criminal misapplication of the funds of the society by the 1st respondent.

30. The next contention of the learned Counsel for the respondents is that unless there is proof of commission of criminal breach of trust and falsification of accounts, a charge under S. 477A I. P. C. cannot be sustained. He relied on *C. N. Krishna Murthy v. Abdul Subban*, AIR 1965 Mys 128; 1965 (1) Cri LJ 565. It was held that in order to bring home the guilt under section 477A I.P.C., the prosecution has to prove that the accused had falsified the account books and made false entries therein wilfully with intent to defraud the State. It was also held that, where the case for the prosecution was that the accused falsified the account books to cover up his own embezzlements and not somebody else's defalcations, but the charge of breach of trust against him was not proved, then the case of the prosecution that the accused intentionally and deliberately falsified the account books to cover up his embezzlements must also fail for want of proof. In the present case the guilt of the 1st respondent under section 409 I. P. C. is brought home to him. So, his guilt under section 477A I. P. C. is also equally brought home to him and the above decision does not apply to the facts of the case.

31. The next contention of the learned counsel for the respondents is that there was delay on the part of P. W. 1 in filing the complaint. The evidence of P. W. 1 is that after taking the charge on 31-8-1960 he finished the scrutiny of the accounts before 1-9-1960 and that he filed the case on 7-11-1960. So, there was a delay of about 2 months in filing the case. The contention of the learned Counsel for the respondents that P. W. 1 took time to make up his mind as to whom he should charge appears to be probable. For, the real persons who abetted the commission of the offences by the 1st respondent appear to be P. Ws. 6 and 8 (the Ex-Accountant and the Ex-Cashier of the C. M. S.).

P. W. 8, the Ex-Cashier is no other than the elder brother of P. W. 5 the Assistant Registrar of Co-operative Societies. Blood is thicker than water. P. W. 1 evidently dropped P. W. 8, who too should have been prosecuted. But, the non-prosecution of P. Ws. 6 and 8 is not fatal to the case. The case depends mostly upon the circumstantial evidence and documents. The delay of two months on the part of P. W. 1 in filing the case does not absolve the 1st respondent from his criminal liability.

32. It was also contended by the learned Counsel for the respondents that though P. W. 1 stated in the complaint petition that he obtained the permission of the Chief Commissioner to prosecute the respondents, he admitted in the cross-examination that he did not take any such permission. But, his evidence shows that he consulted the Co-operative Registrar and took his permission to file the case (vide Ext. P-61). In fact, it is not shown by the Counsel for the respondents that the permission of any officer was necessary before P. W. 1 could launch the prosecution.

33. The learned Counsel for the respondents also argued that the circumstantial evidence in the case is not sufficient to prove the guilt of the respondents. He relied on a number of decisions, which have laid down the general principle that, in a case depending upon conclusions to be drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offences home to him beyond any reasonable doubt. Vide *Bhagat Ram v. State of Punjab* 1954 Cri LJ 1645 : (AIR 1954 SC 621); *Babu Singh v. State of Punjab*, 1964 (1) Cri LJ 566 (SC) and *Malsawn Lushai v. Manipur Administration*, AIR 1966 Manipur 2. In the present case the facts and the evidence, already discussed, go to show that there is legal proof of the guilt of the 1st respondent beyond all reasonable doubt. Though the other respondents might or might not have been aware of the provisions of the Bye-laws of the C. M. S., the 1st respondent is at least liable to be convicted.

34. It was pointed out that the 1st respondent was previously prosecuted for an offence under section 61 of the Bombay Co-operative Societies Act (Act VII of 1925) in a Criminal Case No. 539 of 1960 on the file of the Magistrate of Ist Class, Sadar, Tripura in Agartala on the ground that the 1st respondent committed an offence under section 60 of the said Act in submitting the annual return of the C. M. S. for the Co-operative year ending on 30-6-1959, inasmuch as the 1st respondent showed that

the advance amount of Rs. 6,000/- was realised from the 4th respondent though, in fact, it was not realised then. Ext. D-8 is a certified copy of the judgment of the Magistrate, which shows that the Rules under the Act were framed on 1-10-1959, that they were not retrospective in operation and that their breach on 4-8-1959, the date on which the 1st respondent submitted the return, was not punishable. So, the Magistrate acquitted the 1st respondent.

The learned Assistant Sessions Judge referred to Ext. D-8 and held that it is not a bar to the subsequent prosecution of the 1st respondent under sections 408 and 477A I. P. C. As can be seen from Section 403 Cr. P. C. and Article 20 of the Constitution of India, the 1st respondent is liable to be prosecuted for the offences in question inasmuch as he was not previously prosecuted for the same offences. The offences under sections 60 and 63 of the Bombay Co-operative Societies Act are different from the offences under the Indian Penal Code. So, the previous acquittal of the 1st respondent for offences under sections 60 and 61 of the Bombay Co-operative Societies Act is no bar to the present prosecution.

35. The last contention of the learned Counsel for the respondents is that this is an appeal by a private party under section 417 (3) Cr. P. C. and that unless there are compelling circumstances for interference, this Court should not interfere with the judgment of the lower Court and that the acquittal of the respondents by the lower Court raises a further presumption of their innocence. He relied on *Dhirendra Nath Mitra v. Mukunda Lal Sen*, AIR 1955 SC 584. It was held that it might well be that a different view of the evidence could have been taken, but that was not enough to justify interference in revision, when there was an application by a private party to set aside an order of acquittal. It was also held that it is to be remembered that no right of appeal is conferred in such cases though there is provision for appeal against acquittals and that the Court must exercise the revisional powers very sparingly. This decision lays down the powers of a revisional Court.

In *Balbir Singh v. State of Punjab*, (1957) Cri LJ 481 : (AIR 1957 SC 216) it was held that it is now well settled that, though the High Court has full power to review the evidence upon which an order of acquittal is founded, it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court and that the views of the trial Judge as to the credibility of the witnesses must be given proper weight and considera-

tion. It was also held that there must be substantial and compelling reasons for the appellate Court to come to a conclusion different from that of the trial Judge.

But, in the latest decision of the Supreme Court reported in Durgacharan Naik v. State of Orissa, (AIR 1966 SC 1775) the case law on the subject was reviewed. It was held that the power conferred by Cl. (a) of section 423 Cr. P. C., which deals with an appeal against an acquittal, is as wide as the power conferred by Cl. (b) which deals with an appeal against conviction and that the High Court's powers in dealing with a criminal appeal are equally wide, whether the appeal in question is one against acquittal or against conviction. It was further held that the test suggested by the expression "substantial and compelling reasons" for reversing a judgment of acquittal is not to be construed as a formula which has to be rigidly applied in every case and that, therefore, it is not necessary that before reversing a judgment of acquittal the High Court must necessarily characterise the findings as perverse.

On a thorough examination of the evidence, oral and documentary, it is to be seen that the learned Asstt. Sessions Judge went wrong in construing Ext. P-56 and in rejecting Ext. P-59. He did not consider the fact that the 1st respondent was obliged to encash a cheque on 29-6-1959 by foregoing a sum of Rs. 10/- towards discount. He did not consider the effect of the claim of transactions regarding the identical amount of Rs. 18,200/- shown to have been disbursed at one time, collected at the end of the Co-operative year and again disbursed in the beginning of the next Co-operative year. He did not consider the effect of the dishonest and flagrant violation of the Bye-laws 41 and 42 in Ext. P-41 by the 1st respondent in alleging that he disbursed the amounts to non-members of the C. M. S. without any prior orders of the Board of Directors and without any security of jute and the consequent loss caused to the C. M. S. by his misappropriation or mis-application of the funds of the C. M. S. So, the judgment of the lower Court cannot be said to be correct so far as the 1st respondent is concerned.

36. Thus, it is proved beyond all reasonable doubt that the 1st respondent is guilty of the offence of criminal breach of trust under Section 403 I. P. C. and also of the offence of falsification of accounts under S. 477A I. P. C. regarding the sum of Rs. 18,200/-. He is, therefore, convicted under Ss. 403 and 477A I. P. C. He is sentenced to undergo R. I. for one year under each count. But, the sentences would run con-

currently and the appeal, so far as the 1st respondent is concerned is allowed and the judgment of the lower Court regarding him is set aside. The appeal regarding the other respondents is dismissed.

TVN/G.G.M.

Appeal partly allowed.

AIR 1969 TRIPURA 42 (V 56 C 9)

C. JAGANNADHACHARYULU, J. C.

Pramode Chandra and others, Petitioners v. State, Respondent.

Criminal Misc. Petn. No. 11 of 1968, D/- 4-3-1968, against order of S. J. Tripura D/- 21-2-1968.

(A) Criminal P. C. (1898), Ss. 497, 498 — Principles governing grant of bail — Dacoity — Accused persons not concealing their identity before committing offence — No ground to hold prima facie evidence against them as unbelievable — (Penal Code (1860), Ss. 395, 397).

On the ground that the accused who were neighbours of the complainant did not take the trouble of masking themselves before committing the offence of dacoity, it cannot be contended that the prima facie evidence against them was unbelievable. If such a contention is upheld, then any neighbour can easily commit a dacoity and escape on the ground that he did not conceal his identity before committing the dacoity. Every case depends upon its own facts and circumstances. AIR 1956 SC 441, Expl.

(Para 5)
(B) Criminal P. C. (1898), Ss. 497, 498 — Probability of absconding — Grant of bail, not proper — Penal Code (1860), Ss. 395, 397.

Where there was prima facie evidence against the accused under Sections 395 and 397 I. P. C. the fact that after the occurrence they hid themselves in a big basket in a different village, and continued to do so after the FIR was filed and the process was issued makes probable the case of the prosecution that they would abscond. It is not an isolated act, which by itself might not be of much importance. They are likely to go underground if they are released on bail. AIR 1958 Cal 191, Dist., (1882) ILR 4 Mad 393, Expl.

(Para 6)
(C) Criminal P. C. (1898), Ss. 497, 498 — Grant of bail — Matters to be considered.

Tampering of P. Ws. is not the only question which has to be considered in granting or refusing bail. The main question is whether the petitioners are like-

ly to abscond or whether they are likely to stand their trial without absconding. In that respect their past conduct has to be seen. (Para 7)

(D) Criminal P. C. (1898), Ss. 497, 498 — Dacoity case involving five accused — Two of them released on bail — Case against remaining three accused prima facie stronger than against those released on bail — Refusal to grant bail to these three does not amount to discrimination. (Para 8)

Cases Referred: Chronological Paras
(1963) 1963 (1) Cri LJ 517 = (1962)
2 Andh WR 270, Re, Nomula Laxminarayana 6
(1958) AIR 1958 Cal 191 (V 45) = 1958 Cri LJ 500, Sunil Kumar Saha v. State 6
(1956) AIR 1956 SC 441 (V 43) = 1956 Cri LJ 822, Ram Shankar Singh v. State of U. P. 5
(1882) ILR 4 Mad 393 = 1 Weir 76, Srinivasa Ayyangar v. The Queen 6

N. L. Choudhury, for Petitioners; H. C. Nath, Government Advocate, for Respondent.

ORDER: This is a petition filed under Section 498 Cr. P. C. against the order of the Sessions Judge of Tripura in Criminal Motion No. 37 of 1968, dated 21-2-1968, refusing to grant bail to the three petitioners concerned under Sections 395 and 397 I. P. C. in G. R. Case No. 100 of 1967, Kamalpur, Police Station Case No. 1 (12) 67.

2. The case of the prosecution is that at about 2 or 3 A. M. on 2-12-1967 one Kamar Uddin of Methirma village came outside his hut to answer call of nature, that after going back into his hut, he warmed himself by kindling the fire, that after a while he went to bed keeping the fire kindling and the door unbolted, that then about 10 persons including the petitioners entered into the hut and committed dacoity by stealing Rs. 1750/- in cash and other articles and after causing severe injuries to Kamar Uddin, that Kamar Uddin, his wife and his niece recognized the petitioners and that at about 8 A. M. the F. I. R. was lodged with the Police Station. It is the further case of the prosecution that the three petitioners were arrested on 3-12-1967 when they were hiding inside a bamboo basket for storing paddy in a different village altogether and that they are liable to be punished under Sections 395 and 397 I. P. C.

3. It appears that the lower Courts released two accused on bail; but both the S. D. M. and the Sessions Judge refused to enlarge the petitioners on bail on the ground that they are likely to abscond, if released. Hence the present petition.

4. The point for determination is whether the petitioners are entitled to be released on bail.

5. Certified copy of the order-sheet of the learned S. D. M. shows that he received the F. I. R. in his Court on 2-12-1967 and that 5 accused including the 3 petitioners were produced before him on 3-12-67. The names of the three petitioners herein were mentioned in the F. I. R. which was lodged within a few hours after the occurrence took place. It appears that Kamar Uddin, his wife and his niece recognized the petitioners in the light inside as some of the culprits who committed the dacoity. It also appears that Kamar Uddin was so very severely assaulted that his dying declaration was also recorded. There could not be difficulty (according to the prosecution) for Kamar Uddin, his wife and his niece to recognize the petitioners in the light of the burning lamp and also in the light emitted by the kindled fire. So, there is prima-facie evidence against the petitioners. But, the contention of the learned Counsel for the petitioners is that the petitioners are the neighbours of Kamar Uddin and that it is highly improbable that known persons would have committed dacoity without taking precautions to conceal their identity and in support of this proposition he relied on Ram Shankar Singh v. State of Uttar Pradesh, AIR 1956 SC 441.

The Supreme Court did not lay down as a general principle that known persons would not commit any dacoity without taking precautions to conceal their identity. If the contention of the learned Counsel for the petitioners is upheld, then any neighbour can easily commit a dacoity and escape on the ground that he did not conceal his identity before committing the dacoity. Every case depends upon its own facts and circumstances. The petitioners are said to be teen-agers. Finding that the door of the hut was opened, the petitioners and others might have entered into the hut and committed the dacoity, if the case of the prosecution is true. On the ground that the petitioners did not take the trouble of masking themselves before committing the offence, it cannot be stated that the prima facie evidence against them is unbelievable.

6. It has to be borne in mind that the petitioners were arrested on 3-12-1967 when they were hiding in a big bamboo basket used for storing paddy in an altogether different village. The learned Sessions Judge held that, on account of this conduct of the petitioners, it would not be proper to release them on bail as they would be given an opportunity to abscond, if they are released on bail. The learned Counsel for the petitioners stated that even if the petitioners

really hid themselves in a basket in another village, this would not by itself show that they absconded. He relied on Sunil Kumar Saha v. State AIR 1958 Cal 191: 1958 Cri LJ 500.

In that case the only thing that was proved against a person under S. 109 (a) Cr. P. C. was that on a particular evening of a winter season he was found on the Railway platform moving from place to place without a ticket with a piece of chaddar muffling up his head. It was held that such an isolated act could not form the foundation of an Order under Section 109 (a) Cr. P. C. But, there is prima facie evidence against the petitioners in the present case under Sections 395 and 397 I. P. C. The fact that the petitioners absconded and hid themselves in a big basket in a different village, if true, probabilises the case of the prosecution. It is not an isolated act, as in the above decision which by itself might not be of much importance. The above decision, therefore, has no application to the facts of the present case.

The learned Counsel for the petitioners further argued that the word "abscond" has not been defined anywhere, that a mere abscondence before the issue of a process is not at all abscondence. He relied on In re, Nomula Laxminarayana 1963 (1) Cri LJ 517 (AP). In that case the relevant portion of the judgment of the Madras High Court in Srinivasa Ayyangar v. Queen, (1882) ILR 4 Mad 393 was extracted. It was held in the latter case that the term "abscond" is not to be understood as implying necessarily that a person leaves the place in which he is living, that its etymological and its ordinary sense are to hide oneself. But it was further held that, if a person, having concealed himself before process issues, continues to do so after it has issued, he absconds. The petitioners absconded after the occurrence took place. Later on, the F. I. R. was filed. Their abscondence in view of the present facts of the case shows that the petitioners are likely to go underground or leave the place, if they are released on bail.

7. The next contention of the learned Counsel for the petitioners is that the petitioners' parents were available and could have tampered with the witnesses if they so desired and that, therefore, even if the petitioners are released on bail, the prosecution witnesses would not be tampered with. It might be that the parents of the petitioners might or might not have tampered with the P. Ws. Tampering of P. Ws. is not the only question which has to be considered. The main question is whether the petitioners are likely to abscond or whether they are likely to stand their trial without absconding. In view of their past conduct, I agree with

both the lower Courts and find that the petitioners are not entitled to be released on bail.

8. The last contention of the learned Counsel for the petitioners is that as two accused were already released on bail, there is no reason why discrimination should have been made regarding the three accused petitioners. The case against the petitioners is prima facie stronger than the case against the other accused who were released on bail, inasmuch as, firstly, the F. I. R. was lodged within a few hours after the occurrence took place, secondly, the names of all the three petitioners were mentioned in the F. I. R.; thirdly, the names of the petitioners were mentioned in the dying declaration of the injured and fourthly, the petitioners absconded. So, their case is different from the case of the other accused persons.

9. In the result, the petition fails and is accordingly dismissed.

HGP/D.V.C.

Petition dismissed.

AIR 1969 TRIPURA 44 (V 56 C 10)

C. JAGANNADHACHARYULU, J. C.

Nripendra Chakravarty and others, Petitioners v. District Magistrate, Tripura, Respondent.

Habeas Corpus Petns. Nos. 30, 32 to 36, 39 to 41, 48 to 52, 71 to 73 of 1968, D/-26-8-1968.

(A) Preventive Detention Act (1950), S. 3 (1) (a) (ii) and (iii) — Grounds of detention — Sufficiency — Action prejudicial to maintenance of supplies and services which are essential to community is sufficient ground.

According to section 3 (1) (a) (ii) and (iii) of the Act, any one of the grounds namely, an action prejudicial to the security of the State or the maintenance of public order on one hand, or any action prejudicial to the maintenance of supplies and services essential to the community, is a sufficient ground for an order of detention. AIR 1950 Mad 162 and AIR 1966 SC 740 Dist. (Para 15)

(B) Preventive Detention Act (1950), S. 3 (1) (a) (ii) — Action prejudicial to public order—"Jhuming" involving cultivation by clearing forest in reserved forest area affects maintenance of public order. AIR 1965 SC 147 Ref. (Para 16)

(C) Preventive Detention Act (1950), Ss. 1 and 3 (1) (a) — Power under the Act is in addition to those contained in Criminal P.C. — (Criminal P.C. (1898), S. 54).

The purpose of the Preventive Detention Act is to secure "preventive deten-

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tion", justified by national security and maintenance of public order and essential supplies and services and not a criminal conviction justified by legal evidence and by existing laws relating to crimes and offences. If the ordinary law of the land and their application to any particular person are enough to meet the situation, which the Act is intended to meet, then it is difficult to imagine either the purpose or the object of the Act, which is self-contained. The powers of preventive detention under the Act are in addition to those contained in the Criminal P. C., where preventive detention is followed by enquiry or trial. It cannot therefore be said that if the acts alleged against the detenu are offences under I. P. C. they can be dealt with under Criminal P. C. and no action could be taken under the Preventive Detention Act. AIR 1950 East Punj 172 Dist.

(Para 17)

(D) Preventive Detention Act (1950), S. 3 (1) (a) — Past conduct of detenu can be taken into account when making a detention order. AIR 1952 SC 350 Rel. on.

(Para 21)

(E) Preventive Detention Act (1950), S. 3 (1) (a) — Detention Order — Validity — There should be subjective satisfaction of detaining authority about soundness of grounds.

It is the subjective satisfaction of the detaining authority about the soundness of the grounds and the Court is only concerned with whether there had been such a subjective satisfaction, whether there is absence of mala fides and whether all the opportunities of making representation were given. AIR 1951 SC 157 and AIR 1951 SC 481 and AIR 1952 SC 350 and AIR 1954 SC 276 and AIR 1956 All 589 and AIR 1957 Tri 25 and AIR 1964 SC 334 and AIR 1966 SC 1404, Rel. on.

(Para 22)

Cases Referred: Chronological Paras

- (1968) Writ Petns. Nos. 89 to 92 and 94 of 1968 D/- 12-3-1968 (SC), Bidya Debi Barmo v. Dist. Magistrate Tripura, Agartala 7, 20, 23
- (1968) AIR 1968 Ori 148 (V 53)= 1968 Cri LJ 1096, Hadibandhu Das v. Dist. Magistrate, Cuttack 17
- (1966) AIR 1966 SC 740 (V 53)= 1966 Cri LJ 608, Ram Manohar Lohia v. State of Bihar 15
- (1966) AIR 1966 SC 1404 (V 53)= 1966 Cri LJ 1067, Godavari S. Parulekar v. State of Maharashtra 22
- (1965) AIR 1965 SC 147 (V 52)= 1965 (1) Cri LJ 128, Union of India v. Abdul Jalil 16
- (1964) AIR 1964 SC 334 (V 51)= 1964 (1) Cri LJ 257, Rameshwar Shaw v. Dist. Magistrate Burdwan 22

- (1962) AIR 1962 SC 911 (V 49)= 1962 (1) Cri LJ 797, Harikishan v. State of Maharashtra 23
- (1957) AIR 1957 Tri 25 (V 44)= 1957 Cri LJ 480, Golam Rafique v. State of Tripura 22, 24
- (1956) AIR 1956 All 589 (V 43)= 1956 Cri LJ 1152, Sarju Pandey v. State 22
- (1954) AIR 1954 SC 276 (V 41)= 1954 Cri LJ 735, Sodhi Shamsher Singh v. State of Pepsu 22
- (1954) AIR 1954 All 315 (V 41)= 1954 Cri LJ 685, Prem Dutta Paliwal v. Supdt. Central Prison Agra 24
- (1953) AIR 1953 Hyd 295 (V 40)= 1954 Cri LJ 52, Saadat Jahan v. State of Hyderabad 18
- (1952) AIR 1952 SC 350 (V 39)= 1953 Cri LJ 146, Ujagar Singh v. State of Punjab 21, 22
- (1952) AIR 1952 Cal 26 (V 39)= 1952 Cri LJ 204, Raman Lal Rathii v. Commr. of Police, Calcutta 17
- (1951) AIR 1951 SC 157 (V 38)= 52 Cri LJ 373, State of Bombay v. Atma Ram Shridhar Vaidya 22
- (1951) AIR 1951 SC 481 (V 38)= 1952 Cri LJ 75, Bhim Sen v. State of Punjab 22
- (1950) AIR 1950 Mad 162 (V 37)= 51 Cri LJ 525, M. R. S. Mani v. Dist. Magistrate, Mathurai 14
- (1950) AIR 1950 East Punj 172 (V 37)=51 Cri LJ 888, Khalifa Janki Das v. Imperator 17
- B. C. Deb Burma, M. Majumdar and M. K. Datta, for Petitioners (in all Petitions); H. C. Nath, Govt. Advocate, for Respondents (in all Petitions).

ORDER: These are petitions filed under Article 226 of the Constitution of India for declaration that the orders of detention passed against the petitioners by the respondent District Magistrate of Tripura under sub-section (1), read with sub-section (2) of section 3 of the Preventive Detention Act (Act IV of 1950) (hereinafter called as the Act) are illegal and to release them from their detention.

2. The respondent served all the petitioners (except the petitioner in Habeas Corpus Petition No. 72 of 1968) with orders as per Ext. A-1 dated 9-2-68 under sub-section (1) read with sub-section (2) of section 3 of the Act directing that they should be detained in the jail to prevent them from acting in any manner prejudicial to the maintenance of public order and the maintenance of supplies essential to the life of the community in Tripura. They were all arrested on 11-2-68. They were served with grounds of detention under section 7 of the Act on 15-2-68. The State Government was informed of the orders on

13-2-68 by the respondent under section 3 (3) of the Act. The State Government gave its approval on 19-2-68. It telegraphically communicated to the Central Government the fact of detention under section 3 (4) of the Act on 22-2-68.

3. Though the petitioners were informed that, if they so liked they might make representations to the State Government against the orders of detention and that the Advisory Board would also hear them in person under section 10 of the Act, none of the petitioners, except the petitioner in Habeas Corpus Petition No. 30 of 1968, made any representation to the State Government.

4. The Advisory Board consisting of Shri S. C. Lahiri, Retired Chief Justice, Calcutta High Court, Chairman, Shri T. K. Paul, Judge, City Civil and Sessions Court, Calcutta, Member and Shri B. C. Das Gupta, Judge, City Civil and Sessions Court, Calcutta, Member, considered all the cases and made its report to the State Government under S. 10 of the Act on 17-4-68 that there was sufficient cause for the detention of the petitioners. The State Government passed the orders in question on 26-4-68 detaining the petitioners for a period of one year.

5. The petitioner in Habeas Corpus Petition No. 72 of 1968 was arrested on 16-3-68 and was served with the grounds on 19-3-68. In that case also the above mentioned procedure was followed.

6. The petitioners challenge the orders of detention passed by the respondent.

7. As common questions of law and fact are involved, the Counsel for both the parties argued all the petitions together. So, they are considered in a common judgment.

8. Before dealing with the various questions of law and fact raised by the Counsel for the petitioners, it is very material to note that 5 other persons, who were also served with orders of detention by the respondent on 9-2-68 and whose cases are similar to those of the petitioners herein, filed Writ petitions 89 to 92 and 94 of 1968, Bidya Deb Barma v. District Magistrate, Tripura, Agartala. In the Supreme Court in Delhi on 12-3-68. They raised three questions of law, namely, firstly, that their detention was illegal as the report of the respondent District Magistrate was not submitted "forthwith" to the local Government as required by section 3 (3) of the Act, secondly, that the detention was illegal as the order of approval of the State Government under section 3 (3) of the Act was not communicated to them and thirdly, that their detention was illegal as the State Government did not report the fact of their detention to the Central Government as soon as possible and without avoidable

delay. The Supreme Court negatived their contentions and held on the first point that 10-2-68, 11-2-68 were public holidays, that on 12-2-68 the respondent was hard pressed for time and that the delay of 3 days on the part of the respondent in submitting his report to the State Government on 13-2-68 was explainable sufficiently. On the second point, the Court held that there is no provision in the Act that the approval of the State Government must be communicated to the detenus. Regarding the third question of law, the Court ruled that the action of the State Government in communicating the matter to the Central Government on 22-2-68 could not be said to be so delayed as to render their detention illegal.

9. In the above-mentioned 5 cases, the 5 petitioners further raised common questions of fact that the grounds were so vague that they could not make any effective representation and that their detention was mala fide. The grounds of detention in those cases are practically the same as those in the present cases. The Supreme Court held that more detailed information was not necessary to give the petitioners an opportunity to make their representations, that the grounds were specific and that looking to the conditions of the area, which are notorious, there was no doubt that the affidavit of the respondent was reliable. The Court overruled the objections raised by the petitioners. One of the petitioners further contended that he did not know English, that the order of detention and the grounds supplied to him were in English, that he knew only Bengali and Tripuri languages and that, therefore, he was handicapped. The Court held that this ground was not taken by the concerned petitioner in his petition, but that he raised it in the rejoinder, that he filed the petition in English and questioned the implications of the language of the order and the grounds, that he had the assistance of the other detenus who knew English, that if he was really handicapped, he would have seriously considered the matter and pressed it in the petition itself and that, therefore, it was a belated complaint. In the end, the Supreme Court dismissed all the petitions on 6-8-68.

10. The petitioners filed the present petitions in this Court in May and June, 1968. After the Supreme Court dismissed similar petitions on 6-8-68, the petitioners filed petitions to permit them to urge additional grounds. The petitioners' Counsel stated that he did not want to press the contentions raised by them in their various petitions, which were all overruled by the Supreme Court in the above batch of petitions, but that he wanted to press some other points taken by the

petitioners either in the petitions or in their additional grounds.

11. The first contention of the petitioners' Counsel is that under Article 22 (5) of the Constitution of India the grounds of detention must preclude the order of detention, that the respondent did not have any material or grounds for detention on 9-2-68, but that he got stereotyped orders as per Ext. A-1 in all the cases typed and served on the petitioners stating that the petitioners should be detained with a view to preventing them from acting in any manner prejudicial to the maintenance of public order and maintenance of supplies essential to the life of the community in Tripura, as he was satisfied that they were acting in such a manner.

12. It may be noted that the above contention was not specifically raised in the petitions, but that it was thought of, after the Supreme Court dismissed the similar batch of Writ petitions. The petitioners' Counsel sought to substantiate his contention by pointing out discrepancies in 6 cases between the orders of detention, which are all the same in all the cases, and the grounds as per Ext. A-2 served upon the petitioners in Habeas Corpus Petitions No. 30 of 1968, 33 of 1968, 36 of 1968, 39 of 1968, 49 of 1968 and 72 of 1968. In the grounds the respondent mentioned the conduct of the detenus concerned in instigating the loyal villagers, particularly the tribals, living in and around the Forest Reserved areas to damage the forest plantation and to do jhuming in the Reserved Forest areas in violation of forest laws, as a ground for his order of detention to prevent the detenus from acting in any manner prejudicial to the maintenance of the public order.

To substantiate his order of detention to prevent the detenus from acting in any manner prejudicial to the maintenance of supplies essential to the life of the community in Tripura, the respondent stated that the concerned detenus instigated the loyal cultivators from delivering paddy to the Government, which was requisitioned under the Tripura Foodgrains Requisition Order, for the maintenance of supplies of foodgrains to the people in the lean months and that the detenus concerned were instigating and inciting the people to offer organised and violent resistance against the paddy procurement staff. But, in Habeas Corpus Petitions Nos. 33 of 1968, 36 of 1968 and 72 of 1968 the respondent did not mention that the petitioners instigated the villagers to damage the forest plantation etc. But, the respondent mentioned in the grounds that the petitioners were instigating the loyal cultivators to deliver the paddy to the Government, which was requisition-

ed under the Tripura Foodgrains Requisition Order for the maintenance of supplies of foodgrains to the people in lean months.

In Habeas Corpus Petitions Nos. 39 of 1968 and 49 of 1968 the respondent mentioned grounds to show that the petitioners therein were acting in a manner prejudicial to the maintenance of public order and he did not mention the grounds for charging them that they were acting in a manner prejudicial to the maintenance of supplies essential to the life of the community. In case No. 30 of 1968 the petitioner was not charged that he was acting in any manner prejudicial to the maintenance of services. But, ground No. 3 in Ext. A-2 therein shows that the respondent charged the petitioner therein that he took an active part in organising Tripura "bundh" on 23-8-67 and in preventing the motor vehicles and rickshaws etc. from plying on the road, though this omission on the part of the respondent to mention in Ext. A-2 that the petitioner in Habeas Corpus Petition No. 30 of 1968 acted in a manner prejudicial to the maintenance of service can be explained. For, an action prejudicial to the maintenance of supplies essential to the community includes an action in preventing the motor vehicles and rickshaws etc. from plying on the roads and interfering with the transport of supplies essential to the community.

It is, no doubt, true that this ground of prevention of motor vehicles and rickshaws from plying on the roads would be a matter common to all cases of detenus, who are alleged to have been acting in a manner prejudicial to the maintenance of supplies essential to the community. But, as there was no allegation against others that they organised "Tripura bundh", it was not made against the other detenus. So, the omission on the part of the respondent to mention in Ext. A-2 in Habeas Corpus Petition No. 30 of 1968 that the petitioner therein was acting in a manner prejudicial to the maintenance of public services is explainable.

13. But, the omission of the respondent to mention the grounds for detention of the petitioner in Ext. A-2 in Habeas Corpus Petitions Nos. 33 of 1968, 36 of 1968, and 72 of 1968 for their alleged acts prejudicial to the maintenance of public order is not explainable. Similarly, the omission of the respondent to mention the grounds in Ext. A-2 in Habeas Corpus Petitions Nos. 39 of 1968 and 49 of 1968 for the detention of the petitioners therein for their alleged acts prejudicial to the maintenance of supplies is not explainable. It is also worthy of notice that in Habeas Corpus Petitions Nos. 33 of 1968 and 72 of 1968 the respondent swore two affidavits that the

petitioners therein were guilty of both the charges, though in Ext. A-2 he mentioned the grounds only for one charge, namely, their acts which were prejudicial to the supplies essential to the life of the community in Tripura.

14. The contention of the learned Counsel for the petitioners is two-fold. His first contention is that the above discrepancies go to show that the grounds were subsequently got up on 15-2-68 when they were served on the petitioners in cases nos. 30 of 1968, 33 of 1968, 36 of 1968, 39 of 1968 and 49 of 1968 and on 19-3-68 in Habeas Corpus Petition No. 72 of 1968. The learned Government Advocate conceded the existence of the discrepancies in the 5 cases viz., Habeas Corpus Petitions Nos. 33 of 1968, 36 of 1968, 39 of 1968, 49 of 1968 and 72 of 1968 and stated that in the original records in the office of the respondent the grounds, on which the respondent passed orders of detention, were prepared on 9-2-68 itself and that in issuing the orders of detention as per Ext. A-1 in the 5 cases the office committed mistakes in not scoring out the inapplicable portions. He produced all the 17 files into the Court.

On perusal, it is found that the relevant grounds in all the cases were mentioned in the files on 9-2-68. It is also seen that the respondent passed orders of detention in the records on 9-2-68. So, it is not possible to hold that no grounds existed on 9-2-68 and that mere stereotyped copies of Ext. A-1 were served upon the detenues. The second contention of the petitioner's Counsel is that the respondent did not apply his mind to the cases before passing the orders of detention and relied on M. R. S. Mani v. District Magistrate, Mathurai, AIR 1950 Mad 162. Though it is a case arising under the Madras Maintenance of Public Order Act (Act I of 1947), still the principle is applicable. In the present case the records produced by the Government Advocate go to show that the respondent applied his mind, when he passed the various orders in the records in general. But, he did not apply his mind when he signed the originals of Ext. A-1 in the 5 cases and when he signed the affidavits in the Habeas Corpus Petitions Nos. 33 of 1968 and 72 of 1968.

15. According to section 3 (1) (a) (ii) and (iii) of the Act, any one of the grounds namely, an action prejudicial to the security of the State or the maintenance of public order on one hand, or any action prejudicial to the maintenance of supplies and services essential to the community, is a sufficient ground for an order of detention. In all the cases except in the 5 cases namely, Habeas Corpus Petitions Nos. 33 of 1968, 36 of 1968, 39 of 1968, 49 of 1968 and 72 of

1968 the grounds relate to both the categories covered by section 3 (1) (a) (ii) and (iii) of the Act. In Habeas Corpus Petitions Nos. 33 of 1968, 36 of 1968, 72 of 1968 grounds were mentioned to substantiate the order of detention under section 3 (1) (a) (iii) of the Act. In Habeas Corpus Petitions Nos. 39 of 1968, and 49 of 1968 grounds were mentioned to justify the detention under section 3 (1) (a) (ii) of the Act. So, in all the cases grounds were mentioned by the respondent for the detention of the petitioners. As such, the ruling in Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740 at p. 745, relied on by the petitioner's Counsel, does not apply to the facts of this case. In that case an order under rule 30 (1) (b) of the Defence of India Rules stated that the detention was necessary in order to prevent the detenu from acting in any manner prejudicial to the public safety and the maintenance of "law and order". It was held that it being more than doubtful whether "law and order" meant the same as "public order" the only course open to the Court was to hold that the rules had not been strictly observed and that the order did not justify the detention. In the present case there is no dubiousness about the grounds mentioned by the respondent justifying the detention, though he failed to score out the inapplicable portions in Ext. A-1 orders in the 5 cases.

16. The next contention of the petitioners' Counsel is that in Tripura there is no "reserved forest", that there is only "protected forest" as can be seen from Union of India, representing the Union Territory of Tripura v. Abdul Jalil, AIR 1965 SC 147 that jhuming is also legally allowed according to Schedule V of the Constitution of India and that, therefore, even if there was any instigation by the detenues to interfere with the protected forest and to do jhuming cultivation this was not a ground for detention. This is a new ground of justification, which was not raised in the petitions. Even in the 5 similar cases disposed of by the Supreme Court this ground was not urged. The petitioners' Counsel stated that the above decision was not brought to the notice of the Supreme Court in the batch of 5 cases. But, a perusal of the said decision shows that the forest areas comprised in Garjichara, Chandrapur and north Sonamura reserves were involved in the case. It was held that, the three forests were not notified as "reserved" forests under the provisions corresponding to Chapter II of the Indian Forest Act of 1927, that the provision in the Indian Forest Act corresponding to Tripura Forest Act, under which the notifications fixing the boundaries of the three forests were issued, was that of a "protected" forest under Chapter IV and

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